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THE JUDICATURE ACT

OF ONTARIO,

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AND

THE CONSOLIDATED RULES OF PRACTICE AND PROCEDURE

OF THE

Supreme Court of Judicature

FOR ONTARIO,

WITH PRACTICAL NOTES.

BY

GEORGE SMITH HOLMESTED,

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PREFACE.

BY REASON of the recent Consolidation of the Statutes and Rules relating to the practice of the Supreme Court of Judicature the Editors have been enabled to combine their previous independent labours in the field of the practice of the Courts, and thus to make the third annotated edition of the Ontario Judicature Act and Rules the most complete edition which has yet been published in Canada.

It embraces not only the notes appended to the 2nd edition of "Maclennan's Judicature Act" by Mr. Langton, so far as the same continue applicable, but also the notes to the Common Law Rules and Chancery Orders published by Mr. Holmested. In the present volume therefore has been embodied whatever has been thought of value in those two publications so far as they illustrate *The Judicature Act* and *Consolidated Rules* in their present form, besides a very considerable amount of new matter.

During the eight months which the work has been in course of printing many new cases have been published, and the more important of them, which could not be introduced into the text, will be found in the table of *addenda*.

The table of cases has been carefully prepared under the immediate supervision of the editors; and they have taken special pains to make the Index as complete and exhaustive as possible so that they hope it will be found to answer all reasonable expectations.

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No one, who has not undertaken a work of like magnitude, will be able fairly to appreciate the immense amount of hard and persistent labour which it involves. The Editors are not presumptuous enough to suppose that their work is without a flaw; they are, however, conscious that they have endeavoured to make it as free from defects as possible, and they commit it with some confidence to the candid and liberal judgment of the profession.

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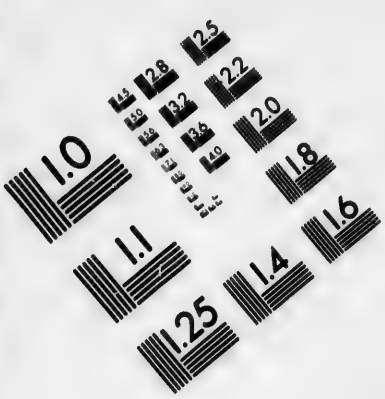
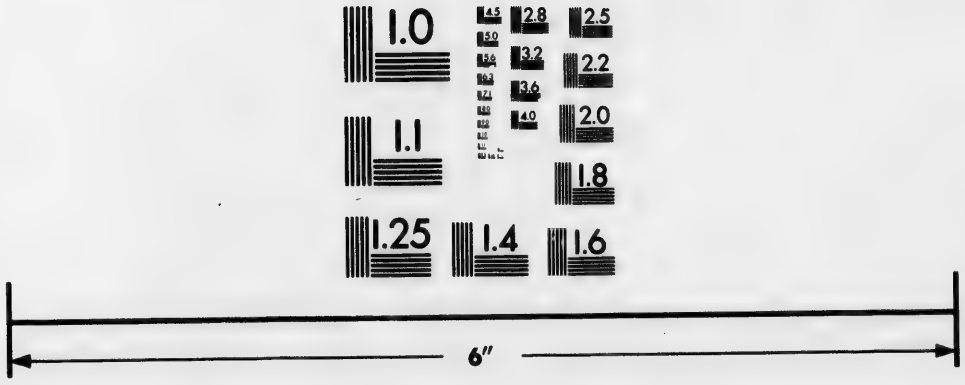
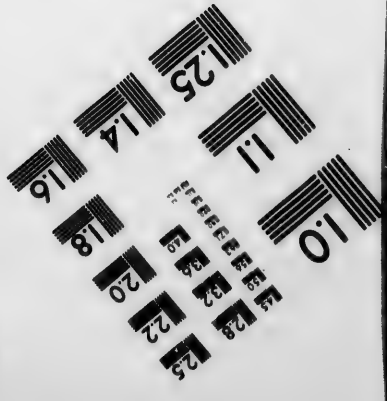




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Order.	Rule.	Order.	Rule.	Margin No.	Margin No.
1	1	1	1	1	224
	3		2	2	
2	1	2	1	3	224
	2		2	4	1195
	3		3	5	231
	5		5	7	232
	8		8	10	233
3	2		2	12	243
	3		3	13	244
	4		4	14	224
	6		6	16	245
	7		7	17	246
	8		8	18	247
4	1	4	1	19	240
	2		2	20	241
5	1	5	1	23	230
	2		3	25	224
	3		4	26	224
	5		10	32	224
	6		11	33	229
	7		12	34	547
	8		13	35	235
6	1	6	1	40	236
	2		2	41	237
7	1	7	1	42	250
	2		2	43	251
8	1	8	1	45	238
	2		2	46	239
9	1	9	1	48	252
	2		2	49	253
	5		5	52	263
	6		6	53	265
	6*a*		7	54	266
	7		8	55	269
	13		15	62	256
11	1, 1*a*	11	1	64	271
			6	69	232
	5		7	70	272
12	1-5	12	1	77	547
	5, 6*b*		8	71-78	277
	6*b*		9	79	281
	7		10	80	282

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Order.	Rule.	Order.	Rule.	Margin No.	Margin No.
12	8	12	11	81	284
	9		12	82	285
	10		13	83	286
	11		14	84	287
	12		15	85	288
	12*a*		16	86	289
	13		17	87	278
	14		18	88	283
	15		22	92	281
	18		25	95	293
	19		26	96	295
	20		27	97	296
	21		28	98	297
	22		29	99	298
13	1	13	1	101	336*a*
	2		2	102	704
	3, 5		3	103	705
	4, 5		4	104	706
	6		5	105	708
			6	106	709
			7	107	711
	7		8	108	714
	8		9	109	715
14	1	14	1	115	739
	2		2	116	739
	3		3	117	740
	4		4	118	741
	5		5	119	742
	6		6	120	743
15	1	15	1	121	745
	2		2	122	746
16	1	16	1	123	300
	2		2	124	445
	3		4	126	301
	4		5	127	302
	5		6	128	303
	6		7	129	308
	7		8	130	309
	9		9	131	315
	9*a*				316
	13		11	133	324
	14		12	134	325
	15		13	135	326
	10		14	136	317
	10*a*		15	137	318
	8		16	138	313, 314
18			17	139	335

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Order.	Rule.	Order.	Rule.	Margin No.	Margin No.
16	9*a*	16	32	154	316
			33-36	155-158	320 (1-5)
			37	159	320 (6)
			46	168	310
	12 (*b*)		47	169	334
	18		48	170	329
			49	171	331
			52	174	332
	21		53	175	332
			54	176	332
50	1	17	1	178	620
	3		3	180	621
	4		4	181	622
	5		5	182	623
	6		6	183	624
	7		7	184	626
17	1	18	1	188	340, 346
	2		2	189	341
	3		3	190	342
	4		4	191	343
	5		5	192	344
	6		6	193	345
	7		7	194	346
	8		8	195	346
	9		9	196	346
19	1	19	1	197	394
	2		2	198	369, 371
	3		3	199	373
	4		4	200	399, 449
	5		9	205	395
	6		10	206	cf. 461-462
	7		11	207	397
	16		12	208	417
	18		15	211	402
	19		16	212	419
	23		20	216	413
	24		21	217	406
	25		22	218	407
	26		23	219	408
	27		24	220	409
	28		25	221	410
27	1		27	223	423
21	1	20	1	225	369
19	8		6	230	404
	9		7	231	405
	11	21	5	238	411
22	1		6	239	371

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22	2	21	7	240	372
	4		9	242	1189
	5		11	244	376
	6		12	245	377
	7		13	246	378
	8		14	247	379
	9		15	248	374
	10		17	250	375
			19	252	417
19	13		20	253	414
	15		21	254	416
30	1	22	1	255	
	1		2	256	
			3	257	632-640
			4	258	
			5	259	
	4		7	261	
24	1	23	1	276	381
	2		2	277	382
	3		3	278	383
	4		4	279	379
25			5	280	392
19	14		6	281	415
20	1	24	1	282	434-435
	2		2	283	436-437
	3		3	284	440
23	1	26	1	290	641-642
	2		2	291	670
	2a		3	292	641
29	1	27	1	294	646
	2		2	295	719
	3		3	296	720
	4		4	297	721
	5		5	298	722
	6		6	299	732
	7		7	300	724
	8		8	301	725
	10		11	304	727
	11		12	305	728
	13		14	307	729
	14		15	308	796
27	1	28	1	309	423
	2		2	310	424
	3		3	311	425
	4		4	312	426
	5		5	313	427

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RULES SUP. C. 1875 AND AMENDING RULES.		RULES SUP. C. 1883.			ONT. RULES.
Order.	Rule.	Order.	Rule.	Margin No.	Margin No.
27	6	28	6	314	429
	7		7	315	430
	8		8	316	431
	9		9	317	432
	10		10	318	433
41*a*	28		11	319	780
59	2		12	320	444
31	12	31	12	354	508
	13		13	355	513
	11		14	356	507
	14		15	357	514
	15		16	358	515
	16		17	359	516
	17-18		18	360	517-518
	19		20	362	519
	20		21	363	499, 520
	21		22	364	522
	22		23	365	523
	23		24	366	506
32	1	32	1	371	400
	2		2	372	617
	3		3	373	618
40	11		6	376	756
			7	377	515
			8	378	619
26		33	1	380	420
33	2		2	381	551
				382	64
34	1	34	1	389	554
	2		2	390	555
	3		3	391	556
	4		4	392	557
	5		5	393	538
	7		7	395	558
36	1	36	1	425	653
	6		8	432	655
	7		9	433	656
	4, 4 (*a*)		12	436	647, 654
	8		13	437	660
	9		14	438	661
	10		15	439	660
	15*a*		28	452	663
	17		30	454	669
	18		31	455	672
	19		32	456	673
	20		33	457	795
	21		34	458	681

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Order.	Rule.	Order.	Rule.	Margin No.	Margin No.
36		36	36	460	675
	22*a*		39	463	682
	23		41	465	687
	24		42	466	688
	30		48	472	34
	31		49	473	36
	32		50	474	37
	33		51	475	38
	34		52	476	39
37	1	37	1	483	564
	4		5	487	566
			16	498	504
			17	499	505
			20	502	578
	2	38	1	521	576, 577
	3		3	523	609
	3*a*		7	527	605
	3*b*		8	528	605
	3*c*		9	529	606
	3*d*		10	530	608
	3*e*		12	532	611
	3*f*		13	533	612
			15	535	614
38	1		25	545	568
	2		26	546	569
	3		27	547	570
	4		28	548	571
	5		29	549	572
	6		30	550	751
39	1	39	1	551	789
	3		6	556	791
	4		7	557	792
40	1	40	1	559	748
	4*a*		3	561	798
	4*a*		4	562	798
	4*a*		5	563	798
	7		7	565	753
	8		8	566	754
	9		9	567	752
	10		10	568	755
41	1	41	1	569	766
	2		3	571	764
	3		4	572	765*a*
	4		6	574	768
	5		7	575	769
		42	2	580	770
42	1		3	581	862

COMPARATIVE TABLE—*Continued.*

RULES SUP. C. 1875. AND AMENDING RULES.		RULES SUP. C. 1889.			ONT. RULES
Order.	Rule.	Order.	Rule.	Margin No.	Margin No.
42	2	42	4	582	867
	3		5	583	868
	4		6	584	873
	5		7	585	874
	6		8	586	858
	7		9	587	875
	8		10	588	876
	10		12	590	888
	11		13	591	889
	12		14	592	893
	13		15	593	890
	14		16	594	891
	15		17	595	863
	16		20	598	894
	17		21	599	895
	17		22	600	885
	19		23	601	886
	20		24	601	866
	21		26	604	887
	22		27	605	782
	22		28	606	Omitted as un-
	24		29	607	necessary.
45	1		32	610-11	cf. 926
	10		34	612	cf. 1180
43	1	43	1	613	859
	2		5	617	860
47	1		6	618	cf. 880-881
44	1	44	1	620	878
	2		2	621	879
45	2	45	1	622	935
	3		2	623	936
	4		3	624	937
	5		4	625	939
	6		5	626	944
	7		6	627	945
	8		7	628	946
	9		8	629	947
	10		9	630	1180
48	1	47	1	644	cf. 868
	2		2	645	869
			3	646	cf. 870
		48	1	647	873
51	1	49	1	649	649
	2*a*		5	653	651
	4		8	656	652
52	1	50	1	657	1131
	2		2	658	1133

COMPARATIVE TABLE—*Continued.*

RULES SUP. C. 1875. AND AMENDING NOTES.		RULES SUP. C. 1883.			ONT. RULES.
Order.	Rule.	Order.	Rule.	Margin No.	Margin No.
52	3	50	3	659	1135
	4		6	662	1134
	5		7	663	1132
	6		8	664	1136
	6*a*		10	666	90
	8		11	667	1120
			13	669	643
			14	670	644
			15	671	645
53	1	52	1	696	525
	2		2	697	526
	3		3	698	527
	4		5	700	479
	5		6	701	529
	6		7	702	531
	7		9	703	532
	8		10	704	533
		53	1	719	1112
			2	720	1113
			3	721	1114
			4	722	1115
54	6	54	6	757	847
		55	19	781	207
		57	1	850	1141
			2	851	1142
			3	852	1143
			4	853	1144
			5	854	1145
			6	855	1146
			7	856	1147
			8	857	1148
			9	858	1149
			10	859	1150
			12	861	1151
			13	862	1153
53		58	4	868	585
			6	870	821
57*a*	1	59	1	884	cf. 219
61	1	63	1	945	cf. 216, 218
	2		4	948	cf. 486
	3		5	949	cf. 486
	4		6	950	cf. 7
	5*a*		11	955	214
61	6		12	956	215
57	1	64	1	961	472
	2		2	962	473
	3		3	963	476

COMPARATIVE TABLE—*Continued.*

RULES SUP. C. 1875. AND AMENDING NOTES.		RULES SUP. C. 1883.			ONT. RULES.
Order.	Rule.	Order.	Rule.	Margin No.	Margin No.
57	4	64	4	964	483
	5		5	965	484
			6	966	477
	6		7	967	485
	6*a*		8	968	478
	8		11	971	480
			12	972	474
55	1	65	1	976	1170
	3		6	981	1245
	3		7	982	1247
R. S. C. Aug. 1874 costs O. 6.	1-3		8-10	983-985	cf. 1172, 1174 508, 485, 1219
	16		27 (18)	1002	457
	17		(19)		1193
	18		(20)		1195
	19		(21)		1204
	21		(23)		1194
	22*a*		(24)		1191
	23		(25)		cf. 194, 197
	24		(27)		1201
	25		(28)		1203
	26		(29)		1214
	28		(37)		1220
	30		(39)		1230
	31		(40)		1231
	32		(41)		851
	33		(42)		853
56	1	66	1	1003	447
	2		3	1005	448
	3		4	1006	Omitted as unnecessary.
59	1	70	1	1037	442
			2	1038	444

ADDENDA.

PAGE 9—After reference to *Long* v. *Hancock*, line 4, add "But see *Poulin* v. *Quebec*, 9 S. C. R. 185, where the dismissal was without costs."

" 11—After reference to *Peek* v. *Derry*, line 2 from end, add "14 App. Cas. 337; *Glasier* v. *Rose*, 42 Ch. D. 436. The House of Lords in *Peek* v. *Derry*, 14 App. Cas. 337, has held that in an action of deceit the plaintiff must prove actual fraud, and such fraud is proved when it is shown that a false representation has been made knowingly or without belief in its truth, or recklessly, without caring whether it be true or false. A false statement made through carelessness, and with reasonable ground for believing it to be true, may be evidence of fraud, but does not necessarily amount to fraud; such a statement, if made in the honest belief that it is true, does not render the person making it liable in an action for deceit."

" 15—After the third paragraph from bottom, add: "An injunction to restrain a breach by an infant of an apprenticeship deed was refused: *De Francesco* v. *Barnum*, 43 Ch. D. 165.

Add after the seventh paragraph: "The Court has jurisdiction to declare a marriage void, but nothing short of the most clear and convincing testimony will justify the interposition of the Court: *Lawless* v. *Chamberlain*, 18 Ont. 296."

" 20—Line 7, add "*Lawless* v. *Chamberlain*, 18 Ont. 296."
Line 26, for "22 Geo. 3" read "22 Geo. 2."
Line 44, add "*Roblin* v. *McMahon*, 18 Ont. 219."

" 27—Add after paragraph 9: "A post-nuptial settlement by a married woman while an infant, made under the sanction of the Court, was held valid against creditors: *Hemingway* v. *Braithwaite*, 61 L. T. N. S. 224."

" 38—After sub-section 2, add: "See *post* s. 55, p. 68."

" 43—At the end of paragraph 5 after reference to *Jamieson* v. *Laing*, add: "Similarly there is inherent jurisdiction to strike out a defence as frivolous, vexatious and abuse of procedure: *Reichel* v. *McGrath*, 14 App. Cas. 665."

" 45—Line 3, after "86" add "and 262."

PAGE 46—Line 1, after *McDougall* v. *Hall*, add "*Byrne* v. *Brown*, 22 Q. B. D. 666."

Add at the end of the third paragraph—"The compromise cannot be set aside on summary application, an action is necessary, *Emeris* v. *Woodward*, 43 Ch. D. 185."

" 47—Add as a note to Section 53 (1)—"See also *Patrick* v. *Simpson*, 24 Q. B. D. 128."

Add after second note to *Rule* 53 (1): "See *Coyne* v. *Broddy*, 15 Ont. App. 159."

Add as a paragraph under clause 4: "Where mortgagees had joined in a lease to defendants, and the mortgagor was seeking an injunction in aid of alleged rights under the lease, the mortgagees were added as co-plaintiffs: *Goodrich* v. *Everglyn Coal Company*, W. N. 1889, 152."

" 49—At the end of 3rd paragraph from the end add:—"See also *Harding* v. *Harding*, 17 Q. B. D. 442."

After second paragraph add: "A broker to whom shares have been transferred for the purpose of sale may, where rival claims are set up to them by a third party, call on the latter and the transferor to interplead: *Robinson* v. *Jenkins*, 24 Q. B. D. 167."

" 54—After the fourth paragraph add "*Re Marter* v. *Gravenhurst*, 18 Ont. 243."

" 55—Add to the third paragraph: "See also *Hepburn* v. *Patton*, 20 Gr. 597, refered to *infra* page 281, *Parkes* v. *St. George*, 10 Ont. App. 496, at page 542."

After paragraph 2 add, "An injunction to restrain a breach by an infant of an apprenticeship deed was refused: *De Francesco* v. *Barnum*, 43 Ch. D. 165."

56—In the ninth paragraph, for "*Mason*" read "*Masson*," and at the end of the paragraph add, "*Newson* v. *Pender*, 27 Ch. D. 43."

Add after the tenth paragraph: "An injunction against infringement of a patent was refused where, though there had been an infringement, it had been discontinued several years before action, and there was no intention or probability of a renewal of the wrongful user, *Proctor* v. *Bayley*, 38 W. R. 100. An injunction should not be granted *ex parte* after appearance except in cases of urgency. If the defendant has appeared, that fact should always be mentioned to the Judge on an *ex parte* motion for an injunction: *Harrison* v. *Cockerell* 3 Mer. 1, and where it is not, the plaintiff will in any event be made to pay the costs of a motion to dissolve an injunction so granted: *The Mexican Co.* v. *Maldonado*, 88 L. T. Jour. 238, and see *Walton* v. *Henry*, 26 C. L. J. 154."

PAGE 59—Add at the foot of the page: "But a mortgagee is not as of right entitled to a receiver under all circumstances at the expense of the equity of redemption; *Re Prytherch, Prytherch* v. *Williams*, 42 Ch. D. 590; 38 W. R. 61, where it was considered not just and convenient to grant a receiver to a mortgagee in possession, who desired to give up possession."

" 60—Second line from the end: Instead of "equitable execution" read "attachment of debts."

" 64—Add after paragraph five: "So also the writ may issue where the person, in whose custody the child had been, has illegally parted with the custody of the child, (especially if this be done to evade the process of the Court); it may be an answer to the writ that it is impossible to comply with it, but such impossibility must be clearly made out, *Reg.* v. *Barnardo, Gossage's case*, 24 Q. B. D. 283."

" 67—To second paragraph add: "But not so as to affect the running of the Statute of Limitations: *Chard* v. *Rae*, 18 Ont. 371."

In paragraph six after reference to "*Re Radcliffe*" add: "*Vibart* v. *Coles*, 24 Q. B. D 364."

" 68—Add as a note to section 55, see "p. 52 *ante*, ss. 2, p. 38."

" 71—At the end of fourth paragraph from the end add: "See articles in 25 C. L. J., p. 597, and 88 L. T. Jour. 40, 123; 82 L. T. Jour. 297."

" 72—Eighth line from bottom for "district" read "distinct."

" 74—Add after third paragraph from the end: "So an order directing an executor to pay costs of an administration action, on the ground that he has caused the litigation by refusal to furnish accounts, is appealable, as he is entitled to costs unless the right is displaced by misconduct, and whether there was misconduct is the subject of appeal: *Re Pugh, Lewis* v. *Pritchard*, 57 L. T. N. S. 858."

" 77—Add at the end of third line from the end: "An order after final judgment in regard to a set-off of costs payable under the judgment: *Blakey* v. *Latham*, 43 Ch. D. 23."

" 78—Add as a note to section 69: "The Court has no power to vary an order in Chambers, except in the manner provided by the Act or *Rules, e.g.*, under this section, or under *Rules* 536 or 846: see *Atty.-Gen.* v. *Llewellyn*, 58 L. T. N. S. 367."

" 81—After reference to *Re Gabourie*, in line 24, add: "*Re Clayton Mills Manufacturing Co.*, 37 Ch. D. 23. *Esdaile* v. *Paine*, 40 Ch. D. 520."

" 82—Add to first paragraph: "Leave was refused where the object of the appeal was to fix executors with interest on money which they had invested, and as to which a loss had occurred: *Coates* v. *McGlashan*, 2 Chy. Ch. 218."

PAGE 85—Line 4, instead of *Ib.*, read, "*Fraser* v. *Johnston*, 12 P. R. 113."

" 87—Instead of the third paragraph, read: "Where a trial is commenced with a jury, the judge may, even after the evidence is taken, or during its progress, dispense with, and discharge the jury, and try the case himself: *Marks* v. *Windsor*, 17 Ont. 719; see also *Denmark* v. *McConaghy*, 26 C. P. 563; *Adair* v. *Wade*, 9 Ont. 15."

After the fifth paragraph, add: "Where at the trial both parties treated an issue as one which should be tried by the Judge, and not by the jury, and the plaintiffs obtained a rule *nisi* for a new trial on the ground that the Judge had decided the issue wrongly, they were not allowed to amend the rule so as to state that the Judge should have left the issue to the jury: *Australian, etc.* v. *Smith*, 14 App. Cas. 318.

As to the effect of withdrawing a juror: see *Thomas* v. *Exeter Flying Post*, 18 Q. B. D. 882.

In cases in County Courts an order made by the Judge before trial, as to trial of the action with, or without a jury, is not appealable under section 42 of the County Courts Act: *McPherson* v. *Wilson*, 13 P. R. 339."

After reference to *Manning* v. *Thompson*, add: "But it must be a judgment which finally and conclusively (subject only to appeal) settles the existence of the debt, so as to become *res judicata* between the parties: *Nouvion* v. *Freeman*, 15 App. Cas. 1."

" 89—Add as a note to section 87: "See *Dreyfus* v. *Peruvian Guano Company*, 42 Ch. D. 66; 61 L. T. N. S. 180."

Add as a note to section 84: "A Judge is not bound to submit questions in writing to the jury: *Lett* v. *St. Lawrence*, 1 Ont. 545."

" 90—After note to *Rule* 88 add: "When the judgment merely declares a charge of money upon land without imposing any personal liability it would appear not to bear interest unless expressly ordered: *Lynch* v. *Skerrett*, 5 Ir. Eq. 494."

" 96—Add at the end of the page: "In *Raymond* v. *Little*, 13 P. R. 364, it was held by Robertson J. under the circumstances of that case that on a reference to a Referee under section 101, the report did not become absolute, like the report of a Master, after being filed fourteen days under *Rule* 848, but that as soon as the report was made, the party in whose favour it was, might move for judgment thereon, and that, on the motion coming up, the report should be produced, accompanied by the evidence taken before the Referee, and the opposite party would then be heard against

the motion, and it was open to him to take any objection to the report, and the Court could adopt it wholly or partially, and if adopted, enforce it as a judgment.

The contrary has since been decided by McMahon, J., in *Hunt* v. *Darling*, 28 Feb., 1890, where it was held that a motion against a report could not be heard, notice of appeal not having been given within 14 days from the filing of report."

PAGE 119—Add after section 137: "See *Re Smith's Trusts*, 18 Ont. 327, where money being rightly in Court as proceeds of settled estate, payment of the fund out of Court on the joint application of the life tenant and an infant entitled in remainder, in order to avoid the expenses of the Accountant's office incident to the holding of a fund in Court, was refused."

" 127—Line 14, for " of appearance " read " after appearance."

" 128—Line 7, after *Building and Loan Co.* v. *Heimrod*, add "19 C. L. J. 254; 3 C. L. T. 361."

" 146—Line 3, for " and which " read " which power."

" 148—Add as note to *Rule* 41: " Under 52 Vict. c. 36, s. 46 (O), a Judge of the County Court has now the same jurisdiction as a Judge of the High Court to try the right of a municipality in the County of such Judge, to a Reeve or Deputy Reeve or Reeves, or the validity of an election, or appointment of Mayor, Warden, Reeve, Deputy Reeve, Alderman or Councillor. The practice in such proceedings in the County Court is to be the same, as nearly as may be, as on similar proceedings in the High Court: see *Rules* 1036, *et seq.* The Judgment of the County Judge in such cases is appealable to a Judge of the High Court, as in cases of appeal from the Master in Chambers."

" 162—Add to paragraph 3: "*Beamish* v. *Farmer*, Ir. R. 1 Eq. 466; *Ashbu rn* v. *Macguire*, 2 W. &. T. L. Cas. 317."

" 164—After third paragraph add: " Where a covenant for payment of a debt is given by a principal and surety, payments by the principal on account of the debt which will prevent the Statute of Limitations from running in his favour will also prevent the Statute running in favor of the surety, though he be no party to the payments: *In re Frisby*, *Allison* v. *Frisby*, 43 Ch. D. 106; but see *Paxton* v. *Smith*, 18 Ont. 178."

" 167—At the end of first paragraph add: " Affirmed 42 Ch. D. 237; 61 L. T. N. S. 741."

" 178—Add as note to *Rule* 60: "There is no rule of practice rendering it necessary in every case for the sufficiency of publication of notices of creditors under Imp. Act 22 & 23 Vict. c. 34, s. 29, to have an advertisement in the *Times* or other London daily papers in addition to the *Gazette*: *Re Bracken*, *Doughty* v. *Townson*, 38 W. R. 48; 61 L. T. N. S. 531."

PAGE 184—At foot of page add: "A report or certificate intended to be used as evidence against an adverse party should not be made *ex parte*: *Re Ryan* v. *Simonton*, 13 P. R. 299."

" 185—Add after the second paragraph: "No certificate should be settled where it is intended to be used in evidence, except in the presence of, or on notice to, all the parties concerned: *Ryan* v. *Simonton*, 13 P. R. 299."

" 187—Add to second paragraph from the end: "And within one month from the date of the ruling, irrespective of the date of the certificate of such ruling: *Maclennan* v. *Gray*, 12 P. R. 431."

" 194—Insert after reference to *Dames* v. *Wood*, line 9 from the end: "Where there was such a condition, and it appeared that the purchasers objected to a prior contract for sale appearing on the registry, and they offered to give time for the removal of their objection, if the vendor would give an indemnity against the prior contract, and they threatened action if this was not accepted, the vendor, in good faith rescinding, was held entitled to do so: *Woolcott* v. *Peggie*, 15 App. Cas. 42; see also *Re 163rd Starr Bowkett Building Society* v. *Siburn*, 61 L. T. N. S. 346."

" 195—For "*Rule* 89" in fourth paragraph read "*Rule* 98."

" 196—In first line of note to *Rule* 96 for "special" read "standing."

" 199—Add to the fourth paragraph: "And where a good holding title is shown, but not one which the Court would force on a purchaser, if the purchaser refuses to complete, he cannot under such circumstances recover the deposit: *Re Turner & Thomas*, 88 L. T. Jour. 81."

" 202—At end of fifth paragraph after "57 L. T. N. S. 7[illegible]" add "14 App. Cas. 429; 61 L. T. N. S. 702."

" 204—Under the heading "Taxes" add: "Taxes imposed under R. S. O. c. 184, s. 612 (9), for local improvements, where the vendor has been a party to the petition, may form an incumbrance which he is bound to remove; *Cumberland* v. *Kearns*, 18 Ont. 151."

" 209—Add as a note to *Rule* 109: "The omission from the abstract of a document, whose contents sufficiently appeared by a document abstracted, was held to be no objection to the abstract: *Re Ebsworth & Tidy*, 42 Ch. D. 23."

" 210—For "*Sanders* v. *Reg.*" read "*Sanders* v. *Malsburg*."

" 212—To fourth line from bottom add, "see *ante* p. 62."

" 216—Line 7, after reference to "48 L. T. N. S. 695," add: "But see *In re Prytherch*, *Prytherch* v. *Williams*, 42 Ch. D. 590, *supra* page 59."

PAGE 217—Add after first paragraph: "But see *contra Lincoln Paper Mills Co.* v. *St. Catharines and Niagara Central Ry. Co.*, 26 C. L. J. 155."

" 219—At the end of line 3 add "117." After the second paragraph add: "A solicitor of the committee is not a proper surety, *Re Gibson*, 13 P. R. 359."

" 226—Add after paragraph 6: "Where a mortgagee had sold under his power of sale, but owing to a defect in the advertisement had been compelled to allow the purchaser compensation, it was held that he was chargeable as against the mortgagor with any loss occasioned by the misdescription, *Tomlin* v. *Luce*, 41 Ch. D. 573, in appeal, 43 Ch. D. 191.

Where the mortgage provided that the total amount to be recovered by the mortgagee 'under these presents' should not exceed £900, payments made by the mortgagee for rent and insurance while in possession were held to be recoverable, though the aggregate amount of the claim exceeded £900: *White* v. *City of London Brewery Co.*, 42 Ch. D. 237."

Under heading "Consolidation of Mortgages," after the first reference to *Johnston* v. *Reid*, add, "*Smith* v. *Smith*, 18 Ont. 205."

Add to the third paragraph: "For costs not connected with the loan transacted: *Field* v. *Hopkins*, 62 L. T. N. S. 102."

" 228—Under heading "Interest" add: "Interest may be allowed on costs which have been ordered to be added to the plaintiff's security, from the date of taxation: *Eardley* v. *Knight*, 41 Ch. D. 537."

" 229—In the second paragraph, after "*St. John* v. *Rykert*, 4 Ont. App. 213," add "*Grant* v. *People's Loan & Deposit Co.*, 26 C. L. J. 119; *Arbuthnot* v. *Bunsilall*, 62 L. T. N. S. 234."

Under heading "Tender" add: "A tender is not equivalent to payment, and if refused, the mortgagor's remedy is an action for redemption; detinue for his title deeds will not lie: *Bank N. S. W.* v. *O'Connor*, 14 App. Cas. 273."

" 252—Add as a note to *Rule* 185: "See *Re Smith*, 18 Ont. 327."

" 254—Add as a note to s. 191: "See R. S. O. c. 157, s. 4."

" 259—Line 25, after reference to "*Re Blake*," add, "*Re Solicitor*, 61 L. T. N. S. 842," and at the end of the paragraph the following: "Where a solicitor has been suspended for misapplication of money, he will not necessarily be struck off on being subsequently convicted of embezzlement in reference to the same transaction: *Re Solicitor*, 61 L. T. N. S. 842."

Note to *Rule* 202: *Essery* v. *G. T. Railway Co.*, is now reported in 13 P. R. 219.

PAGE 270—Line 9 from the end, for "*United Telephone Co.* v. *Foster*," read "*United Telephone Co.* v. *Tasker*."

" 274—Add as a note to *Rule* 233: "Absence from the Province of the Judge in whose name writs are tested, does not render it improper to teste writs in his name: *Brett* v. *Smith*, 1 P. R. 309."

" 277—Paragraph 7, after the second clause read: "See also *St. Louis* v. *O'Callaghan*, 13 P. R. 322. The Judge exercises a discretion, however, where the time has expired, and where the Statute of Limitations," etc.

" 281—Add as a note to *Rule* 243: "Provision has now been made by 53 Vict., c. 39, for the discharge of a *lis pendens* where the plaintiff does not promptly proceed with his action."

" 283—Alter (4) in fourth paragraph to (5), and add as (4): "The plaintiff's claim is for $213.90, balance due for sawing wood by the plaintiff for the defendant: *Villeneuve* v. *Waite*, 12 P. R. 505."

" 286—Add as a note to *Rule* 248: "A separate action for possession should not be brought when other remedies against the mortgagor are claimed; *Hay* v. *McArthur*, 8 P. R. 321."

" 292—Add as a note to *Rule* 254: "See *Carty* v. *London*, 13 P. R. 285, in note to item 17, tariff of costs, page 1071."

" 294—Add as a note to *Rule* 258: "Where a plaintiff signs judgment against a defendant in ignorance that he is an infant, it is discretionary with the Court whether such judgment shall be set aside: *Furnival* v. *Brooke*, 49 L. T. N. S. 134.

Service on the Official Guardian of a petition under *The Quieting Titles Act* is good service upon infants who are required to be notified: *Re Murray*, 13 P. R. 367."

" 296—After reference to "*Russell* v. *Cambefort*," in *Rule* 265, add: "23 Q. B. D. 526."

" 297—After reference to "*Haggin* v. *Comptoir*," *etc.*, in note to *Rule* 267, add: "23 Q. B. D. 519."

" 302—Before the last paragraph add: "Parties may contract themselves out of the *Rules* respecting service, and thus a foreign corporation may contract that process, etc., may be served upon a person within the jurisdiction, and the appointment of such person is irrevocable until some other agent is appointed: *Tharsis Sulphur, etc. Co.*, v. *Société Industrielle, etc. des Metaux*, 38 W. R. 78."

PAGE 325—Add to the last paragraph but one, after reference to "*Trice* v. *Robinson*": "But letters of administration obtained *pendente lite* will not relate back to the commencement of the action, so as to bar the running of the Statute of Limitations: *Chard* v. *Rae*, 18 Ont. 371."

Add after fourth paragraph under *Rule* 309, after reference to "*Goodrich* v. *Marsh*": "But where a mortgagee was a trustee of the mortgage moneys, and had become bankrupt, it was held that the *cestuis que trustent* were necessary parties to a foreclosure action by a prior mortgagee: *Francis* v. *Harrison*, 43 Ch. D. 183."

" 327—Add after first paragraph: "In a suit for foreclosure, where a trustee was defendant and was bankrupt, the *cestuis que trustent* were added: *Francis* v. *Harrison*, 43 Ch. D. 183." And after the next paragraph add: "And see *Francis* v. *Harrison*, *supra*."

" 333—After the reference to "*Taylor* v. *Taylor*" in thirteenth line from bottom, add: "But see *Swayne* v. *Follows*, 18 Q. B. D. 585, where security for costs on an appeal by next friend was ordered."

" 337—Line twenty-seven, for "3 Q. B. D." read "8 Q. B. D."

" 338—Line nine, *Moore* v. *Jackson*, is now reported 16 Ont. App. 431.

At the end of the first paragraph add: "13 P. R. 242, and it must be property with respect to which she might reasonably be deemed to have contracted; where, therefore, at the date of the contract the only free separate property consisted of the clothes of herself and her children, purchased with the income of property subject to a restraint on anticipation, it was held that she should not be reasonably deemed to have contracted with reference to such clothes: *Leak* v. *Driffield*, 24 Q. B. D. 98."

" 339—Instead of third paragraph, read: "The judgment has been said not to subject the married woman to a 'personal' liability, but only to a "proprietary" liability; *per* Bowen, L.J., in *Scott* v. *Morley*, 20 Q. B. D. at p. 128; but in *Holtby* v. *Hodgson*, 24 Q. B. D. 105, it was said that this was only a short and compendious way of saying that the judgment must be executed against her property, not her person: see also *McLeod* v. *Emigh*, 12 P. R. 45.

With regard to all her property, other than that settled to her separate use, with a restraint on anticipation, a judgment debt operates against a married woman just as it would against an unmarried woman: *Holtby* v. *Hodgson*, *supra*, at p. 107."

Line 34, *Spahr* v. *Bear* is now reported 18 Ont. 70.

PAGE 348—Line 21, after reference to "*Clegg* v. *Rowland*," add: "Or an alleged *cestui que trust* of the deceased: *Re Bracken, Doughty* v. *Townson*, 43 Ch. D. 1; 61 L. T. N. S. 531, nor."

" 350—Line 14, after reference to "*Humphreys* v. *Humphreys*, 3 P Wm. 250," add: "But letters of administration obtained *pendente lite* will not relate back to the commencement of the action, so as to bar the running of the Statute of Limitations: *Chard* v. *Rae*, 18 Ont. 371."

" 351—After the reference to "*Scarf* v. *Jardine*," add: "See also *Robb Murray*, 10 C. L. T. 110.

Adams v. *Watson Manufacturing Co.*, is further reported in appeal, 16 Ont. 2."

" 358—Add before the heading "Adding defendants": "An amendment by adding a plaintiff ought not to be allowed so as to prejudice the defendant's right to set up the Statute of Limitations as against the added party: see *Hudson* v. *Fernyhough*, 61 L. T. N. S. 722."

" 359—Add to second paragraph of note to *Rule* 324 (*a*): "But it has been held to apply when a defendant alleges in his pleading that the contract sued on by the plaintiff was made jointly with another, and the plaintiff under this *Rule* was compelled to add as a defendant the alleged joint contractor: *Robb* v. *Murray*, 26 C. L. J. 155."

Add as the last paragraph: "Where a defendant is added, the action is deemed to have commenced against him only from the time he was added: see *St. Louis* v. *O'Callaghan*, 13 P. R. 322."

" 364—After ninth paragraph add: "Where a defendant claimed indemnity against a co-defendant, but the co-defendant did not plead to the defendant's pleading and no order was applied for, or made, before the trial of the case of the plaintiff, for the trial of the question between the co-defendants, it was held that, after judgment in favor of the plaintiff, no order should be made for trial of the question between the co-defendants: *Mead* v. *Etobicoke*, 13 P. R. 341."

" 371—Line thirteen: *Blore* v. *Ashby*, is now reported 42 Ch. D. 682.

" 373—Middle of page: *Blore* v. *Ashby*, is now reported in 42 Ch. D. 682.

" 387—After second paragraph add: "And see *ante* p. 217 and case cited in *addenda*."

Line seven from bottom: After "*Burrows*" insert "and *Heney* v. *Kerr*, 10 C. L. T. 69."

" 396—Add as a note to *Rule* 359: "The making of a motion to stay proceedings on payment of principal and interest is not equivalent to a tender: *Kinnaird* v. *Trollope*, 42 Ch. D. 610."

PAGE 400—Before third paragraph from the bottom add: "A statement of claim in an action for defamation for words charging the plaintiff with an offence under R. S. C. c. 168, ss. 26 or 58 need not aver special damage, but it is otherwise when the offence charged is a violation of ss. 27 or 59: *Routley* v. *Harris*, 18 Ont. 405."

" 401—Add as a note to *Rule* 369 (*a*): "Where further time for a month "peremptory" was given, this was held to mean that the pleading must be delivered within the specified time, unless the order itself be expressly altered by any subsequent order: *Falck* v. *Axhelm*, 38 W. R. 196."

" 409—Add after the fourth paragraph: "Where the plaintiff's claim was dismissed for default in compliance with an order, the defendant was allowed to proceed with his counter-claim by motion for judgment as by default of pleading thereto by the plaintiff: *Higgins* v. *Scott*, 21 Q. B. D. 10, in note to *Rule* 727, page 619."

" 417—Line eleven, after *Irwin* v. *Brown*, insert "12 P. R. 639 *supra*, page 409."

" 418—Line 14, after reference to "*Ward* v. *Kerr*," add: "But see *contra*, *Wright* v. *Wright*, 13 P. R. 268."

Add as a note to *Rule* 381, after reference to "*Graves* v. *Terry*": "In Ontario it has been held that the delivery of a reply after the three weeks does not in itself entitle the opposite party to move to set it aside, and even if strictly the right to move exists, the pleadings should not in general be set aside, but the time should be extended: *Wright* v. *Wright*, 13 P. R. 268."

" 421—After the second paragraph add: "Where a plaintiff objected at the trial of the action to the reception of evidence under a defence which was demurrable, but to which he had not demurred, and the evidence was rejected, a new trial was granted with leave to defendant to amend; and costs were ordered to abide the result: *Switzer* v. *Laidman*, 18 Ont. 420.

Line 9, after reference to "*Saunders* v. *Stull*," add: "See also *Beatty* v. *Haldan*, 4 Ont. App. 239, at p. 249."

" 425—At the end of the last paragraph but one, add: "But see *contra*, *Wright* v. *Wright*, 13 P. R. 268, where the delivery of a pleading after the time had expired, was held to be not an irregularity."

" 426—*Lloyd* v. *Ward*, in last paragraph but one, is now reported 13 P. R. 238.

" 431—Add at the end of the sixth paragraph: "*Knight* v. *Engle*, 61 L. T. N. S. 780."

PAGE 435—After the reference to *Rule* 411 in third note under *Rule* 403, add: "Or the incorporation of a corporate party: *Rule* 412."

" 443—After the fourth paragraph add: "Contributory negligence cannot be set up under this plea, but must be specially pleaded: *Doan* v. *Michigan Central*, 10 C. L. T. 83; 25 C. L. J. 154."

" 447—*Edevain* v. *Cohen*, in paragraphs six and seven, is now further reported in appeal, 43 Ch. D. 187.

Add to the sixth paragraph: "43 Ch, D. 187, or where the added claim would take away a defence, such as of the Statute of Limitations, which had accrued, and would change the substantial right of the parties: *Hudson* v. *Fernyhough*, 61 L. T. N. S. 722.

" 449—After the fifth paragraph, insert: "There is inherent jurisdiction to strike out a defence as frivolous, vexatious and abuse of procedure, *e.g.*, where it attempts to re-try, in another form, a question already decided against the defendant: *Reichel* v. *McGrath*, 14 App. Cas. 665."

Add, at foot of page: "*Hudson* v. *Fernyhough*, 61 L. T.N.S. 722."

" 459—Add as a note to *Rule* 443: "An order setting aside proceedings must be served promptly, or it will be deemed to have been abandoned: *Molsons Bank* v. *Dillabaugh*, 13 P. R. 313."

" 460—Add after eighth paragraph: "An amendment was not allowed where it would defeat the Statute of Limitations: *Hudson* v. *Fernyhough*, 61 L. T. N. S. 722."

" 465—At the end of note to *Rule* 458, add: *McCready* v. *Hennessy*, 9 P. R. 489, and *Boswell* v. *Coaks*, 36 Ch. D. 441; 36 W. R. 65.

" 466—At end of second paragraph, add, "13 P. R. 219."

" 471—Add at the end of the last clause but one: "If payment be made to the client, notwithstanding notice given by the solicitor not to pay till his costs are satisfied, the solicitor to the extent of his lien is entitled to recover the amount paid against the party paying: *Ross* v. *Buxton*, 42 Ch. D. 190."

" 472—Line 23, add to reference to "*Ross* v. *Buxton*": "42 Ch. D. 190."

" 473—Line 2, for "*Baker* v. *Hemming*," read "*Barker* v. *Hemming*."

" 476—At the end of second paragraph add: "5 Ont. 634; *Re Ostrom & Township of Sydney*, 15 Ont. App. 372."

" 479—In sixth paragraph, after reference to *Veale* v. *Automatic Boiler, etc., Co.*, add: "and *Re Davis and York*, 10 C. L. T. 8."

" 481—Add after reference to *Baker* v. *Oakes*, line 26: "Nor can the Court under this *Rule* shorten the time limited by a statute, and not by these *Rules*: *Re Sweetman and Gosfield*, 13 P. R. 293."

PAGE 482—Add after the fifth paragraph: "This *Rule* only empowers the Court to abridge or enlarge periods of time fixed by the *Rules*, and does not extend to a case where a period is limited by statute: *Re Sweetman and Gosfield*, 13 P. R. 293."

Add after the sixth paragraph: "*St. Louis* v. *O'Callaghan*, 13 P. R. 322, and the time for moving against and award has been extended: *Re Oliver and Scott's Arbitration*, 43 Ch. D. 310."

" 487—Add after paragraph nine: "A second examination of the same party will not be allowed except under the most special circumstances: *Thorburn* v. *Brown*, 8 P. R. 114, and upon special motion on notice: *Laird* v. *Stanley*, 6 P. R. 322."

At the end of sixth paragraph add: "But see *Leach* v. *G. T. Ry.*, 13 P. R. 386; where the Judges of the Court of Appeal were not agreed to whether a conductor was examinable for discovery as an officer of defendants; also *Knight* v. *G. T. Ry. Co.*, 13 P. R. 386; and *Fowle* v. *C. P. Ry. Co.*, 26 C. L. J. 189; *Leach* v. *G. T. Ry. Co.*, 13 P. R. 388."

" 491—In eighth paragraph after "*Badgerow* v. *G. T. Ry. Co.*, 13 P. R. 132," add "and in the case of a plaintiff corporation see *Central Press Association* v. *American Press Association*, 13 P. R. 353."

" 494—Add as a note to *Rule* 501 (*b*): "A special examiner has no power to authorize any other person to take down the depositions in shorthand, and where the examiner proposes to proceed with the examination in that way, the person proposed to be examined may refuse to submit to the examination: *Bradt* v. *Bradt*, 13 P. R. 271."

" 497—In the last paragraph after the reference to "*Dyke* v. *Stephens*" insert: "see also *Mayor* v. *Collins*, 24 Q. B. D. 361."

" 498—Add to the eleventh paragraph: "See also *Shelly* v. *Hussey*, 8 P. R. 250."

" 508—Add after the fifth paragraph: "Statements made to a reporter in the employment of the proprietor of a newspaper are not privileged: *Davis* v. *Shepstone*, 55 L. T. N. S. 1."

" 516—Add as a note to *Rule* 525: "Where a motion has been made and refused, it cannot be renewed without leave: *Reg.* v. *Richardson*, 13 P. R. 303. Formerly a motion for a writ of *habeas corpus* was an exception, but see now *Re Hall*, 8 Ont. App. 135."

After reference to *Re* "*Peck & Ameliasburg*," fourth line from the end, add: "*Re Colenutt & Colchester*, 13 P. R. 253."

PAGE 517—After the first paragraph add: "The Court has no power under *Rule* 485 to shorten this period of four clear days, as it is fixed by the Statute, and the powers given by *Rule* 485 only extend to periods of time fixed by the *Rules*: *Re Sweetman and Gosfield*, 13 P. R. 293. Query—whether in computing the four clear days, *Rule* 480, providing for the hours for effecting certain services applies, the notice of motion being the first proceeding in the matter."

Add as note to *Rule* 526: "It is only by the indulgence of the Court that a second application is permitted or entertained where a previous one has been refused: *Reg* v. *Richardson*, 13 P. R. 303; *sed vide Payne* v. *Newberry*, 26 C. L. J. 155."

Add to the fourth note under *Rule* 527 the following: "But orders setting aside proceedings must be served promptly, or they will be deemed to have been abandoned: *Molson's Bank* v. *Dillabaugh*, 13 P. R. 312."

" 519—At the end of sixth paragraph, add, "*Magurn* v. *Magurn*, 10 P. R. 570."

" 521—Add as a note to *Rule* 533: "Where leave is given the fact should be stated in the notice of motion: *Dawson* v. *Beeson*, 22 Ch. D. 504."

" 521—Line 4, before *Blain* v. *Blain*, insert: "*Wright* v. *Wright*, 13 P. R. 268."

Add, at the end of the first paragraph, "*Wright* v. *Wright*, 13 P. R. 268."

" 526—Add as a note to *Rule* 544: "An order for arrest signed by the Judge granting it and not by the Clerk in Chambers, was held by Ferguson, J., to be a nullity: *St. Croix* v. *McLaughlin*, 10 C. L. T. 135."

" 527—Add as a note to *Rule* 550: "This *Rule* does not prevent any arrangement for settlement of an action, entered into and acted upon by litigants, from being sanctioned and enforced by the Court, and so enables them to refer matters in difference between them to arbitration: *Macdonell* v. *Baird*, 13 P. R. 331."

" 528—The reference to "*Exchange, etc.* v. *Ass. of Land Financiers*" should be "*Hop Exchange, etc.*"

" 535—Add at the end of note to *Rule* 562: "But see *Sierich* v. *Woodcock* in note to *Rule* 800."

" 538—Line 8, after "*supra*" insert "*Thomson* v. *Gye*, 13 P. R. 273."

" 539—Add after second paragraph: "But an order for examination for discovery before delivery of the statement of claim ought not to be granted except under special circumstances: *Thomson* v. *Gye*, 13 P. R. 273. In *Carty* v. *London*, 10 C. L. T. 3, the costs of an examination were allowed, though the evidence was rejected at the trial as inadmissible."

PAGE 541—At the end of note to *Rule* 570 add: "But see *contra*, *Ferris* v. *Eyre*, 18 Ont 395."

" 543—Insert as a note to *Rule* 576: "Affidavits in reply were rejected, where they only contained matters supporting the original case: *In re Ferris and Eyre*, 18 Ont. 395; 10 C. L. T. 8."

" 544—After *Rule* 490, in line 20, add: "*Bolkow* v. *Foster*, 7 P. R. 388; *Wilson* v. *Cowan*, 19 C. L. J. 140. 3 C. L. T. 216; *Lynskey* v. *C. P. Ry. Company*, 4 C. L. T. 93."

" 555—Add after the first paragraph: "For some strong observations as to the duty of commissioners to see that deponents understand the affidavits they are making, see *Bourke* v. *Davis*, 38 W. R. 170; 88 L. T. Jour. 103."

" 558—Add as a note to *Rule* 614: "The Common Pleas Division has given directions (23rd December, 1889) that to secure uniformity of practice in the matter of exhibits marked, but not attached to affidavits, that Division of the Court would follow the practice in vogue in the other Divisions, and such exhibits will not be required to be filed, and where handed in for the use of the Court, will be delivered out again without any order."

" 560—After reference to Day's C. L. P. Act, line 17 from the end, add: "*Udy* v. *Stewart*, 10 Ont. 591; *Kramer* v. *Waymark*, L. R. 1, Ex. 541."

564—Add after paragraph 9: "After the death of a judgment debtor, an order for a receiver of his estate cannot be made without representation of the deceased's estate: *Re Shephard*, *Atkins* v. *Shephard*, 43 Ch. D. 131."

" 565—Sixth paragraph, third line, for "may" read "might."

" 568—After first reference to *Hawkesley* v. *Bradshaw*, add: "*Harper* v. *Davis*, 19 Q. B. D. 170."

" 569—Add to the second paragraph: "But see *Buckton* v. *Higgs*, 4 Ex. D. 174; *Gretton* v. *Mees*, 7 Ch. D. 839, where the plaintiff was given costs up to the time of payment into Court, and defendant costs subsequent thereto. The Judge at the trial doubtless has a discretion under *Rule* 1170 to give defendant the whole costs of the action. In *Small* v. *Lyon*, 10 P. R. 222, where judgment was given for defendant with costs, it was held that the Taxing Officer had no alternative but to tax the defendant all his costs."

Add as a note to *Rule* 635: "In an action for an injunction to restrain a nuisance, and for damages, the defendants denied liability and paid money into Court in satisfaction of the claim for damages. The plaintiff accepting the money in satisfaction of the claim for damages, was held not entitled to tax his costs, as the entire cause of action was not satisfied: *Moon* v. *Dickinson*, 38 W. R. 278."

PAGE 570—Add to the fourth paragraph under *Rule* 637: "The costs are not taxable on any higher scale than if the judgment had been recovered for the amount received out of Court: *Chick* v. *Toronto Electric Light Co.*, 12 P. R. 58; and see *Rule* 1174."

Add as a note to *Rule* 637: "Query, whether the plaintiff is entitled to costs under this *Rule*, where the money is paid in with the plea of tender: see *Griffiths* v. *Ystradyfodwg*, 24 Q. B. D. 307."

" 571—Add after the second note to *Rule* 640: "Where a defence sets up a tender, it is not essential that the tender should be alleged to have been made before action, if the fact may be inferred from the other statements of the defence: *Griffiths* v. *Ystradyfodwg*, 24 Q. B. D. 307."

"Where to a claim for money had and received to the plaintiff's use, the defendant pleaded tender before action, and paid into Court the sum tendered in full satisfaction, it was held in England that the plaintiff could not take the money out in satisfaction, and tax his cost as of course, but the plea of tender raised an issue, which remained unsettled on the record, and in respect of which the defendants were entitled to go to trial: *Ib.*"

Dele "When paid in, further money will now be subject to the same rules as in other cases where money is paid in," in note to *Rule* 640.

" 573—Add after the fifth paragraph: "A letter saying, 'We shall discontinue this action, and take out of Court the amount paid in, and tax our costs. We will send formal notice to-morrow, is not a notice of discontinuance within the *Rule*: *Moon* v. *Dickinson*, 38 W. R. 278."

" 578—Add as a note to *Rule* 647: "Where the plaintiff gives notice of trial, but neglects to enter the action for trial, the action cannot be dismissed under this *Rule*, and defendant's remedy is to enter the action himself, under *Rule* 663: *McDougald* v. *Thompson*, 13 P. R. 256; *Simpson* v. *Murray*, 10 C. L. T. 137; 26 C. L. J. 189."

After note to *Rule* 648 add: "On a motion to dismiss an action for non-attendance of a plaintiff to be examined, the plaintiff's undertaking to attend and submit to examination, was not accepted where the action was not a meritorious one: *Denham* v. *Gooch*, 13 P. R. 344.

" 580—Add at the end of third paragraph, under *Rule* 652, after reference to *Syers* v. *Pickersville*: "But actions will not be stayed unless the issues are substantially the same: *Niagara Grape Co.* v. *Nelles*, 13 P. R. 179, 258."

PAGE 580—After reference to the "*Never Despair*" add: "*Girvin* v. *Burke*, 13 P. R. 216."

" 581—Add after tenth paragraph: "In determining who is to have the conduct of a consolidation of two cross-actions, the main *indicia* to be regarded are, which action was first begun, upon whom does the chief burden of proof lie, and which action is the more comprehensive in its scope: *Girvin* v. *Burke*, 13 P. R. 216."

" 582—Line 11—*Niagara Grape Co.* v. *Nelles* is now reported in appeal, 13 P. R. 258.

" 583—Line 22—add at the end of the paragraph: "And actions against newspapers for libels: 50 V. c. 9, s. 5 (O.)."

" 585—"*C. P. Railway Company* v. *Manior*," in note to *Rule* 653 (a), should be "*C. P. Railway Company* v. *Manion*."

" 586—At the end of the second note to *Rule* 655 add: "But it is to be read in connection with sec. 52 (12) of the Act which provides that multiplicity of proceedings is to be avoided: *Village of Fort Erie* v. *Fort Erie Ferry Ry. Co.*, 10 C. L. T. 117.

Line 8: *Shaw* v. *Crawford*, is now reported 13 P. R. 219.

" 590—Add at the end of notes to *Rule* 663: "It has now been decided in Ontario that where the plaintiff gives notice of trial, but neglects to enter it, the defendant may enter it himself under this *Rule*, but cannot move to dismiss under *Rule* 647: *McDougald* v. *Thompson*, 13 P. R. 256; *Simpson* v. *Murray*, 26 C. L. J. 189; 10 C. L. T. 137."

" 594—*Price* v. *Manning*, in note to *Rule* 674, is now reported 42 Ch. D. 372.

" 596—Add at the end of notes to *Rule* 676: "In action for false arrest and malicious prosecution, arising out of a false information laid by defendant, a certified copy of the information being objected to, leave was given to put in afterwards the original, and an exemplification of the judgment of acquittal: *Hamilton* v. *Broatch*, 17 Ont. 679."

" 597—*Bank of Hamilton* v. *Stark*, in note to *Rule* 681, is now reported 13 P. R. 13.

" 598—In paragraph nine, after the reference to *Davies* v. *Felix*, add: "*Rocke* v. *McKerrow*, 24 Q. B. D. 463."

" 606—Add at the end of last paragraph but one: "See also *Ontario Bank* v. *Burk*, 12 P. R. 561."

" 616—Line 29, between "signed" and "within" insert: "If defendant does not deliver his defence."

" 619—At the end of the fourth paragraph add: "*Faithful* v. *Woolley*, 43 Ch. D. 287."

PAGE 625—Add to paragraph (*d*): "And defendant may answer the motion to show there is a defence, by cross-examination of the plaintiff on his affidavit: *Kingsley* v. *Dunn*, 13 P. R. 300."

" 626—Add to the second paragraph: "See also *DeRojas* v. *Michael*, 79 L. Jour. 99, where, besides a money claim, the plaintiff asked for the restoration of a steamship, and an injunction to restrain defendant from parting with it."

" 627—At the end of paragraph 4, add: "*Canadian Bank of Commerce* v. *Woodstock*, 13 P R. 242."

" 629—Add after the first paragraph: "But defendant is entitled *ex debito justitiæ* to cross-examine the plaintiff on his affidavit: *Kingsley* v. Dunn, 13 P. R. 300."

Add at the end of fourth paragraph: " and *Kingsley* v. *Dunn*, 13 P. R 300."

" 632—After second paragraph add: " The dismissal of a motion under this *Rule* for not complying with the provisions of *Rule* 1251, is no bar to a subsequent motion when the provision of that *Rule* have been complied with by the plaintiff: *Payne* v. *Newberry*, 26 C. L. J. 155; 10 C. L. T. 111."

" 647—Line 12—For " *Canadian Loan*" read "*Canadian L. & E.*"

" 649—Insert as note to *Rule* 764: " From the pronouncing of the judgment it becomes an effective judgment, so that it may be attached, though the judgment is not formally entered: *Holtby* v. *Hodgson*, 24 Q. B. D. 103."

" 654—After " record " in second note to *Rule* 780, add: " Of the Court."

" 655—In seventh paragraph after quotation from *Lawrie* v. *Lees*, add: " See also *Balfour* v. *Drummond*, 4 Manitoba 467."

" 660—Add as a note to *Rule* 789: " Where the case has been tried by jury, and a party's only remedy is a motion for a new trial, he must apply to the Divisional Court under this *Rule*: see *Rocke* v. *McKerrow*, 24 Q. B. D. 463, and notes to *Rule* 798."

" 661—In eighth paragraph: For " *Cook* v. *G. T. Ry. Co.*," read " *Goose* v. *G. T. Ry. Co.*, 17 Ont. 721."

Line 9, after reference to *O'Sullivan* v. *Lake*, add: "15 Ont. App. 711."

Line 17, add: " *Wells* v. *Lindop*, 15 Ont. App. 695."

" 662—Line 5, after 135, add: " *Praed* v. *Graham*, 24 Q. B. D. 53; 38 W. R. 103;" and after the fourth paragraph: " See *St. Denis* v. *Baxter*, 15 Ont. App. 387."

PAGE 662—After the sixth paragraph insert: " As to what may be considered in estimating damages in an action for libel: see *Praed* v. *Graham*, 24 Q. B. D. 53."

" 667—In the third paragraph, after the reference to *Yetts* v. *Foster*, insert: " or after leaving the case to the jury the Judge thinks on reflection that there was no evidence to go to the jury and directs judgment to be entered for defendant: *Rocke* v. *McKerrow*, 24 Q. B. D. 468."

" 669—To paragraph 3 of note to *Rule* 800, add: " 13 P. R. 260."

Rule 801: *Reg.* v. *Armstrong*, is now reported 13 P. R. 306.

" 670—After reference to *Campbell* v. *Cole*, add: " *St. Denis* v. *Baxter*, 15 Ont. App. 387."

" 672—After "but," in line 16, add: "it has been recently held, by the Court of Appeal in England, that the discretion of the Court is not limited by any such general rule or practice: *Attorney-General* v. *Emerson*, 24 Q. B. D. 56; 38 W. R. 102."

Sixth line from the end: *Re Palmer* is also reported 22 Ch. D. 88.

" 675—After the third note to *Rule* 807, add: "*Re Gibson*, 13 P. R. 359."

" 681—Add to the notes to *Rule* 823: "Where no written judgment has been delivered by the Court appealed from, a statement of the grounds assigned therefor should be obtained from the reporter, or from notes of counsel who attend to hear judgment, and should be inserted in the appeal book: *Blackley* v. *Kenney*, 16 Ont. App. 522."

" 690—*Re Christie*, in note to *Rule* 946, was followed in *Williamson* v. *Ellis*, 10 C. L. T. 111.

" 692—Add as a note to *Rule* 847, at the end of the page: " Where a party gives notice of motion, and neglects to set down the motion, the opposite party may be entitled to the costs of appearing on return of the notice to show cause against the motion: *Reg.* v. *Armstrong*, 13 P. R. 306."

" 696—At the end of notes to *Rule* 850, add: " Where an appeal was unnecessary no costs were given: *Fouchier* v. *St. Louis*, 13 P. R. 318."

" 697—After the second paragraph add: " On appeals from a Taxing Officer the Court will not interfere with his discretion as to *quantum* and *quoties* of fees, and this rule covers any question of distribution or allotment of charges among different cases or branches of a case: *Conmee* v. *N. American Contracting Co.*, 10 C. L. T. 117."

Add at the end of paragraph 7, after reference to *Re Nation*: "*Strousburg* v. *Sanders*, 38 W. R. 117."

PAGE 698—After eighth paragraph add: "Leave to appeal was refused though the question sought to be raised was one of public importance and turned on the construction of a statute, because the Privy Council did not think there was any reasonable doubt as to the correctness of the construction which had been adopted: *Montreal* v. *Seminaire de St. Sulpice*, 14 App. Cas. 660.

Where an appellant obtained leave to appeal on the ground that he desired to raise a particular question of great and general importance, he was not permitted on the appeal to contend that no such question arose, and that the case turned upon a question of fact on which the Court below was in error: *St. Johns* v. *Central Vermont Ry. Co.*, 14 App. Cas. 590."

" 702—Fourth line from bottom for "*Re Tevidale*" read "*Re Twidale.*"

" 708—Add as a note to *Rule* 867: "This *Rule* was held not to apply where a solicitor ordered to pay into Court money obtained out of Court by him, failed to do so. The solicitor may in such case be committed as for contempt, notwithstanding R. S. O. c. 67, s. 6: *Pritchard* v. *Pritchard*, 18 Ont. 173."

" 716—After the third paragraph add: "See *Young* v. *Ridgetown*, 18 Ont. 140."

" 719—After reference to *Hyde* v. *Greenhill*, middle of page, add: "followed in *Pratt* v. *Inman*, 43 Ch. D. 175."

" 724—After first paragraph add: "but see now, *The Creditors' Relief Act*, (R. S. O. c. 65) s. 28."

" 726—Add as a note to *Rule* 894: "A sale of land after the expiration of a year from the delivery of the writ, without its being renewed, where there was no inception of the execution prior to the expiration of the year, is invalid: *Daley* v. *Gehl*, 18 Ont. 132."

" 728—Line 2, after U. C. Q. B. 292, add: "*Daley* v. *Gehl*, 18 Ont. 132."

Line 7, for "*Rule* 4; R. S. O. c. 1, s. 18 (15)," read "51 Vict. c. 2, s. 4 (O)"

" 738—Third line add: "13 P. R. 310."

" 740—Line 9, for "215" read "245."

Add as a note to *Rule* 933: "There is no express provision for committal of employees ordered to attend for examination under *Rule* 928; and see *Central Press Association* v. *American Press Association*, 15 P. R. 353."

" 741—The reference to *Lloyd* v. *Wallace*, third line from the end should be "9 P. R. 335."

PAGE 741—At foot of page add: "Under *The Creditors Relief Act* (R. S. O. c. 65 s. 37), the Sheriff may attach debts due to an execution debtor."

" 742—Before the heading "Attachment of Debts," add: "Proceedings to attach a judgment may be taken after the pronouncing, but before the actual entry, of the judgment debtor's judgment: *Holtby* v. *Hodgson*, 24 Q. B. D. 103.

A judgment against a married woman, to be executed against her separate estate, is a judgment enabling the judgment creditor to attach debts due to the married woman: *Holtby* v. *Hodgson*, *supra*."

9th paragraph: *Young* v. *Young*, is now reported 10 C. L. T. 17; and *Canada Cotton Co.* v. *Parmalee*, is now reported in appeal, 13 P. R. 308. At the end of the paragraph add: "But see 26 C. L. J. 65."

" 744—Sixth paragraph, after reference to *Stuart* v. *McKim*, add: "But see *contra*, *Prout* v. *Gregory*, 24 Q. B. D. 281."

" 745—*Holtby* v. *Hodgins*, in sixth paragraph, is now reported 24 Q. B. D. 105, *Canada Cotton Co.* v. *Parmalee* is now reported in appeal, 13 P. R. 308, *Young* v. *Young* is now reported 10 C. L. T. 17.

Add the following paragraph: "A dividend payable under the administration in bankruptcy of the estate of a person dying insolvent to a creditor of the estate: *Prout* v. *Gregory*, 24 Q. B. D. 281."

" 747—After reference to *Wills* v. *Luff*, under "Equitable Execution," add: "*Re Shephard, Atkins* v. *Shephard*, 43 Ch. D. 131."

" 748—Add after third paragraph: "The proper form of equitable relief can only be granted where proper parties are before the Court: *Re Shephard, Atkins* v. *Shephard*, 43 Ch. D. 131."

" 749—Add at the end of second paragraph, "*Taylor* v. *Gallagher*, before Robertson, J., 7th January, 1890."

Add after reference to *Wardrope* v. *Canadian Pacific Railway Co.*, in note to *Rule* 936, "*Re Combined Weighing and Advertising Machine Co.*, 43 Ch. C. 99."

" 757—Add as a note to *Rule* 955, "As to arbitration, see *Rule* 550."

" 761—*Chard* v. *Rae*, in the last paragraph, is now reported 18 Ont. 371.

Line 30: For "*Fowler*" read "*Foster*."

Add after reference to *Vivian* v. *Westbrook*: "*Re Finch*, 23 Ch. D. 267, *Re Ross*, 18 C. L. J. 11."

" 762—After the fourth paragraph add: "A judgment for administration of the estate of a deceased person operates as from its date, not merely in favour of a creditor, but in favour also

of the estate, *i. e.*, of the personal representative and other creditors, when the estate is insolvent, in regard to a set-off against the creditor's demand, and the judgment prevents the further running of the Statute (21 Jac. 1, c. 16) against the set-off: *Re Ballard, Lovell* v. *Forrester*, 88 L. T. Jour. 379."

PAGE 762—Add after fifth paragraph: "A personal claim barred as to personal estate by the six years limitation may be preserved by a charge of debts on land as against real estate, so as to become liable to be barred only after ten years: *Re Stephens, Warburton* v. *Stephens*, 43 Ch. D. 39."

The last line, for "execution" read "executor."

" 763—Add as a note to *Rule* 965: "An application may be made on behalf of an infant: *Re Hill, Hawse* v. *Hawse*, 10 C. L. T. 87."

" 776—Add as a note to *Rule* 983: "Notice of proceedings in the Master's office should be given to the parties, though they have not appeared on the motion for the administration order: *Re Pattison, Jackson* v. *Matthews*, 12 Gr. 47."

" 778—Third paragraph; before *Young* v. *Wright*, insert "*Macdonnell* v. *McGillies*, 8 P. R. 339; *Bennetto* v. *Bennetto*, 6 P. R. 145."

" 783—Add as a note to *Rule* 994: "A sale was authorized to provide for the support of a tenant for life and infant child entitled in remainder: *Re Smith*, 4 Ont. 518."

" 786—After first paragraph add: "As to leases made by an infant, see *Lipsett* v. *Perdue*, 26 C. L. J. 154."

" 795—Add as a note to third paragraph: "Service on the Official Guardian is good service upon infants who are required to be notified: *Re Murray*, 13 P. R. 367."

" 803—Add after seventh paragraph: "When an infant is required to be served with notice of proceedings under *The Quieting Titles Act*, service may be effected on him by serving notice on the Official Guardian: *Re Murray*, 13 P. R. 367."

" 813—After the first paragraph, add: "Formerly the relator was required to attach to the writ of summons a statement setting forth what is now required to be alleged in the notice of motion."

" 832—Add as a note to *Rule* 1051: "Under the concluding words of this *Rule* an appeal lies to a Divisional Court of the High Court from any order made under this *Rule* by a County Judge in a County Court action: *Elliott* v. *McCuaig*, 10 C. L. T. 118; 26 C. L. J. 189."

" 849—See *Moore* v. *Wallace*, 13 P. R. 201.

PAGE 878—Eighth line from bottom, *Dominion S. & I. Co.* v. *Kilroy* is now reported 15 Ont. App. 487.

" 879—At foot of page add: "But a claimant cannot set up a *jus tertii* against the execution creditor: *Richards* v. *Jenkins*, 18 Q. B. D. 451; but a transferee of the equity of redemption in goods seized under execution can maintain title to them as against the execution creditor of his transferor; *Usher* v. *Martin*, 24 Q. B. D. 272."

" 881—To third paragraph from the bottom add: "And of a broker to whom shares have been transferred for the purpose of sale, to which a rival claim is set up: *Robinson* v. *Jenkins*, 24 Q. B. D. 167."

" 885—Add to the first paragraph: "But he was held entitled to costs of appearing on a motion by a claimant for a final order barring the execution creditor for default in giving security for costs: *Gray* v. *Alexander*, 10 P. R. 358."

" 894—At the end of last paragraph add: "And in the case of third parties, see *Blore* v. *Ashby*, 38 W. R. 141."

Add to the third paragraph the following: "And where the Judge gives no directions as to a set-off of costs by defendant, (such as is contemplated by *Rule* 1172, in actions tried by a jury,) the Taxing Officer has no power to allow such set-off: *Truax* v. *Dixon*, 13 P. R. 279."

" 901—Add after the second note under *Rule* 1172: "Where an action to enforce Mechanics' Lien was brought in the High Court, which might have been brought in the County Court, and the Court gave plaintiff Division Court costs, but did not adjudicate as to whether the defendant should set off High Court costs, it was held that the Taxing Officer had no power under this *Rule*, the case being tried without a jury, to allow the set-off, but a substantive order allowing such set-off was made by the Court under *Rule* 781: *Truax* v. *Dixon*, 13 P. R. 279."

" 902—Line 19: *Danaher* v. *Little* is now reported 13 P. R. 361.

" 914—After the reference to *Barrett* v. *Campbell*, insert, "So also a contractor, and the assignee of his former partner in the contract, were held entitled to sever: *Melbourne* v. *City of Toronto*, 13 P. R. 346."

" 915—After the reference to *Barker* v. *Hemming*, in note to *Rule* 1204 insert: "nor to judgments on a claim, and counter-claim, where the latter is in the nature of a cross-action so as to be treated as a distinct judgment: *Link* v. *Bush*, 10 C. L. T. 135."

PAGE 932—Add after seventh paragraph: "Any one of the several *cestuis que trustent* may, in the discretion of the Court, obtain an order under this section for taxation of bills of costs of a solicitor employed by the trustees in connection with the business of the trust estate: *Sanderson* v. *Porter*, 16 Ont. App. 565."

" 940—In fourth paragraph, for "*Rule* 1240" read "*Rule* 1248."

" 945—After third paragraph add: "and actions by insolvent persons against Justices of the Peace and other public officers: see 53 Vict. cap. 23 (O.)"

" 948—Add to note to *Rule* 1251: "Where a plaintiff against whom an order for security for costs had been obtained, moved to set it aside and also for judgment under *Rule* 739 without paying $50 into Court under this *Rule*, the motion was refused with costs, and *Doer* v. *Rand*, 10 P. R. 105, and *Anglo American Co.* v. *Rowlin*, *Ib.*, 391, where held no longer in force: *Payne* v. *Newberry*, 13 P. R. 354; 26 C. L. J. 122, 155; 10 C. L. T. 88."

" 950—Add as note to *Rule* 1260: "In *Milligan* v. *Sills*, 13 P. R. 350; it was held by Rose, J., that an appeal lies from an order of the Master in Chambers under this *Rule*. The point was raised in the Divisional Court, but its decision was not necessary."

" 1069—Add the following: "Costs incurred after the death of the client were disallowed, though the solicitor was not aware of the death: *Pool* v. *Pool*, 61 L. T. N. S. 401."

"The usual agency terms" entitle the agent to disbursements out of pocket, and to half the profit charges, whether the country solicitor is paid by his client or not: *Ward* v. *Lawson*, 43 Ch. D. 353.

Objection cannot be taken by a party ordered to pay costs, that the opposite party's costs are those of a firm of solicitors, one of whose members is not an admitted or certificated solicitor: *Scott* v. *Daly*, 12 P. R. 610."

" 1099—At foot of page add: "An action lies at the suit of a witness for his fees, if not duly paid by the party subpœnaing him: *Chamberlain* v. *Stonehouse*, 24 Q. B. D. 113."

THE JUDICATURE ACT.

REVISED STATUTES OF ONTARIO.

CHAPTER 44.

An Act respecting the Supreme Court of Judicature.

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TRANSFER OF CAUSES FROM COUNTY AND DIVISION COURTS TO HIGH COURT, s. 158.
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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

TITLE.

Short title.

1. This Act may be cited as "*The Judicature Act.*" 44 V. c. 5, s. 1.

INTERPRETATION.

Interpretation of terms. 44 Vict. c. 5.

2. Where the words following occur in this Act and in the Rules, made thereunder or under *The Ontario Judicature Act, 1881*, they shall be construed in the manner hereinafter mentioned unless a contrary intention appears.

1. "Rules of Court" shall include forms.

2. "Cause" shall include any action, suit, or other original proceeding between a plaintiff and a defendant.

3. "Action" shall include suit and shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court. (*a*)

(*a*) The original clause had the additional words "and does not include a criminal proceeding by the Crown."

An interpleader proceeding by a sheriff is not an action but a proceeding in an action; *Hamlyn* v. *Betteley*, 6 Q. B. D. 63; *Coulson* v. *Spiers*, 9 P. R. 491.

"Action" may include a petition; see *Re Atkin's Estate*, 1 Ch. D. 82; *Finney* v. *Hinde*, 4 Q. B. D. 102; *Re Dynevor & Duffryn Collieries*, W. N. 1878, 199; and in England includes proceedings by originating summons; *Re Fawsitt Galland* v. *Burton*, 30 Ch. D. 231.

4. "Matter" shall include every proceeding in the Court not in a cause.

5. "Plaintiff" shall include every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

6. "Petitioner" shall include every person making any application to the Court, either by petition, motion, or summons, otherwise than as against any defendant.

7. "Defendant" shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings.

8. "Party" shall include every person served with notice of, or attending, any proceeding, although not named on the record.

9. "Pleading" shall include any petition or summons, and shall also include the statement in writing of the claim

or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter-claim of a defendant. Sec. 2.

"Summons" in this clause does not mean a writ of summons: *Murray* v. *Stephenson*, 19 Q. B. D. 60.

10. "Judgment" shall include decree.

11. "Order" shall include rule.

12. "Oath" shall include solemn affirmation and statutory declaration.

The above definitions are all taken from the English Jud. Act 1873, sec. 100.

13. "Proper Officer" shall, unless and until any Rule to the contrary is made, mean an officer to be ascertained as follows:—

(*a*) Where any duty to be discharged under this Act or under Rules of Court is a duty which has been discharged by any officer, such officer shall continue to be the proper officer to discharge the same, until otherwise provided by Rule;

(*b*) Where any new duty is under this Act or under the Rules aforesaid to be discharged, the proper officer to discharge the same shall be such officer having previously discharged analogous duties, as may from time to time be directed to discharge the same, in the case of an officer of the High Court, not attached to any Division, by the President of the High Court, and in the case of an officer attached to any Division, by the President of the Division. 44 V. c. 5, s. 91.

The above interpretation of "proper officer" is taken from English R. Sup. C., 1875, Order 63.

CONSTITUTION OF SUPREME COURT.

Supreme Court of Judicature continued.

3.—(1) The Supreme Court of Judicature for Ontario at present existing is hereby continued, and all commissions, rules, orders and regulations granted or made, in, by, or respecting the former Court of Queen's Bench for Ontario, the Court of Chancery for Ontario, and the Court of Common Pleas for Ontario, or the Supreme Court of Judicature,

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Sec. 3. the Court of Appeal, and the High Court of Justice, or the Judges or officers thereof, existing and in force when this Act takes effect, shall remain in force until altered or rescinded or otherwise determined. R. S. O. 1877, c. 39, s. 2; 44 V. c. 5, s. 3 (1).

By the Jud. Act of 1881 (sec. 3) the then existing Courts, viz., the Court of Appeal, the Court of Queen's Bench, the Court of Chancery, and the Court of Common Pleas, were united and consolidated together, and constituted one Supreme Court of Judicature for Ontario. This Court is continued by the above section.

The Rules and Orders of the former Courts are now rescinded and a consolidation of all such Rules and Orders substituted for them.

The Jud. Act has not fused the two systems of Law and Equity, but has transferred each of these two jurisdictions to one Court which administers both systems: *per* Chitty, J., in *Emmerson* v. *Ind*, 34 W. R. 636, 54 L. T. N. S. 757.

The Supreme Court does not sit as a Court unless it be to make General Rules and Orders: sec. 105, sub-s. 1. The Judges of the Supreme Court are also to hold a Council once a year to consider the Procedure and Administration of the Law, and to report thereon: sec. 109. The Master in Ordinary, and Local Masters of the Court of Chancery, and the Taxing Officers, are declared to be Officers of the Supreme Court and attached thereto: sec. 112 (2), *post*: by order in Council of 22nd May, 1889, the Masters have been also made officers of the High Court. All the Judges, and their successors, are Judges of the Supreme Court, thus marking the uniformity which is aimed at in the administration of justice, and the abolition of all distinction between Courts administering Law and Courts administering Equity. The Appeal Judges are made competent to do any work which ordinarily is discharged by the Judges of the High Court, and the Judges of the High Court are to act, when needed, in the Court of Appeal: secs. 5, 9.

(2) The Supreme Court shall continue to consist of two permanent divisions, to be called "The High Court of Justice for Ontario," and "The Court of Appeal for Ontario."

(3) The High Court of Justice for Ontario shall continue to consist of three divisions, to be called the Queen's Bench Division, the Chancery Division, and the Common Pleas Division of the High Court. 44 V. c. 5, s. 3 (2, 3).

(4) The Queen's Bench Division shall, during the reign of a King, be called "The King's Bench Division," and during the reign of a Queen, "The Queen's Bench Division." R. S. O. 1877, c. 39, s. 3.

The English Act did not identify the existing Courts with the Divisions of the High Court bearing the same names; the Ontario Act expressly makes the High Court and its several Divisions a continuation of the existing Courts, under a new name: see *West Huron Election case*, 19 C. L. J. 240; 3 C. L. T. 446; 8. S. C. R. 126, in note to sec. 163. The Divisions of the High Court are not however themselves Courts, but together constitute the High Court which is thus divided for convenience in transacting business: *Reg.* v. *Bunting*, 7 Ont. 118. See also *Reg.* v. *Dudley*, 33 W. R. 348: *Serrao* v. *Noel*, 15 Q. B. D. 557-8.

(5) The persons hereafter appointed to fill the places of the Chief Justice of the Queen's Bench, the Chancellor of Ontario, and the Chief Justice of the Common Pleas, and their successors respectively, are to be appointed by the authority mentioned in *The British North America Act*, and with the same respective titles as heretofore. 44 V. c. 5, s. 3 (4). Sec. 3. Imp. Stat. 30-31 V. c. 3.

By the B. N. A. Act, section 96, it is provided that "the Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

(6) The persons to be appointed Judges of the High Court shall be Barristers-at-Law of at least ten years' standing at the Bar of Ontario. R. S. O. 1877, c. 39, s. 8.

(7) Save as in this Act is otherwise expressly provided, all the Judges hereinbefore mentioned, and their successors, shall have in all respects equal power, authority and jurisdiction. 44 V. c. 5, s. 3 (5).

So in England by Jud. Act, 1873, sec. 5.

(8) The Chief Justice of the Queen's Bench shall be the President of the Queen's Bench Division, the Chancellor shall be the President of the Chancery Division, and the Chief Justice of the Common Pleas shall be the President of the Common Pleas Division. 44 V. c. 5, s. 3 (6).

See English Jud. Act, 1873, sec. 31.

(9) Besides the Chief Justice of the Queen's Bench, two Justices of the High Court shall be attached to the Queen's Bench Division; besides the Chancellor of Ontario, three Justices of the High Court shall be attached to the Chancery Division; and besides the Chief Justice of the Common Pleas, two Justices of the High Court shall be attached to the Common Pleas Division. *See* 44 V. c. 5, s. 3 (3, 8); 48 V. c. 13, ss. 2-4.

(10) The President of the said High Court shall be that one of the Presidents of the Queen's Bench, Chancery and Common Pleas Divisions, who, for the time being, is first in order of seniority.

(11) Upon a vacancy happening among the Judges, the Judge appointed to fill the vacancy is (subject to the pro-

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Secs. 3-7.

visions of this Act, and to any Rules of Court which may be made pursuant thereto) to become and be a member of the same Division to which the Judge whose place has become vacant belonged.

(12) Nothing in this Act shall prevent, or shall be construed as intended to prevent, the transfer of any Judge of any of the said Divisions from one to another of the said Divisions. 44 V. c. 5, s. 3, (7-9).

Judgment by Judge who resigns after case heard.

4. Where a Judge resigns his office, and any case which has been fully heard by such Judge, either alone or jointly with other Judges, stands for judgment, he may give judgment therein as if he was still a Judge of the same Court; and any such judgment shall be of the same force and validity as if he were still such Judge, provided that such judgment of the Judge be delivered within six weeks after his said resignation. 44 V. c. 5, s. 86.

Existing Court of Appeal, continued.

5. The Court of Appeal for Ontario, at present existing is continued, under that name, and shall consist of a Chief Justice, to be called the Chief Justice of Ontario, and three other Judges, to be called Justices of Appeal, and the Judges of the High Court, shall be *ex officio* Judges of the Court of Appeal, so as to provide for the cases mentioned in section 12 of this Act. 44 V. c. 5, s. 4; R. S. O. 1877, c. 38, s. 3; 48 V. c. 13, s. 2.

Vacancies in Court of Appeal, how filled.

6. The Chief Justice of Ontario and the Justices of Appeal may be selected from the Judges for the time being, or retired Judges of the High Court, or from such barristers as are eligible to be appointed Judges of that Court. R. S. O. 1877, c. 38, s. 4.

Precedence of Judges.

7.—(1) The Chief Justice of Ontario shall have rank and precedence over all other Judges of the Courts in Ontario.

(2) The Justices of Appeal, the Chief Justice of the Queen's Bench, the Chancellor of Ontario, and the Chief Justice of the Common Pleas shall have rank and precedence among themselves according to their seniority of appointment to any of the said offices.

(3) The other Judges of the High Court shall have rank and precedence among themselves according to seniority of appointment to their respective offices. R. S. O. 1877, c. 38, s. 6; c. 39, s. 7; c. 40, s. 6.

Secs. 8-11.

Appeal Judges may hold Assizes, etc.

8. The Chief Justice of Ontario and the Justices of Appeal, may, in addition to their duties as Judges of the Court of Appeal, preside over Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol delivery, and hold sittings of the High Court of Justice, for the trial of civil causes, matters and issues, and criminal matters or proceedings; and every such Justice in the exercise of such duties shall have the same rights, powers and privileges as a Judge of the High Court presiding at such Courts or sittings. R. S. O. 1877, c. 38, s. 8.

Provision for absence or vacancy in office of a Judge.

9. Upon the request of the Judge or Judges with or for whom he is requested to sit or act, it shall be lawful for any Judge of the Court of Appeal, or any retired Judge of the said Court, or of the High Court, who may consent so to do, to sit and act as a Judge of the said High Court, or to perform any other official or ministerial acts for or on behalf of any Judge absent from illness or any other cause, or in the place of any Judge whose office has become vacant, or as an additional Judge of any Division; and while so sitting and acting, any such Judge of the Court of Appeal or retired Judge shall have all the power and authority of a Judge of the said High Court. R. S. O. 1877, c. 39, s. 10; c. 40, s. 22; 44 V. c. 5, ss. 40, 85.

See Eng. J. A. 1873, s. 51.

Quorum.

10. No sitting of the Court of Appeal shall be held unless four of its members are present, where the appeal is from the High Court, or unless three of its members are present where the appeal is from a County Court, Provisional Judical District Court, or Judge of a Surrogate Court or Stipendiary Magistrate. 41 V. c. 8, s. 2.

Divisional Courts of Court of Appeal.

11.—(1) In case from pressure of business, or other cause, it shall at any time seem expedient to the Lieutenant-Governor in Council, or to the Judges of the Supreme Court, or a majority of them (of which majority two Judges of the Court of Appeal, including the Chief Justice, unless absent on leave, shall form part), the Court of Appeal may sit in two Divisions at the same time; and in such case, and to enable two Divisional Courts to be held, the Judges of the said Supreme Court, or the said majority of them, shall select from the Judges of the High Court so many of the Judges thereof as may be necessary, together with the

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Secs. 12-14.

ordinary Judges of the Court of Appeal, to form two Divisions of the said Court, and the judges so chosen and acting shall have all the power and authority of the Judges of the said Court of Appeal.

(2) Unless otherwise arranged by the Judges of the Court of Appeal and the said Judges so selected, two of the ordinary Judges of the Court of Appeal shall, where practicable, sit in each such Divisional Court. 44 V. c. 5, s. 42.

The English Jud. Act of 1875, section 12, provides for the Court of Appeal sitting in two divisions at the same time when necessary; the two sections in some other respects do not correspond.

Quorum may be made up by the Judges of the High Court.

12. In case of there being a vacancy in the Court of Appeal, or in case from illness or some other cause, any of the Judges of the said Court is not present at some sitting of the Court, or in case any of the said Judges is under some legal disqualification to hear an appeal, the Judges of the High Court shall choose from amongst their number as many Judges as are necessary, to form a quorum; and the Judges so chosen and acting shall have authority to continue to hear appeals partly heard before them, and to give judgment in all appeals heard before them, notwithstanding that such vacancy may in the meantime have been filled up, or that the Judge who was absent may have resumed his duties. R. S. O. 1877, c. 38, s. 10.

One cause of disqualification is given in section 13. As to other causes of disqualification, see *Boulton* v. *The Church Society*, 15 Gr. 450; *Dimes* v. *Grand Junction, etc.*, 3 H. L. C. 759.

Judge whose decision appealed from, etc., not to sit on appeal.

13. No Judge against whose judgment an appeal is brought, or who took part in the trial of the cause or matter, or in the hearing in the Court below, shall sit or take part in the hearing of or adjudication upon the proceedings in the Court of Appeal. R. S. O. 1877, c. 38, s. 13.

Written judgment of an absent Judge may be read by another Judge.

14. Where a Judge has heard a case in the Court of Appeal and is not present at the time of the judgment of the Court being delivered, his written judgment may be read by one of the other Judges of the Court, and shall have the same effect as if he were present; and in such case if the judgment delivered is on an appeal from the High Court, it shall be sufficient if three Judges are present; and if the judgment is on an appeal from the County Court, it shall be sufficient if two Judges are present; and it shall

not be necessary that the Judges shall be unanimous. 45 V. c. 6, s. 2. *See also* s. 4, *ante*. Secs. 15-19.

Where the Court of Appeal is equally divided the judgment in appeal is affirmed, and usually with costs: *Long* v. *Hancock*, 12 Ont. App. 156; but where on a motion to quash the Court was equally divided in opinion as to their jurisdiction to hear the appeal, no costs were given: *Whiting* v. *Hovey*, *ib.* 119.

Judgment may be given in the absence of one of the Judges who heard the cause if other Judges are unanimous.

15. In case, after a cause or matter in the Court of Appeal has been heard and stands for judgment, one of the Judges by whom the appeal was heard is transferred to the Supreme Court of Canada, or resigns his office, or is absent from illness or other cause, or dies, the remaining Judges, if unanimous in their decision, may give judgment as if such Judge were still a Judge of the said Court of Appeal, and were present and taking part in the said judgment. 45 V. c. 6, s. 3.

Presiding Judge in absence of Chief Justice.

16. In the absence of the Chief Justice of Ontario, the Judge entitled to precedence over the other Judges present shall preside. R. S. O. 1877, c. 38, s. 14.

Sittings of the Court of Appeal.

17. The Court of Appeal shall subject to the provisions of section 57 of this Act, hold its sittings at the City of Toronto at such times and for such periods as the acting Judges thereof for the time being, or a majority of them, may deem necessary or convenient for the speedy despatch of business. R. S. O. 1877, c. 38, s. 15; 44 V. c. 5, s. 19.

Oath of office.

18. The oath to be taken by the Judges to be hereafter appointed shall be the following:—

"I do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as ; so help me God."
44 V. c. 5, s. 5.

Administration of oath.

19. The oath is to be administered to the Chief Justices and the Chancellor by the Lieutenant-Governor in Council, and to the Justices of the High Court, other than the Chief Justices, in presence of the President of the High Court; and to the Justices of the Court of Appeal in open Court by the Chief Justice of Ontario, unless the Lieutenant-Governor in any of such cases shall otherwise direct. 44 V. c. 5, s. 5.

By C. S. U. C., c. 10, s. 8, and c. 12, s. 8, it was provided that the oath should be administered to the Chief Justices and the Chancellors by or before the "Governor in Council." The R. S. O. c. 39, s. 9, and c. 40, s. 7, required the oath to be taken before the Lieutenant-Governor in Council. Since Confederation the oath has sometimes been taken twice, viz: both before the Governor and the Lieutenant-Governor. The Puisne Judges

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Sec. 20. of the Common Law Courts have heretofore been sworn in open Court by the Chief Justice of the Court, and the Vice-Chancellors in open Court in presence of the Chancellor. In England the Lord Chancellor takes the oath in presence of Her Majesty in Council, "or otherwise, as Her Majesty may direct": 31 & 32 Vict., c. 72, Sched. 1st part; and the other Judges take the oath in presence of the Lord Chancellor (Jud. Act 1875, sec. 5). The oath taken by the English Judges: 31 & 32 Vict., c. 72, differs a little in form from that given in the present Act, which follows the form hitherto prescribed in this Province: see R. S. O. 1877, c. 38, s. 7; c. 39, s. 9; c. 40, s 7).

JURISDICTION OF HIGH COURT.

Jurisdiction of High Court.

20. The High Court shall be a Superior Court of Record of original jurisdiction, and shall, subject as in this Act mentioned, possess all such powers and authorities, as by the law of England, are incident to a Superior Court of civil and criminal jurisdiction; and shall have, use and exercise all the rights, incidents and privileges of a Court of Record, and all other rights, incidents and privileges as fully to all intents and purposes as the same were on the 5th day of December, 1859, used, exercised and enjoyed by any of Her Majesty's Superior Courts of Common Law at Westminster in England, and may and shall hold plea in all and all manner of actions and causes as well criminal as civil, and may and shall proceed in such actions and causes by such process and course as are provided by law; and as shall tend with justice and despatch to determine the same; and may and shall hear and determine all issues of law; and may and shall also hear and (with or without a jury, as provided by law) determine all issues of fact that may be joined in any such action or cause, and judgment thereon give, and execution thereof award in as full and ample a manner as might, at the said date, be done in Her Majesty's Courts of Queen's Bench, Common Bench, or, in matters which regard the Queen's revenue (including the condemnation of contraband or smuggled goods), by the Court of Exchequer in England. R. S. O. 1877, c. 39, s. 4; 44 V. c. 5, s. 9 (1).

All that the Jud. Act has done is to give the High Court the jurisdiction which either the Courts of Chancery or the Courts of Common Law had before. It has conferred no new right to relief. An action to enforce a charge where the value of the subject matter was under £10 could not have been entertained by any of those courts before the Jud. Act, and therefore cannot now be maintained: *Westbury* v. *Meredith*, 30 Ch. D. 387: see *Gilbert* v. *Braithwaite*, 3 Chy. Ch. 413; *Westbrooke* v. *Browett*, 17 Gr. 339; *Reynolds* v. *Coppin*, 19 Gr. 627; *Harding* v. *Cardiff*, 29 Gr. 308; *Allen* v. *Lyon*, 5 Ont., 615; *Shaw* v. *Freedy*, 8 C. L. J. 136.

In *Clarbrough* v. *Toothill*, W. N., (1881), 110; 50 L. J. Chy. 743; 18 C. L. J. 101, it was held that where an Act passed before the Judicature Act and refer-

ring in terms to a common law action only authorized a certain proceeding, such proceeding might after the Jud. Act be taken in any of the Divisions of the High Court. Sec. 21.

In England it has been held that the prerogative writ of mandamus is still only granted on application to the Q. B. D. : *Glossop* v. *Heston Local Board*, 12 Ch. D. 115, 116, 122. In Ont., however, it is different : see notes to s. 53 (8).

Under The Criminal Procedure Act (R. S. C. c. 174) s. 2 *h*, any division of the High Court is a "Court for Crown cases reserved" under that Act, and by section 3 of that Act, every Superior Court of criminal jurisdiction has power to try any treason, felony, or other indictable offence. The regulation of the procedure in criminal cases is a matter within the exclusive jurisdiction of the Dominion Parliament: B. N. A. Act, s. 91, s-s. 27, and proceedings in criminal cases are now regulated for the most part by The Criminal Procedure Act (R. S. C. c. 174).

21. The High Court shall also, subject as in this Act mentioned, have the like jurisdiction and powers as by the laws of England were on the 4th day of March, 1837, possessed by the Court of Chancery in England, in respect of the matters hereinafter enumerated, that is to say: Equitable jurisdiction.

1. In all cases of fraud and accident;

2. In all matters relating to trusts, executors and administrators, co-partnership and account, mortgages, awards, dower, infants, idiots, lunatics and their estates;

3. To stay waste;

4. To compel the specific performance of agreements;

5. To compel the discovery of concealed papers or evidence, or such as may be wrongfully withheld from the party claiming the benefit of the same;

6. To prevent multiplicity of suits;

7. To decree the issue of letters patent from the Crown to rightful claimants;

8. To repeal and avoid letters patent issued erroneously or by mistake, or improvidently, or through fraud. R. S. O. 1877, c. 40, s. 34; 44 V. c. 5, s. 9 (1). *See also* s. 53 (9).

Fraud and Accident.—*Fraud*, the jurisdiction by this section vested in the High Court, in respect of fraud, is confined to fraud arising in reference to civil rights. A distinction has been attempted to be drawn between acts which are illegal but which are not accompanied by any moral turpitude, and acts which are both illegal and are the result of moral delinquency. The former class of acts have been termed "legal fraud": see *Peek* v. *Derry*, 37 Ch. D 541, and the latter "moral fraud," or "actual fraud," but it has been denied that any such distinction exists, and that in all cases where "fraud" is charged it must be supported by proof of moral turpitude: *Joliffe* v. *Baker*, 11 Q. B. D. 255; 48 L. T. N. S. 966; *Weir* v. *Barnett*, 3 Ex. D. 238, 243 *per* Bramwell, J.; and see *In re Watson* 21 Q. B. D. 301; *Peek* v. *Derry*, 87 L. T. Jour. 184. It is important that fraud should not be charged where it cannot be supported Fraud.

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Sec. 21. by proof of moral turpitude, because where fraud is charged, but not proved, the plaintiff, though successful, may be compelled to pay the costs of the action: *Neale* v. *Winter*, 9 Gr. 261, or the costs occasioned by the improper charges: *Hodgins* v. *McNeil*, *Ib.* 305; and see *McKenzie* v. *Yielding*, 11 Gr. 406, where a successful defendant, who by his answer had improperly impugned the motives of the plaintiff's solicitor, was disallowed the costs of the answer; or the plaintiff may be denied his costs though successful: *Watson* v. *Watson*, 23 Gr. 70; *McLaurin* v. *McDonald*, 12 Gr. 82; *Hughson* v. *Davis*, 4 Gr. 588.

Where fraud is alleged in any proceeding, the facts must be set out in the statement of claim or petition, as the case may be, which are alleged to amount to fraud, mere general allegations that fraud has been committed are insufficient; *Re Rica Gold Washing Co.*, 11 Ch. D. 36 *per* Jessel, M. R.

Accident. *Accident.*—By the term accident is intended not merely casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force, but such unforseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or misconduct in the party seeking relief in respect thereof: Story. s. 78. One of the most common instances in which relief is sought under this head is in the case of lost bonds, or other instruments under seal. In such a case relief is usually granted on the terms of the plaintiff giving a bond of indemnity to the defendants: *McDonald* v. *Hime*, 15 Gr. 72; but see *Macauley* v. *Boyle*, 25 C. P. 339; and where a suit was brought to recover promissory notes alleged to be lost after maturity, and the defendant allowed the bill to go *pro confesso* indemnity was dispensed with: *Abel* v. *Morrison*, 23 Gr. 109. The jurisdiction of the Court also extends to giving relief in respect of instruments which have been destroyed: *Frontenac* v. *Breden*, 17 Gr. 645.

Under this head of jurisdiction the Court may also grant relief in the case of a defective execution of a power resulting from accident or mistake, or both, and also in regard to agreements to execute powers which may generally be deemed a species of defective execution: see Sugd. on Pow. 549. But this relief is only granted to persons having some moral right, and where there are no opposing equities. Thus, such relief may be granted in favor of a purchaser: *Fothergill* v. *Fothergill*, 2 Freem. 256; under which term a mortgagee, or lessee, are included: *Barker* v. *Hill*, 2 Chy. R. 113; *Reid* v. *Shergold* 10 Ves. 370; to a creditor: *Pollard* v. *Greenvil*, 1 Chy. Ca. 10; *Wilkes* v. *Holmes*, 9 Mod. 485; to a wife: Cowp. 267; *Clifford* v. *Burlington*, 2 Vern. 379, to a legitimate child; *Sarth* v. *Blanfrey*, Gilb. Eq. R. 166; *Sneed* v. *Sneed*, Amb. 64; and to a charity: *Innes* v. *Sayer*, 7 Ha. 377; 3 Mc. & G. 606; *Atty.-Genl.* v. *Silthorp*, 2 R. & M. 107: but not in favor of the donee of the power, nor a husband: *Watt* v. *Watt*, 3 Ves. 244; nor an illegitimate child: *Tudor* v. *Anson*, 2 Ves. Sr. 582; nor a grandchild: *Watt v. Bullas*, 1 P. Wms. 60; nor of remote relations, or volunteers: *Smith* v. *Ashton*, 1 Freem. 308.

Under this head of jurisdiction, personal representatives who have by mistake overpaid creditors, or legatees, beyond the amount they are justly entitled to receive, may recover the overpayment: *Edwards* v. *Freeman*, 2 P. Wms. 447; *Hawkins* v. *Day*, Amb. 160; Story s. 90.

But relief cannot be given from the consequences of a positive contract; thus, a lessee cannot get relief from payment of rent because of the destruction of the demised premises by accident: *Pym* v. *Blackburn*, 3 Ves. 34, 38; Story s. 101; nor can relief be given on the ground of accident to a party whose own gross negligence or fault has caused the accident: *Ex p. Greenway*, 6 Ves. 812.

Trusts. **Trusts.**—The jurisdiction in respect of trusts was formerly a part of the exclusive jurisdiction of the Court of Chancery. By the Statute of Frauds (29 Car. 2, c. 3,) s. 7. All declarations or creations of trust or confidences, of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trusts, or by his last will in writing; and by sec. 9, all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by his last will. Section 3 makes two exceptions from the statute: (1) trusts arising or resulting from any conveyance of lands or tenements, by implication, or construction of law; (2) trusts transferred or

extinguished by an act or operation of law. Trusts of chattels real must be evidenced by writing: *Forster* v. *Hale*, 3 Ves. 695; *Riddle* v. *Emerson*, 1 Vern. 108, but not trusts of chattels personal: *McPhadden* v. *Jenkins*, 1 Ph. 153; *Benbow* v. *Townsend*, 1 My. & K. 506. Sec. 21.

A trust of lands in a foreign country may be enforced by the High Court where the trustee is resident within its jurisdiction: *Smith* v. *Henderson*, 17 Gr. 6; and see *Re Robertson*, *Robertson* v. *Robertson*, 22 Gr. 449.

The Court has jurisdiction under the English Trustee Acts (10 & 11 Vict. c. 96; 13 & 14 Vict., c. 60; and 15 & 16 Vict., c. 55), which are virtually re-enacted in this Province: see *post* ss. 22, 23; *Re Hodges*, 1 Gr. 289; Taylor & Ewart, Jud. Act, pp. [136-176].

Under the provisions of these Acts the Court has power to appoint new trustees upon a summary application: *Re Helliwell*, 21 Gr. 346; *Re Dillon*, 3 C. L. J. 126.

The Court is authorized to allow trustees under any deed, settlement or will compensation for their services: R. S. O. c. 110, s. 38.

Executors and Administrators.—The jurisdiction of the Court over personal representatives authorizes it to entertain actions or proceedings to compel them to account for their administration: see *Rules* 965-988; to fix the compensation to be paid to them for their services: R. S. O. cap. 110, sec. 38; to control their management of the estate of their testator, or intestate, and if necessary to restrain them from exercising their office, and to appoint a receiver or other person to act in their stead: *Harrold* v. *Wallis*, 9 Gr. 443; *Re Moore*, *McAlpin* v. *Moore*, 21 Ch. D. 778; *Re Murphy*, before Boyd, C., 9 April, 1887; and an injunction may be granted at the instance of an executor against his co-executor to restrain him from intermeddling with the estate before probate: *In re Moore*, *Kerr* v. *Moore*, 58 L. T. N. S. 386. Executors, etc.

Co-partnership.—The Court of Chancery formerly exercised a concurrent jurisdiction with the Courts of Common Law in partnership cases, but in all cases of difficulty and complexity the equity jurisdiction was resorted to. Under this head the Court has power to entertain actions for the specific performance of agreements to enter into partnership for a definite term: *Buxton* v. *Lister*, 3 Atk. 385; *England* v. *Curling*, 8 Beav. 129; but not where no specified time for the duration of the partnership has been named: *Hercy* v. *Birch*, 9 Ves. 357. It has also power to enforce the specific performance of articles of partnership: *Somerville* v. *McKay*, 16 Ves. 382; *England* v. *Curling*, 8 Beav. 129; *Miles* v. *Thomas*, 9 Sim. 606, 609; *Marshall* v. *Watson*, 25 Beav. 501; *Haggart* v. *Allan*, 4 Gr. 36; but not where damages would be an adequate compensation: *Street* v. *Rigby*, 6 Ves. 815; *British Empire Shipping Co.* v. *Somes*, 3 K. & J. 433; nor where the partnership is in contravention of any public Act: *Collins* v. *Swindle*, 6 Gr. 282. Partnership.

It has also power to decree a dissolution of partnership: *Rawlins* v. *Wickham*, 1 Giff. 355; *Hue* v. *Richards*, 2 Beav. 305; *Newton* v. *Doran*, 1 Gr. 590; *O'Lone* v. *O'Lone*, 2 Gr. 125; and to appoint a receiver of the partnership assets: *Prentiss* v. *Brennan*, 2 Gr. 274; *Ib.* 322; *Rule* 116, note; and to decree the taking of the partnership accounts. The Court has also power to entertain an action to establish a partnership: *Bingham* v. *Smith*, 16 Gr. 373; and to decree an account up to the time of the commencement of the action, even where a dissolution is not asked: *Loscombe* v. *Russell*, 4 Sim. 8; *Fairthorne* v. *Weston*, 3 Ha. 387.

Account.—In this respect the Court of Chancery formerly also exercised a concurrent jurisdiction with the Courts of Law, but owing to its superior machinery for compelling discovery, and taking accounts, it practically exercised an almost exclusive jurisdiction in all cases of any complication. Under this head of jurisdiction the Court entertains actions for an account brought by a principal against his agent: *McKenzie* v. *Johnston*, 4 Mod. 373; *Kerr* v. *Lafferty*, 7 Gr. 412; *Ridley* v. *Sexton*, 18 Gr. 580; 19 Gr. 146; *Arthurton* v. *Dalley*, 2 Gr. 1; *Wright* v. *Rankin*, 18 Gr. 625; *M'Lean* v. *Grant*, 20 Gr. 76; *Smith* v. *Henderson*, 17 Gr. 6; *Harrison* v. *Harrison*, 14 Gr. 586; *Landman* v. *Crooks*, 4 Gr. 353; but not by an agent against his principal: *Padwick* Account.

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Sec. 21. v. *Stanley*, 9 Ha. 627; *Smith* v. *Leveaux*, 2 D. J. & S. 1. An action for an account will lie where there are mutual accounts between the plaintiff and defendant, *i.e.*, where each has received and paid on account of the other: *Phillips* v. *Phillips*, 9 Ha. 471; or by *cestui que trust* against his trustee; or by creditors, legatees, or next of kin against personal representatives; or by a client against his solicitor; or by partners against each other; or by a mortgagor against his mortgagee, or *vice versa*; or where the accounts are complicated; or where fraud is charged; or by any party having a statutory right to call another to account, *e.g.*, by a municipal corporation against a registrar of deeds for an account of moneys received by him in excess of his salary, to which excess the corporation is entitled: *Re Ingersoll, Gray* v. *Ingersoll*, 16 Ont. 194.

See further as to proceedings in taking accounts: *Rule* 57, *et seq.* and notes.

Mortgages. **Mortgages.**—At Common Law the right of a mortgagee to the mortgaged property was, on default in payment of the mortgage, absolute; but in Equity, notwithstanding the mortgage, or default in payment, the mortgagor was still regarded as the owner of the mortgaged property, and the mortgage was considered merely as a security for the debt. In order to give effect to the equitable rights of the parties Equity had formerly an exclusive jurisdiction. The jurisdiction of the Court in respect of mortgages extends to actions by mortgagors against mortgagees to redeem, or by mortgagees against mortgagors and others interested in the equity of redemption for the foreclosure of their right to redeem, or for the sale of the mortgaged property. As to the mode in which this jurisdiction is exercised: see *Rules* 248, 341*a*, 717, 718, 124, 137, and notes.

Awards. **Awards.**—The Court of Chancery had formerly a concurrent jurisdiction with Courts of Law in respect of awards. The Court has power to set aside awards: *Lawson* v. *Hutchinson*, 19 Gr. 84; *Edward* v. *Gordon*, 12 Gr. 333; *Kemp* v. *Henderson*, 10 Gr. 54; *Jekyll* v. *Wade*, 8 Gr. 363; *Hickman* v. *Lawson*, 8 Gr. 386; *Gillam* v. *Cleghorn*, 7 Gr. 83. But an award was not impeachable in Equity on the ground that it was erroneous in either law or fact, unless the error appeared on its face. The cases in which the Court of Chancery could interfere were those in which such an error so appeared; or where there had been corruption, fraud, or excess of jurisdiction; or where the arbitrators making the award admitted that they had made a mistake: *Re Grant & Eastwood*, 22 Gr. 563; *Pardee* v. *Lloyd*, 26 Gr. 374; and see *Le May* v. *McRae*, 16 Ont. App. 348; *Re Harvey & Parkdale*, 16 Ont. 372. The Court of Chancery could also enforce awards: *Armstrong* v. *Cayley*, 2 Chy. Ch. 128, 163; *Wilson* v. *Switzer*, 1 Chy. Ch. 44, and see *Bell* v. *Miller*, 9 Gr. 385; *Hodder* v. *Turvey*, 20 Gr. 63; where specific performance was decreed: *Darnley* v. *London, Chatham & Dover Ry. Co.*, L. R. 2, H. L. 43; *Blackett* v. *Bates*, L. R. 1 Chy. 117; *Nickels* v. *Hancock*, 7 D. M. & G. 300. Formerly it was customary in Chancery to make the award a rule of Court as a preliminary to proceeding to enforce it: *White* v. *Kerby*, 2 Chy. Ch. 452; *Wadsworth* v. *McDougall*, 5 Gr. 290; *Allan* v. *O'Neal*, 2 Chy. Ch. 452; but at law the practice was to make only the submission a rule of Court, and this latter practice it is said should now be followed in the High Court: see *per* Jessel, M.R., *Jones* v. *Jones*, 14 Ch. D. 594-5, and see *In re Gifford*, 20 Q. B. D. 368; but as to awards made since 1 July, 1889, see now 52 Vict., c. 13 (O).

An award must be moved against within the term following its publication or within the period which such term formerly occupied: *Kean* v. *Edwards*, 12 P. R. 625; but see now 52 Vict., c. 13, ss. 4-6, as to awards made since 1 July, 1889.

Dower. **Dower.**—The jurisdiction of the Court of Chancery was formerly concurrent with that of the Courts of Law in actions to enforce claims for dower: *Craig* v. *Templeton*, 8 Gr. 483; *Grieve* v. *Woodruff*, 1 Ont. App. 617. Damages for detention of dower cannot be recovered where the husband does not die seised, even though a demand of dower be made: *Morgan* v. *Morgan*, 15 Ont. 194.

The Court had jurisdiction to compel a widow to elect between the provision made for her by her deceased husband's will and her dower, whenever it was inconsistent with the testator's intention to be collected from his will, that she should enjoy both: *Lapp* v. *Lapp*, 16 Gr. 159; *Murphy* v. *Murphy*, 25 Gr. 81;

Ripley v. *Ripley*, 28 Gr. 610; *Laidlaw* v. *Jackes*, 25 Gr. 293; 27 Gr. 101; **Sec. 21.**
Patrick v. *Shaver*, 21 Gr. 123; *Armstrong* v. *Armstrong*, 21 Gr. 351; *McGregor* v. *McGregor*, 20 Gr. 450; *Coleman* v. *Glanville*, 18 Gr. 42; *Lee* v. *McKindy*, 18 Gr. 527; *Hutchinson* v. *Sargent*, 16 Gr. 78; *McLennan* v. *Grant*, 15 Gr. 65; *Kerr* v. *Leishman*, 8 Gr. 435: and where a dowress has made her election she may be restrained from afterwards prosecuting an action for dower: *Westacott* v. *Cockerline*, 13 Gr. 79.

Infants.—The jurisdiction of the Court of Chancery over infants, was partly Infants.
exclusive, and partly concurrent, with that of the Superior Courts of Common Law. As regards the custody of the persons of infants, it was concurrent with that of the Courts of Law; but as regards their estates, it was exclusive.

As regards the persons of infants, the Court of Chancery could make order for their custody, education, and maintenance, and appoint guardians of their persons: *Re Keith*, 7 P. R. 138; *McNabb* v. *McInnes*, 25 Gr. 144; *Re Irwin*, 16 Gr. 461; *Murphy* v. *Lamphier*, 12 Gr. 241; *Anon*, 6 Gr. 632. The Surrogate Courts had a concurrent jurisdiction with the Court of Chancery to appoint guardians of the persons and estates of infants: *Re Stannard*, 1 Ch., Ch. 15; *Re McQueen*, 23 Gr. 191.

As regards the custody of infants: see *Re Keith*, 7 P. R. 138; *Re Gillrie*,, 3 Gr. 279; *Re Davis*, 3 Ch., Ch., 277; *Andrews* v. *Salt*, 8 Chy. 622; *Re Smart*, 12 P. R. 312, 435, S. C. in appeal, 24 C. L. J., 569; and see R. S. O., c. 137, ss. 1, 2, 10, 13, in notes to sec. 53 (11), whereby important changes were made in the law relating to the custody and guardianship of infants.

Formerly there was a conflict between the Courts of Law and Equity as to whether a testamentary guardian could be interfered with: see *Re Andrews*, L. R. 8 Q. B. 153; *Andrews* v. *Salt*, 8 Chy. 622; but the power to remove testamentary guardians is now expressly given to the Court by statute: R. S. O. c. 137, s. 16. Formerly it was not customary for the Court of Chancery to exercise jurisdiction in regard to an infant, unless the infant had some property in respect of which the jurisdiction could be invoked: *Wellesley* v. *Beaufort*, 2 Russ. 21; *Clayton* v. *Clarke*, 3 D. F. & J. 682; but the right of the Court to exercise jurisdiction is not considered to be limited to cases in which the property of the infant is involved: *Re Spence*, 2 Ph. 247; *Re Tynn*, 2 Dr. & S. 481; *Re Smart*, 12 P. R. 312, 435. Any suit relating to the estate or person of an infant and for his benefit has now the effect of making him, whether plaintiff or defendant, a ward of Court: *Gynn* v. *Gilbard*, 1 Dr. & S. 356: *Re Berte*, 9 H. L. C. 440; *Pendleton* v. *Macrory*, 2 Dick, 736.

The Court, upon an application for a *habeas corpus* by a father to obtain the custody of his children, cannot require the applicant to proceed by way of petition in order that the facts may be better inquired into: *Re Smart*, 24 C. L. J. 569.

The Court has power to order the sale of infants' estates when necessary to provide for their maintenance or education, or when by reason of any part of the property being exposed to dilapidation or depreciation from any other cause, the infant's interest requires it: R. S. O. c. 137, s. 3. The Court may also make provision out of an infant's estate for his maintenance and education: *Ashbough* v. *Ashbough*, 10 Gr. 430; R. S. O. c. 137, s. 7.

Idiots and Lunatics.—The Court of Chancery formerly exercised an Lunatics.
exclusive jurisdiction over the persons and estates of idiots and lunatics. This jurisdiction is now regulated, so far as regards obtaining declarations of lunacy and providing for the sale of lunatics' estates, and for their custody and maintenance and the payment of their debts, by R. S. O. c. 54.

Staying Waste.—The jurisdiction of the Court of Chancery to stay waste Waste.
was part of the concurrent jurisdiction of the Court which was exercised by means of injunction. The jurisdiction of Equity originally arose in England on account of the incompetency of the Courts of Law to give adequate relief. The jurisdiction of the Court of Chancery was originally confined to cases of what was by a somewhat misleading use of words called "equitable waste," meaning thereby acts which were deemed waste only in Courts of Equity, and for which no action would lie at law; and to cases where no waste had been

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Sec. 21. actually committed, but was threatened; but by late statutes the jurisdiction was extended, and the Court was enabled to grant an injunction to restrain waste, notwithstanding that the party in possession claimed by an adverse legal title: R. S. O. (1877) c. 40, s. 39; *Wightman* v. *Fields*, 19 Gr. 559. This clause is now superseded by s. 53, s-s. 2 *post*: see R. S. O. p. 2087, which in effect abolishes the distinction between legal and equitable waste, by taking away from a tenant for life without impeachment of waste, the legal right to commit equitable waste. See, however, *In re Cartwright, Avis* v. *Newman*, 41 Ch. D. 532.

A mortgagee of a term of years being in possession, may, at the suit of the mortgagor, be restrained from committing waste, even though he have obtained the consent of the reversioner: *Chisholm* v. *Sheldon*, 1 Gr. 318.

A mortgagor in possession will not be restrained from cutting timber for fuel, fencing, or repairs upon the premises, but if the security is scanty he will be restrained from cutting timber for other purposes, at the suit of the mortgagee: *Russ* v. *Mills*, 7 Gr. 145; *King* v. *Smith*, 2 Ha. 239; or at suit of an execution creditor: *Wason* v. *Carpenter*, 13 Gr. 329.

An injunction has been granted to restrain waste pending litigation to the ownership of the property: *Christie* v. *Long*, 3 Gr. 630; and an injunction has also been granted to restrain waste in favour of an unpaid vendor against a vendee and his assignee: *Lawrence* v. *Judge*, 2 Gr. 301; *Ferrier* v. *Kerr*, 2 Gr. 668; *Mitchell* v. *McGaffey*, 6 Gr. 361; *Walsh* v. *Brown*, 4 U. C. L. J. 68; *McLean* v. *Burton*, 24 Gr. 134; *Summers* v. *Cook*, 28 Gr. 179. A tenant for life who is not entitled to hold without impeachment of waste, may be restrained from committing any waste in an action at the suit of the remainderman: *Clow* v. *Clow*, 4 Ont. 355; but see *Drake* v. *Wigle*, 22 C. P. 341; *Saunders* v. *Breakie*, 5 Ont. 603; *Munsie* v. *Lindsay*, 10 P. R. 173, and where the tenant for life holds his estate without impeachment of waste, if he is guilty of malicious, extravagant, or capricious waste, that was formerly called "equitable waste" and may be restrained at the suit of the reversioner or remainderman: *Garth* v. *Cotton*, 1 L. C. Eq. 806; *Vane* v. *Barnard*, 2 Vern 738; *Rolf* v. *Somerville*, 2 Eq. Ca. Abr. 759; *Morris* v. *Morris*, 15 Sim. 505; *Micklethwait* v. *Micklethwait*, 1 De. G. & J. 519; *Turner* v. *Wright*, 2 D. F. & J. 234; *Talbot* v. *Hope-Scott*, 4 K. & J. 96; and see s. 53, s-s. 2 *post*. He cannot be restrained from merely permissive waste: see *In re Cartwright, Avis* v. *Newman*, 41 Ch. D. 532.

A tenant in tail in possession cannot be restrained from committing waste: *Turner* v. *Wright*, Joh. 752; *Saville's case* Mos. 224, 1 L. C. Eq. 13, except after possibility of issue extinct; *Attorney-General* v. *Marlborough*, 3 Madd. 538; *Abrahall* v. *Bubb*, 2 Sw. 172.

Where the plaintiff has slumbered on his rights: *Hughson* v. *Cook*, 20 Gr. 238; or the injury is trifling: *Bernard* v. *Gibson*, 21 Gr. 195, an injunction will be refused.

Specific performance.

Specific Performance.—The jurisdiction of the Court of Chancery to decree specific performance of contracts was discretionary, but the exercise of this discretion was regulated by certain fixed rules and principles: *Lumare* v. *Dixon*, L. R. 6 H. L. 414. Speaking generally, the Court of Chancery refused to decree specific performance of contracts or obligations except in those cases in which there was no adequate remedy at law for breach of the agreement, and in which the Court could superintend and enforce the execution of its decree: *Johnson* v. *Montreal & City of Ottawa Ry.*, 22 Gr. 290. Agreements for the sale or leasing of land will be specifically enforced: *Dennison* v. *Kennedy*, 7 Gr. 342; *Simmons* v. *Campbell*, 17 Gr. 612; even when made by parol, if there have been acts of part performance: *Shennan* v. *Parsill*, 18 Gr. 8; *Butler* v. *Church*, 16 Gr. 205; *McDonald* v. *McKinnon*, 26 Gr. 12; but payment of the whole, or part, of the purchase money is not an act of part performance sufficient to admit parol evidence of a contract for the sale of lands: *Johnson* v. *The Canada Co.*, 5 Gr., 558; the acts of part performance relied on must be such as cannot be referred to any other than the alleged contract: *Sexton* v. *Shell*, 6 U. C. L. J. 94. As to how far signing the deed, without delivery by

the vendor, is part performance, or evidence to satisfy the Statute of Frauds: see *Gillately* v. *White*, 18 Gr. 1; *McClung* v. *McCracken*, 3 Ont. 596. Sec. 21.

The sale and specific delivery of chattels may be enforced when damages would manifestly be an inadequate compensation. So also the specific delivery of heirlooms: *Pusey* v. *Pusey*, 1 L. C. Eq. 961; *Somerset* v. *Cookson*, 1 L. C. Eq. 961; or chattels of unique value: *Falke* v. *Gray*, 4 Drew 651; *Dowling* v. *Betljemann*, 2 J. & H. 544; *Thorn* v. *Commissioners of Works*, 32 Beav. 490; *Elwes* v. *Brigg Gas Co.*, 33 Ch. D. 562; 55 L. T. N. S. 831; may be enforced: but specific delivery of merchandise will not usually be decreed: *Buxton* v. *Lister*, 3 Atk. 384; *Fothergill* v. *Rowland*, 17 Eq. 141; but a contract relating to saw logs has been specifically enforced: *Farewell* v. *Wallbridge*, 6 Gr. 634; *Flint* v. *Corby*, 4 Gr. 45; *Stevenson* v. *Clark*, *Ib.* 541; *Fuller* v. *Richmond*, 2 Gr. 24; 4 Gr. 657. Specific performance.

An agreement for the allotment of shares in a company, if any shares remain available, may be specifically enforced: *Price* v. *Denbigh Ry. Co.*, 17 W. R. 572; *Ferguson* v. *Wilson*, 2 Chy. 77; *Canada Life Assce. Co.* v. *Peel Manufact'g Co.*, 26 Gr. 477. Agreements for the sale of shares in companies: *Duncuft* v. *Albrecht*, 12 Sim. 190; *Cheale* v. *Kenward*, 3 D. & J. 27; *Turner* v. *Moy*, 32 L. T. N. S. 56; for the sale of patents: *Cogent* v. *Gibson*, 32 Beav. 557; or future inventions: *Printing Co.* v. *Sampson*, 19 Eq. 462; for the sale of good will with business premises, and fixtures: *Smith* v. *Peters*, 20 Eq. 511; *Mossop* v. *Mason*, 18 Gr. 453; 17 Gr. 360; 16 Gr. 302; or with plant and trade secret; *Bryson* v. *Whitehead*, 1 S. & S. 74; but not of good-will only: *Baxter* v. *Connoly*, 1 J. & W. 580. A contract between several manufacturers not to sell goods manufactured by them below a stipulated price may be enforced: *The Ontario Salt Co.* v. *The Merchants Salt Co.*, 18 Gr. 540; as also agreements not to trade within reasonable limits: see *Holcomb* v. *Nixon*, 5 Gr. 278, 373.

As to specific performance of awards, and contracts relating to partnerships, see *supra*.

Agreements for the execution of separation deeds may be enforced: *Wilson* v. *Wilson*, 1 H. L. C. 538.

Sometimes where the Court cannot decree specific performance of a positive part of a contract, if the contract includes a separate negative contract, the latter may be enforced; *e. g.*, an agreement by a singer to sing at a particular place cannot be enforced, nor an agreement by a writer to write for a particular publisher; but if the agreement also provides that the singer is not to sing elsewhere without the consent of the plaintiff, or that the writer will not write for any other publisher during the engagement, the negative agreement may be enforced: *Lumley* v. *Wagner*, 1 D. M. & G. 604; *Rolfe* v. *Rolfe*, 15 Sim. 88; *Stiff* v. *Cassell*, 2 Jur. N. S. 348; *Daggett* v. *Ryman*, 16 W. R. 302.

Discovery.—This was formerly a part of the exclusive jurisdiction of the Court of Chancery, but, even before the Judicature Act, the Common Law Courts were empowered to compel discovery; see R. S. O. (1877) c. 50, ss. 156, *et seq.*; 41 Vict. c. 8, s. 9. Discovery is now an incidental part of the relief which may be obtained in every action. This may be obtained by a plaintiff against a defendant, and by a defendant against a plaintiff. The method of obtaining discovery is prescribed by *Rules* 487-524. Actions for discovery only, in aid of a foreign action, will not be entertained: *Dreyfus* v. *Peruvian Guano Co.*, 41 Ch. D. 151. Discovery.

Multiplicity of Suits.—The mode by which a multiplicity of suits in reference to the same matter, was avoided in the Court of Chancery, was by requiring all persons interested in the subject matter of the litigation to be made parties either as plaintiffs or defendants in one suit; but as this general rule sometimes operated inconveniently it was in certain classes of cases provided that some only of the persons interested need be made parties, and that those who were not made parties should be sufficiently represented by those who were made parties, and should be bound by the proceedings as if they had been themselves parties. This method of procedure is perpetuated: see *Rules* 300-311, 315-316, 320-322 and notes; or else it was provided that the parties interested need not all, be made original defendants, but might be added as defendants at a later stage of the proceedings: see *Rule* 306. Multiplicity of suits.

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Sec. 21. Decreeing issue or cancellation of patents.

Decreeing the Issue, or Cancellation of Patents.—The jurisdiction conferred on the High Court by this section to decree the issue or cancellation of patents is probably confined to patents issued by the Provincial Government. But under the C. S. C. c. 61, s. 34, the Court has also power to decree the cancellation of patents for invention issued by the Dominion Government; and may also entertain actions to restrain the infringement of such patents, and for damages therefor: *Ib.* s. 30; *Hunter* v. *Carrick*, 28 Gr. 489; 10 Ont. App. 449; 11 S. C. R. 300; *Smith* v. *Goldie*, 7 Ont. App. 628. A prior patent to a person who is not the true inventor is no defence to an action by the true inventor under a subsequent patent: *Smith* v. *Goldie*, 9 S. C. R. 46. The Court of Chancery would formerly rescind a patent for land improperly granted by the Provincial Government, although the grant were voidable, or even void at law: *Martin* v. *Kennedy*, 2 Gr. 80. But it would not set aside a patent issued upon a deliberate view of all the circumstances, when there was no fraud or mistake: *Simpson* v. *Grant*, 5 Gr. 267; *Boulton* v. *Jeffrey*, 1 E. & A. 111; *Barnes* v. *Boomer*, 10 Gr. 532; *Kennedy* v. *Lowlor*, 14 Gr. 224; and see *Farmer* v. *Livingstone*, 8 S. C. R. 140; even though the patent issued contrary to a report of the Heir and Devisee Commissioners as to the party entitled: *McDiarmid* v. *McDiarmid*, 9 Gr. 144; nor if the plaintiff had an opportunity of bringing the material facts to the attention of the officers of the Crown before the patent issued, and neglected to do so: *Mahon* v. *McLean*, 13 Gr. 361. But a patent issued in error might be rescinded; *e. g.* where a patent issued to a third party after another party had contracted to purchase, and had gone into possession of the land: *Martyn* v. *Kennedy*, 4 Gr. 61; *Attorney-General* v. *Hill*, 8 Gr. 532; or when it issued without proper consideration by the officers of the Crown of all the facts; *Fricht* v. *Scheck*, 10 Gr. 254; or had issued to A., when an order-in-council had been passed for the grant of the land to B.: *Attorney-General* v. *Garbutt*, 5 Gr. 383; and see *Saugeen* v. *Church Society*, 6 Gr. 538.

The Attorney-General is a proper party to such actions whenever the person to whom the patent has issued would be entitled to compensation if the patent be rescinded: *Ib*; *Rees* v. *Attorney-General*, 16 Gr. 467; and see *McIntyre* v. *Attorney-General*, 14 Gr. 86; but if the case made by the plaintiff is one of fraud, and the patentee would not be entitled to any compensation on the patent being set aside, then the Attorney-General is not a necessary party: *Rees* v. *Attorney-General*, 16 Gr. 467; and see *Cosgrove* v. *Corbett*, 14 Gr. 617; *Lawrence* v. *Pomeroy*, 9 Gr. 474; but see *Attorney-General* v. *McNulty*, 8 Gr. 324; 11 Gr. 281, 581; *Westbrooke* v. *Attorney-General*, 11 Gr. 330; *Mutchmore* v. *Davis*, 14 Gr. 346, where the Attorney-General appears to have been a party though the patent was impeached for fraud.

The Court may be unable to grant relief where innocent parties have acquired a title under the impeached patent: *Proctor* v. *Grant*, 9 Gr. 26, 224; but see *Stevens* v. *Cook*, 10 Gr. 410.

The Court by virtue of its jurisdiction to decree the issue of patents, would not, however, entertain a suit for the specific performance of an order in council for the grant of land: *Simpson* v. *Grant*, 5 Gr. 267.

Rules of decision in such cases.

22. The rules of decision in the said matters in the last preceding section mentioned shall, except where otherwise provided, be the same as governed the Court of Chancery in England, in like cases, on the 4th day of March, 1837. R. S. O. 1877, c. 40, s. 35; 44 V. c. 5, s. 9 (1).

This section must be read in connection with the rest of the statute law of this Province; and wherever any provincial statute modifies what was the law or rules of decision of the Court of Chancery in England in like cases on the 4th March, 1837, then the express provisions of the provincial statutes must control the decision of the High Court rather than those rules which governed the Court of Chancery in England at the date above mentioned: see *Smith* v. *The Methodist Church*, 16 Ont. 199.

Sec. 22. Imperial Statutes passed prior to 1837, how far in force.

By R. S. O. c. 93 s. 1, it is provided that in all matters of controversy relative to property and civil rights, resort shall continue to be had to the laws of England as they stood on the 15th Oct., 1792, as the rule for the decision of the same, and all matters relative to testimony and legal proof in the investigation of fact and the forms thereof in the several courts of Ontario shall continue to be regulated by the rules of evidence established in England as they existed on the day and year last aforesaid—except so far as the said laws and rules have been since repealed, altered, varied, modified or affected by any Act of the Imperial Parliament still having the force of law in Ontario, or by any Act of the late Province of Upper Canada or of the Province of Canada, or of the Province of Ontario still having the force of law in Ontario or by the Revised Statutes. So far as the rules of decision of the English Court of Chancery were, "relative to property and civil rights," on the 4th March, 1837, affected by Imperial statutes passed subsequently to the 15th Oct., 1792, this section seems to give to those Imperial statutes the force of law in this Province, but this point is not free from doubt: see *Harrison* v. *Spencer*, 15 Ont. 692. If that decision is correct, it may be a somewhat difficult question to determine how far, if at all, Imperial statutes affecting property and civil rights passed subsequently to the 15th Oct., 1792, but prior to 4th March, 1837, and which controlled the rules of decision of the English Court of Chancery on 4th March, 1837, are incorporated into the law of Ontario by sect. 22.

In a recent case it was held that the Imperial statute known as The Thellusson Act (39 & 40 Geo. 3 c. 9) was not in force in Ontario: *Harrison* v. *Spencer*, 15 Ont. 692; but since that decision it has by 52 V. c. 10 s. 1 been declared to have been, and to be in force. In *Hodgins* v. *McNeil*, 9 Gr. 305, it was held that Lord Lyndhurst's Act (5 & 6 W. 4 c. 54) relating to marriage between a man and his deceased wife's sister, had not been introduced into this Province. But in *Re Hodges*, 1 Gr. 285, it was held that where a mortgagee died intestate, leaving an infant heir, after a decree for foreclosure, but before final order, and the executor revived the suit and obtained the final order, that the infant heir was a person seized upon trust within the meaning of the Imperial statute 11 Geo. 4, 1 W. 4 c. 60 s. 6 (since repealed by Imperial statute 13 & 14 Vict. c. 60) and that under that Act he might be ordered on a petition, without suit, to convey the land to the executor, or to a purchaser from the executor: see now R. S. O. c. 110 s. 16 and c. 108 s. 4, whereunder the personal representative has now a legal title. So also it has been held that the Imperial statutes known as the Trustee Relief Acts 10 & 11 Vict. c. 96; 13 & 14 Vict. c. 60; and 15 & 16 Vict. c. 55): Morgan & Chute, Chy. Acts & Orders pp. 63-117 are in force in this Province: see Taylor & Ewart Jud. Act. pp. [136-176]; *Re Lash*, 1 Ch. Ch. 226; *Re Kingsland*, 15 C. L. J. 85; *Re Croskery*, 16 Ont. 207.

How far English statutes are made operative in Ontario must depend on the judicial construction of the Provincial statute by which they are claimed to have been introduced. In the cases which follow, questions arose as to how far the Imperial statutes referred to therein were in force. In *Stinson* v. *Pennock*, 14 Gr. 604, it was held that the Imperial statute 14 Geo. 3 c. 78, which provides for the application of insurance moneys in the re-building of the premises destroyed, upon the application of a mortgagee, had been made a part of our provincial law; but in the later case of *Carr* v. *Fire Assurance Assocn.*, 14 Ont. 487, this decision was followed though with doubt. The Imperial Parliament has power by express words to apply its enactments to this country; see B. N. A. Act and 31 Geo. 3 c. 31; *Attorney-General* v. *Grassett*, 5 Gr. 412; 6 Gr. 200; 59 Geo. 3 c. 69; *Regina* v. *Schram*, 14 C. P. 318, and see *Regina* v. *Sherman*, 17 C. P. 167; *Regina* v. *Slavin*, 17 C. P. 205; but without such express words, or some necessary implication to be drawn therefrom, they do not apply: see *Penley* v. *Beacon Assce. Co.*, 10 Gr. 422 per Vankoughnet, C.

The 9 Geo. 2 c. 36, commonly (though erroneously) called the Mortmain Act has, after some conflict of opinion, been held to have been introduced in Ontario: *Doe d. Anderson* v. *Todd*, 2 U. C. Q. B. 82; *Hallock* v. *Wilson*, 7 C. P. 28; *Mercer* v. *Hewston*, 9 C. P. 349; *Davidson* v. *Boomer*, 15 Gr. 1, 218;

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Sec. 23. Imperial Statutes, how far in force in Ontario.

Hambly v. *Fuller*, 22 C. P. 141; *Ferguson* v. *Gibson*, 22 Gr. 36; *Whitby* v. *Liscombe*, 23 Gr. 1; *Smith* v. *The Methodist Church*, 16 Ont. 199; *Butland* v. *Gillespie*, 16 Ont. 486.

Whether the Imperial Marriage Act 26 Geo. 2 c. 33, is in force in Ontario has been the subject of a judicial difference of opinion: see *Regina* v. *Secker*, 14 U. C. Q. B. 604; *Hodgins* v. *McNeil*, 9 Gr, 305; *Regina* v. *Bell*, 15 U. C. Q. B. 287.

It has been held that the law of England in respect to the rights and powers of rectors of churches as to the land vested in them as such, is in force in this Province: *Lyster* v. *Kirkpatrick*, 26 U. C. Q. B. 217; and see *Kirkpatrick* v. *Lyster*, 13 Gr. 323; 16 Gr. 17. *Lyster* v. *Kirkpatrick* was decided in reference to a rectory established by the Crown under 31 Geo. 3 c. 31 ss. 38, 39, but there can be little doubt that the enabling and restraining statutes of Henry 8 and Elizabeth apply also to lands vested in bishops and incumbents in right of their offices under the Church Temporalities Act (3 Vict. c. 74), s. 16.

The *Nullum Tempus* Act 9 Geo. 3 c. 16, was held to be in force, but it does not apply to unsurveyed waste lands of the Crown: *Regina* v. *McCormick*, 18 U. C. Q. B. 131.

The Imperial statute 12 Geo. 2 c. 28, against lotteries has been held to be in force in Ontario: *Cronyn* v. *Widder*, 16 U. C. Q. B. 356; *Corby* v. *McDaniel*, 16 U. C. Q. B. 378; *Marshall* v. *Platt*, 8 C. P. 189; *Loyd* v. *Clark*, 11 C. P. 248; *Cronyn* v. *Griffths*, 18 U. C. Q. B. 396; but see now R. S. C. c. 159 ss. 2-8.

Imperial Statute once adopted does not cease to be operative on its repeal in England.

An Imperial statute once introduced in Ontario does not cease to operate even though repealed in England, until also repealed in Ontario; thus the Imperial statute 22 Geo. 3 c. 46, which relates among other things to attorneys sharing their business with persons not admitted, though repealed in England is in force in Ontario: *Dunne* v. *O'Reilly*, 11 C. P. 404; and see *Andrew* v. *White*, 18 U. C. Q. B. 170.

1 W. & M. c. 18, relating to disturbances in church is held to be in force, and not superseded by R. S. C. c. 15, s. 2: *Reid* v. *Inglis*, 12 C. P. 191.

So also the Imperial statute 5 & 6 Edward 6 c. 16, against buying and selling offices, was held to have been introduced as part of our criminal law by 40 Geo. 3 c. 1; and see 49 Geo. 3 c. 126; *Regina* v. *Mercer*, 17 U. C. Q. B. 602: *Regina* v. *Moodie*, 20 U. C. Q. B. 389.

So also the Imperial statute 26 Geo. 3 c. 86 s. 2, which provides that owners of ships shall not be liable for any loss or damage which may happen to any goods shipped on any such vessel by reason or means of any fire happening to such ship is held to be in force in Ontario: *Torrance* v. *Smith*, 3 C. P. 411; *Hearle* v. *Ross*, 15 U. C. Q. B. 259.

So also many cases have judicially recognized the fact that the Statute of Frauds (29 Car. 2 c. 3): *Dickson* v. *Jacques*, 31 U. C. Q. B. 141; *McCarthy* v. *Cooper*, 12 Ont. App. 284; and the Imperial Statute of Limitation, 21 Jac. 1 c. 16 (see R. S. O. c. 60 s. 6) are in force in Ontario.

Jurisdiction in cases where formerly no adequate remedy at law.

23. The High Court shall have the like jurisdiction and power as the Court of Chancery in England possessed on the 10th day of June, 1857, as a Court of Equity to administer justice in all cases in which there existed no adequate remedy at law. R. S. O. 1877, c. 40, s. 36; 44 V. c. 5, s. 9 (1).

This section confers upon the High Court all the powers of the English Court of Chancery on 10th June, 1857, whether derived from the Common Law, or statutory enactment: see *Re Hodges*, 1 Gr. at p. 289, *per* Esten, V.C. The general words of this section, however, are controlled by other express enactments of the Provincial Legislature. See sec. 22, notes *supra*.

Secs. 24, 25. Jurisdiction in matters of revenue.

24. The High Court shall have the like equitable jurisdiction in matters of revenue as the Court of Exchequer in England possessed on the 18th day of March, 1865. R. S. O. 1877, c. 40, s. 37 ; 44 V. c. 5, s. 9 (1).

This section in the Revised Statutes of 1877 was taken from 28 Vict. c. 17, s. 2, and was confined in its terms to the Court of Chancery. The Courts of Law appear also to have had jurisdiction both legal and equitable in matters of revenue : see R. S. O., 1877, c. 39, s. 4 ; and see s. 20 *supra*. Prior to 28 Vict. c. 17, s. 2, it had been held that the Court of Chancery had no equitable jurisdiction in revenue cases : see *Norwich* v. *Attorney-General*, 2 E. & A. 541 ; *Miller* v. *Attorney-General*, 9 Gr. 558 ; and even after equitable jurisdiction in revenue cases had been conferred on the Court of Chancery, it was held that the Court had no jurisdiction to relieve against the forfeiture of a recognizance of bail in a criminal case, which had been estreated into a court of Quarter Sessions : *Rastall* v. *Attorney-General*, 17 Gr. 1 ; 18 Gr. 138 ; but it was held that the Crown might proceed in Chancery for dues alleged to be fraudulently withheld, although there were no equitable circumstances connected with the demand : *Attorney-General* v. *Walker*, 25 Gr. 233.

Relief against forfeiture for breach of covenant to insure in certain cases. Imp. Act 22-23 V. c. 35, s. 4.

25. The High Court shall have power to relieve against a forfeiture for breach of a covenant or condition in any lease to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court in conformity with the convenant to insure, upon such terms as to the Court may seem fit. R. S. O. 1877, c. 40, s. 49 ; 44 V. c. 5, s. 9 (1).

Under the general jurisdiction of the Court of Chancery now vested in the High Court independently of this section, it has power to relieve against forfeitures in cases other than those provided for in this section : see sec. 58, s-s. 3 *post*. Wherever a penalty or a forfeiture is imposed to secure the performance of some act, or the enjoyment of some right or benefit, if the breach of the act, or the withholding of the right or benefit can be adequately compensated in money, relief from the penalty or forfeiture may be decreed : *e. g.*, where the payment of a larger sum is imposed in the event of failure to pay a stipulated sum by a given day, such larger sum is regarded as merely a security for legal interest during the time the money is in default : *Aylet* v. *Dodd*, 2 Atk. 239 ; *Sloman* v. *Walter*, 1 Br. Ch. 418 ; *Sanders* v. *Pope*, 12 Ves. 282 ; *Davis* v. *West*, 12 Ves. 475. So where the performance of several acts is secured by a covenant to pay a sum, which as to some of the acts, would be too large, and as to others too small, a compensation for the injury, the sum is considered to be a penalty : see *Kemble* v. *Farren*, 6 Bing. 141. But where the damages from the breach cannot be measured, then the sum agreed to be paid in default of performance, is held to be liquidated damages from which no relief can be granted : *Atkyns* v. *Kinnier*, 4 Ex. 776, 783 ; *Galsworthy* v. *Strutt*, 1 Ex. 659 The general leaning of the Court was formerly against granting relief against forfeitures for breach of covenants to repair in the absence of special circumstances : *Hill* v. *Barclay*, 16 Ves. 402 ; 18 Ves. 62 ; *Gregory* v. *Wilson*, 9 Ha. 683 ; *Nokes* v. *Gibbon*, 3 Drew 681 ; *Croft* v. *Goldsmid*, 24 Beav. 312 ; but see *Bamford* v. *Creasy*, 3 Giff. 675 ; *Hughes* v. *Metropolitan Ry. Co.*, 2 App. Ca. 439 ; neither would the Court grant relief against a forfeiture for breach of a covenant by a lessee not to assign the term without leave : *Hill* v. *Barclay*, 18 Ves. at p. 63. And prior to the 29 Vict. c. 28, s. 5, on which

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this section is founded, the Court of Chancery would not relieve against a forfeiture for breach of a covenant to insure: *Green* v. *Bridges*, 4 Sim. 96. Relief may be granted under this section in respect of a covenant contained in an instrument made before the passing of the 29 Vict. c. 28, as regards any subsequent breach: *Page* v. *Bennett*, 2 Giff. 117. See further as to cases in which the Court will, or will not, relieve against penalties and forfeitures: Story's Eq. chap. 34.

By s. 58 s-s. 3, *post* a general power is given to the Court to relieve against all penalties, forfeitures, and agreements for liquidated damages. Whether the Court in the exercise of its discretion will relieve against forfeitures which a court of Equity would not formerly relieve against, has not been determined.

When relief is granted, the same to be recorded. Imp. Act 22-23 Vic. c. 35, s. 5.

26. The Court, where relief is granted, shall direct a record of such relief having been granted to be made by indorsement on the lease or otherwise. R. S. O. 1877, c. 40, s. 50; 44 V. c. 5, s. 9 (1).

The object of the indorsement required by this section is probably for the purpose of identifying the instrument, in respect of which the relief is granted, to give notice to third persons dealing with the property, of the fact that relief has been granted by the Court. In the case of lands this may also be effected by the registration of the judgment.

To what leases preceding provisions apply. Imp. Act 22-23 V. c. 35, s. 9.

27. The preceding two sections shall be applicable in the case of leases for a term of years absolute, or determinable on a life or lives or otherwise, and also in the case of a lease for the life of the lessee or the life or lives of any other person or persons. R. S. O. 1877, c. 40, s. 51; 44 V. c. 5, s. 9 (1).

Jurisdiction Partition.

28. In any action or proceeding in the High Court for partition or sale of the estate of joint tenants, tenants in common or co-parceners, where any of the persons interested in the lands whereof partition or sale is sought are unknown to the plaintiff, or have not been heard of for three years or upwards, the Court shall have the same jurisdiction that, in proceedings under *The Partition Act*, it possesses for the purpose of binding the interests of such persons and dealing with the estate of such of them as by reason of long continued absence may reasonably be believed to be dead; and the like proceedings may be taken in such action or proceeding for the said purposes as might be taken upon a petition under the said Act; and every deed or vesting order made in any such action or proceeding shall have the same effect as a deed or vesting order made in proceedings under the said Act. R. S. O. 1877, c. 40, s. 52; 44 V. c. 5, s. 9 (1).

Rev. Stat., c. 104.

The effect of this section is to enable the Court in an ordinary suit to avail itself of the powers and authorities conferred upon it by the *Partition Act*,

without resorting to the procedure laid down in that Act: see *Bennett* v. *Bennett*, 8 Gr. 446; *Cassey* v. *Cassey*, 15 Gr. 399; *Munro* v. *Munro*, *Ib.* 431: and see *Rules* 998-991, and notes, and *post* s. 34. Secs. 29, 30.

29. The High Court shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights; and alimony when granted shall continue until the further order of the Court. R. S. O. 1877, c. 40, s. 43. Jurisdiction in alimony.

The jurisdiction by this section conferred on the High Court, is part of the jurisdiction formerly exercised in England by the Ecclesiastical Courts, as incident to proceedings for divorce or judicial separation.

Where proceedings are instituted against a defendent for alimony, if he is about to quit Ontario with intent to defraud his creditors generally, or the plaintiff in particular, he is liable to be arrested and held to bail: see R. S. O. c. 67, s. 3, *Rule* 1088: *Richardson* v. *Richardson*, 8 P. R. 274; *Needham* v. *Needham*, 29 Gr. 117; *Harn* v. *Harn*, 4 U. C. L. J. 261.

The defendant may be discharged from arrest if on the facts it shall appear that the plaintiff cannot reasonably be expected to succeed in the action: *Macpherson* v. *Macpherson*, 2 Ch. Ch. 222. The order of arrest issued *pendente lite* remains in force after judgment even though the wife resides out of the jurisdiction: see *Macdonald* v. *Macdonald*, 5 U. C. L. J. 66.

Pending the action, if the wife is in need of support, an order may be granted for payment of interim alimony; as to the mode of obtaining interim alimony: see Form 9 *k.*, *Rules* 738, 530, and notes.

Permanent alimony is granted where the husband has been guilty of desertion and cruelty: *Severn* v. *Severn*, 3 Gr. 431; or desertion, where coupled with other acts of cruelty, *Ib.*; or cruelty alone: *Jackson* v. *Jackson*, 8 Gr. 499; but not as a rule where he has only been guilty of a solitary act of personal violence: *Rodman* v. *Rodman*, 20 Gr. 428. So also it may be granted for desertion and adultery: *Henderson* v. *Henderson*, 19 Gr. 464; and perhaps for adultery alone: *Howey* v. *Howey*, 27 Gr. 57; or for wrongfully accusing the wife of adultery: see *Ferris* v. *Ferris*, 7 Ont. 496. But where the wife leaves the husband without sufficient cause she is not entitled to alimony: *Edwards* v. *Edwards*, 20 Gr. 392. A judgment for alimony may be suspended on the application of the husband on proof of the wife's subsequent adultery: *Severn* v. *Severn*, 14 Gr. 150; but a husband who has deserted his wife, is not entitled as of right to have a judgment against him for alimony vacated on his afterwards offering to receive and maintain her: *Cronk* v. *Cronk*, 19 Gr. 283.

A bond given by a husband to a trustee to secure the payment of alimony to the wife in pursuance of a judgment, is not assignable: *Reiffenstein* v. *Hooper*, 36 U. C. Q. B. 295; *Re Robinson*, 27 Ch. D. 160.

30. An order or judgment for alimony may be registered in any Registry Office in Ontario, and the registration shall, so long as the order or judgment registered remains in force, bind the estate and interest of every description which the defendant has in any lands in the County or Judgment for alimony may be registered and thus bind lands.

Sec. 31. Counties where the registration is made, and operate thereon in the same manner and with the same effect as the registration of a charge by the defendant of a life annuity on his lands. R. S. O. 1877, c. 40, s. 44; c. 111, s. 49.

A judgment for alimony is registered by means of a certificate: see R. S. O. c. 114, s. 47.

The charge created by the registration of a judgment for alimony, binds all the lands of the defendant in the registration division in which the registration is made. The judgment itself does not contain any clause creating a lien, nor does it specify any lands to be bound; it can only be registered among the instruments having no local description: (see R. S. O. c. 114, s. 25). The simple fact of registration creates the charge. This charge may be enforced by a petition in the alimony action when the defendant has made default in paying the alimony ordered to be paid. Upon such a petition the Court may order the land bound by the judgment, or such part thereof as may be deemed necessary, to be sold and the purchase money to be applied in payment of the arrears of alimony, and the alimony as it accrues. For form of order in such a case: see *Forrester* v. *Forrester*, D. B. 37, fo. 232.

Vesting order, effect of.

31. In every case in which the Court has authority to order the execution of a deed, conveyance, transfer or assignment of any property, real or personal, the Court may by order vest such real or personal estate in such person or persons, and in such manner, and for such estates, as would be done by any such deed, conveyance, assignment or transfer if executed; and thereupon the order shall have the same effect as if the legal or other estate or interest in the property had been actually conveyed, by deed or otherwise, for the same estate or interest, to the person in whom the same is so ordered to be vested, or in the case of a *chose in action*, as if such *chose in action* had been actually assigned to such last-mentioned person. R. S. O. 1877, c. 40, s. 101; 44 V. c. 5, s. 9 (1).

Only interests of parties before the Court can be vested.

The power of the Court to grant a vesting order extends to every case where it has power to order the execution of a conveyance, transfer, or assignment, of any property, real or personal; but the Court cannot order the execution of any conveyance by any person who is not before the Court and amenable to its jurisdiction, and it can therefore only vest the interests of those who are before the Court and subject to its jurisdiction: *Re Hewish*, 17 Ont. 454.

Where lands are sold under the judgment or order of the Court, a conveyance by the person having the legal estate is all that is necessary to vest the title in the purchaser. It is not necessary that parties to the suit having purely equitable interests should also join in the conveyance: *Ross* v. *Steele*, 1 Ch. Ch. 94; *Moore* v. *Shinners*, 1 Ch. Ch. 59; but persons having equitable interests who are not parties to the action would not (unless represented sufficiently by persons who are parties), be bound by the judgment. It is therefore necessary for a purchaser, before taking either a conveyance or vesting order, to see that all persons having any interest, have been made parties, or are properly represented by persons who are parties, and are bound by the judgment.

Effect of vesting order.

By a vesting order, all the interest, legal and equitable, of the parties to the action, or any of them, may be vested in the person named in the order: *Re*

Robertson, 22 Gr. 449. Even though some of them be infants: *Donaldson* v. *Berry*, 2 Ch. Ch. 16. But where the legal estate was in the plaintiff, who became the purchaser himself at a sale under a decree, the Court refused to make a vesting order because it had no power to order him to convey to himself: *Bowen* v. *Fox*, 1 Ch. Ch. 387. In such cases the purchaser's title would be made out by the production of the judgment and the master's report on sale duly confirmed; (see *per* Maclennan, Q.C., *arguendo*, 22 Gr. 452); but this has been thought an unsatisfactory mode of proving that the equitable rights have been extinguished, and in some cases under similar circumstances vesting orders have been made, no objection thereto being raised by the parties. Sec. 31. Vesting order when refused.

A vesting order will not be granted to a purchaser except on proof of payment of his purchase money, or on evidence entitling him to an order dispensing with its payment.

The purchaser is entitled to a conveyance with ordinary covenants for title, and he cannot be compelled to accept a vesting order: see *Slater* v. *Fisken*, 1 Ch. Ch. 1; but he may, if he choose, take a vesting order instead. Purchaser entitled to deed.

In *Slater* v. *Fisken*, *supra*, it was held that a purchaser, before taking a vesting order, was entitled to proof that the persons whose estates were sold were alive at the time of the sale; but in deducing title under a vesting order it has been held unnecessary to give this evidence because the order will be presumed to be rightly made until the contrary is shown: *Re Morse*, 8 P. R. 475; and see *Gunn* v. *Doble*, 15 Gr. 655; *Shaw* v. *Crawford*, 4 Ont. App. 371; *McLean* v. *Grant*, 20 Gr. 76. Evidence.

Upon a sale of the lands of infants under an order of the Court, it was held that an application for a vesting order by the purchaser might be made without notice to the infants: *Boulton* v. *Stegman*, 1 Ch., Ch. 199; but see *Thorne* v. *Chute*, 2 Ch. Ch. 221. So also a vesting order has been granted *ex parte* where a party to the action was ordered to convey, but could not be found after due diligence: *McNair* v. *Simpson*, 1 Ch. Ch. 299; and see *Lawrason* v. *Buckley*, 3 Ch. Ch. 270, where the costs of the motion were ordered to be paid out of the purchase money. But where one of the plaintiffs had become the purchaser in a mortgage action, notice of a motion to dispense with payment into Court and for a vesting order was required to be given to the mortgagor who had appeared in the suit: *McMaster* v. *Kempshall*, 1 Ch. Ch. 329. Where granted *ex parte*.

Where a purchaser takes a vesting order he usually waives all objection to the title, and if possession has not previously been delivered to him, he assumes the responsibility of obtaining possession: *Bull* v. *Harper*, 6 P. R. 36; and where a purchaser after the lapse of a year from obtaining a vesting order, applied to be allowed compensation in respect of certain taxes which the vendor should have paid, the application was refused: *Kincaid* v. *Kincaid*, 6 P. R. 93. But so long as the purchase money remains in court, an application by a purchaser who has inadvertently taken a vesting order without first requiring incumbrances to be paid off, to have the incumbrances discharged out of the purchase money, will be granted: *Fleming* v. *McDougall*, 8 P. R. 200; *Turrill* v. *Turrill*, 7 P. R. 142. Purchaser taking v. o. waives objections to title, etc.

As regards infants, whose estates have been sold under the direction of the Court, the Court may order some person to execute the conveyance in the place of the infants: R. S. O. c. 137, s. 5; and the Master in Ordinary or a Local Master may, in like manner, be ordered to execute a deed for adult parties who have been committed to gaol for contempt in refusing to execute the same, after the expiration of two calendar months from their being committed or detained under such process: 11 Geo. 4 & 1 W. 4, c. 36, s. 15. See ante s. 23; *Ledyard* v. *Campbell*, O. B. 26, fo. 719. Infants.

Under the Imperial Trustee Act, 1850, the Court has also power to make vesting orders. See secs. 5, 6, 7, 9, 10, 13, 14, 15, 16, 19, 23, 25, 34, 35, and under sec. 20, wherever the Court can under that Act make a vesting order it may also appoint some person to execute a conveyance. Trustee Acts.

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Sec. 32. Jurisdiction of Court of Chancery in respect to leases, settled estates, estates of infants, and special cases.

32.—(1) The High Court shall have the same jurisdiction as the Court of Chancery in England had on the 18th day of March, 1865, in regard to leases and sales of settled estates, and in regard to enabling infants, with the approbation of the Court, to make binding settlements of their real and personal estate on marriage; and in regard to questions submitted for the opinion of the Court in the form of special cases on the part of such persons, as may by themselves, their committees or guardians, or otherwise, concur therein. R. S. O. 1877, c. 40, s. 85; 44 V. c. 5, s. 9.

(2) The examination of a married woman apart from her husband, as to her knowledge of the nature and effect of an application for the sale or leasing of any settled estate, or as to her consent thereto, shall in no case be necessary unless expressly directed by the Court or a Judge.

(3) Infants and persons of unsound mind (not so found), required to be served with notice of any application to the High Court, may be served by delivering to the official guardian *ad litem* a copy of the petition or other proceeding required to be served; and from the time of such service, the said official guardian shall be the guardian *ad litem* of the infant or person of unsound mind, unless and until the Court or Judge, otherwise orders; and the said official guardian, or any other guardian appointed by the Court for the infant or person of unsound mind, shall take all such proceedings as he may think necessary for the protection of the interests of the infant or person of unsound mind in the proceeding in which he is so appointed guardian.

(4) In case there be more than one infant or person of unsound mind (not so found) for whom service is made on the official guardian *ad litem*, one copy only of the petition or other proceeding, need be so served, but the name of each person on whose behalf the official guardian is served, is to be stated on the copy served.

(5) Money realized from the sale or leasing of any settled estate or any interest therein, shall be paid, applied or invested, as the Court or a Judge shall direct. 49 V. c. 16, s. 8.

Settled estates, leases and sales of.

Leases and Sales of Settled Estates.—The jurisdiction of the English Court of Chancery in regard to leases and sales of settled estates on the 18th March, 1865, was regulated by the Imp. Acts 19 & 20 Vict. c. 120; 21 & 22 Vict. c. 77; 25 & 26 Vict. c. 108: 28 Vict. c. 45. As to what are settled estates within the meaning of these Acts, see *Re Laing*, 1 Eq. 416; *Collett* v. *Collett*, 2 Eq. 203; *Re Shepheard*, 8 Eq. 571; *Beioley* v. *Carter*, 4 Chy. 230.

This section modifies the practice prescribed by those statutes. Sec. 32.

Settled estates, leases and sales of.

The Court has no power under this section to order the sale of a part of a settled estate in order to make improvements on the remainder: *Re Moore*, 6 P. R. 28; *Re Chambers*, 28 Beav. 653; nor can it sanction an exchange: *Re Bishoprick*, 21 Gr. 589.

Applications under this section must be made to a Judge and not to the Master in Chambers or any local Judge or local Master: *Rules* 30, 41, 138.

Errors in the advertisement of the application to lease or sell a settled estate may be waived by the Court, if in its opinion they are not misleading; *Re Whitely*, 8 Eq. 574; *Re Bicknell*, 14 Eq. 467: *Re Hemsley*, 16 Eq. 315.

The marriage of a petitioner after the publication of the advertisement was held not to be a ground for requiring its republication: *Re Marshall*, 15 Eq. 66. And on the death of a petitioner after advertisement, the petition may be amended by stating the fact, and substituting a new petitioner: *Re Wilkinson*, 9 Eq. 71.

Where property was vested in a trustee in trust after the death of the tenant for life to sell and divide the proceeds among numerous persons who would become absolutely entitled, with power to the trustee to give receipts, on a petition by the tenant for life under Imp. Act 19 & 20 Vict. c. 120, for a sale of the property, it was held under sec. 17 of the Act that the consent of all the beneficiaries was necessary: *Re Ives, Bailey* v. *Holmes*, 3 Ch. D. 690. The persons whose consent is required by section 17 are persons whose consents are capable of being obtained. The consent of unascertained persons who are interested is not requisite.: *Beioley* v. *Carter*, 4 Chy. 230; *Re Strutt*, 16 Eq. 629: *Re Potts*, 16 Eq. 631*n*.

Settlements by infants.

Settlements.—The jurisdiction of the English Court of Chancery as to sanctioning marriage settlements by infants of their property, was on the 18th March, 1865, regulated by the Imp. Stat. 18 & 19 Vict. c. 43. The Act does not apply to males under twenty years nor females under seventeen years: see sec. 4. An application for the sanction of the Court to a settlement does not constitute the infant a ward of Court so as to necessitate the Court to inquire into the propriety of the marriage: Seton, 766.

This Act only enables the Court to remove the bar of infancy, but it does not enable an infant, even with the sanction of the Court, to do more than an adult could do: *e. g.*, where an infant was a married woman and made a post-nuptial settlement with the sanction of the Court under the above mentioned Act, but the settlement was one which would not have bound her if she had been an adult; it was held, notwithstanding it had received the sanction of the Court, to be invalid: *Buckmaster* v. *Buckmaster*, 35 Ch. D. 21; 56 L. T. N. S. 795; 13 App. Cas. 61; *Mills* v. *Fox*, 37 Ch. D. 153. But the Act enables an infant with the sanction of the Court to make a valid post-nuptial settlement so far as an adult can make one: *Re Wall*, 50 L. T. N. S. 435.

In England applications for the sanction of the Court to a settlement by an infant are required to be supported by evidence to show, (1) The infant's age; (2) If there is any parent or guardian; (3) If none, what near relatives, and with whom, and under whose care the infant is; (4) Infant's parents' rank and position; (5) Infant's fortune and property; (6) The age, rank and position of the other party; (7) His property, fortune and income; (8) The fitness, and consent to act, of the trustees: Seton, 766.

Special cases.

Special Cases.—The jurisdiction of the English Court of Chancery in regard to special cases on the 18th March, 1865, was regulated by Imp. Stat. 13 & 14 Vict. c. 35. By this Act a special case may be stated without commencing an action. Provision is made by *Rules* 554-558 for stating a special case after action commenced.

By 13 & 14 Vict. c. 35 (*supra*), s. 1, persons interested in any question as to the construction of any Act of Parliament, deed, will, etc., or as to the title, etc., to any real or personal estate contracted to be sold, or as to any other matter falling within the jurisdiction of Equity, may concur in stating a

Sec. 33. Special cases.

special case for the opinion of the Court, and executors, administrators and trustees may concur therein. By s. 2 the committee of a lunatic's estate may concur with the sanction of the Lord Chancellor or of the Lords Justices; (but in Ontario the sanction of any one of the Judges of the High Court would seem to be sufficient: R. S. O. c. 54, s. 2.) By s. 3 a husband may concur for his wife, if she has no distinct interest; and if her interest is distinct, she may concur if her husband does so. By s. 7 the special case is to be entitled as a cause; lunatics, infants, etc., are to be described as such, and their guardians named. But in Ontario the service on persons under disability and the appointment of guardians *ad litem* for them, is regulated by s. s. 3 *supra*.

A married woman, if plaintiff, and her husband defendant, is to have a next friend (*sed vide* R. S. O. c. 132, s. 14; *Rule* 314). By s. 9, the special case is to state how any infant's guardian is constituted (*sed vide* s. s. 3 *supra*); and the concurrence of any married woman concurring in her own right. It would seem proper that the case should be signed by all parties, or their solicitors, or guardians *ad litem*. By s. 14, the Court, upon the hearing, may determine the questions raised, or any of them, and by decree declare its opinion without proceeding to administer any relief consequent thereon; or may decline to decide. By s. 15 the declaration is to indemnify trustees. By s. 16 the Court may suspend acting on the declaration on such conditions, if any, as it thinks fit. By s. 17 the case is to be a *lis pendens*, and may be registered as such. By s. 18 the documents referred to, and copies thereof, or extracts therefrom, identified by the signatures of the solicitors for the parties or their Toronto agents, may be read without further proof, and *semble* they ought to be put in at the hearing and marked by the Registrar: *Watson* v. *Rodwell*, 11 Ch. D. 150, 153; and any document admitted by the case to be in the possession of any party may after appearance by the defendants be ordered to be deposited and produced. By s. 32 the costs of all proceedings under the Act are in the discretion of the Court. By s. 33 all decrees and orders are to be subject to rehearing, appeal and review, and to be discharged and varied as if made on bill.

Fictitious questions not entertained.

Fictitious questions will not be entertained, so as to give the Court jurisdiction in matters not cognizable under the Act: *Pryse* v. *Pryse*, 15 Eq. 86; and see *Key* v. *Key*, 4 D. M. & G. 73. All persons beneficially interested should be parties: *Entwistle* v. *Cannon*, 4 W. R. 450; and trustees must be parties to a case for construing the trust deed: *Vorley* v. *Richardson*, 8 D. M. & G. 126. Where some of the parties beneficially interested are out of the jurisdiction, but others having identical interests are before the Court, the presence of the absentees may in the discretion of the Court be dispensed with: *Re Brown*, 29 Beav. 401.

The case must be framed so that the rights of the parties can be determined, or the Court will decline to answer the questions submitted: *Bulkely* v. *Hope*, 4 W. R. 280. The Court will not act on inferences drawn by the parties, but necessary facts should be proved by affidavit: *Domville* v. *Lamb*, 9 Ha. lv.

The case may be amended: see *Rule* 44; but where a material fact was omitted in the case, but was admitted by all parties at the hearing, prefacing the order with a recital to that effect was held to be sufficient: *Lane* v. *Debenham*, 11 Ha. 188; 17 Jur. 1005.

The provisions of sub-section 3 *supra* only apply to proceedings under section 32: *Wolf* v. *Ogilvy*, 12 P. R. 645.

The Court may try the validity of wills.

33. The High Court shall have jurisdiction to try the validity of last wills and testaments, whether the same respect real or personal estate, and whether probate of the will has been granted or not, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as

the Court has jurisdiction to try the validity of deeds and other instruments. R. S. O. 1877, c. 40, s. 41; 44 V. c. 5, s. 9.

Sec. 34. Setting aside wills, jurisdiction of High Court.

Originally the jurisdiction to try the validity of last wills and testaments affecting personal estate belonged exclusively to the Court of Probate; and where they affected real estate, it belonged to the Superior Courts of law: see Story's Eq. s. 1445. This section is a perpetuation of an Act (12 Vict. c. 64 passed in 1849) which conferred a concurrent jurisdiction in reference to these matters upon the Court of Chancery.

The Provincial Court of Probate was established in 1793 by 33 Geo. 3 c. 8; and in 1858 it was abolished, and the Surrogate Courts were constituted on their present basis by 22 Vict. c. 93.

The jurisdiction of the High Court, as regards wills affecting personalty, depends on this section; but as regards wills affecting realty the jurisdiction of the High Court would seem to depend not only on this section, but also on secs. 20 and 35, by which the jurisdiction of the former Superior Courts of law is vested in the High Court.

For cases on which wills have been contested on the ground of the mental incapacity of the testator: see *Brown* v. *Bruce*, 19 U. C. Q. B. 35; *Menzies* v. *White*, 9 Gr. 574; *Emes* v. *Emes*, 11 Gr. 325; *Martin* v. *Martin*, 15 Gr. 586; *Ingoldsby* v. *Ingoldsby*, 20 Gr. 131; *Wilson* v. *Wilson*, 22 Gr. 39; and for cases in which wills have been sought to be set aside as having been obtained by undue influence: see *Waterhouse* v. *Lee*, 10 Gr. 176; *Donaldson* v. *Donaldson*, 12 Gr. 431; *Wilson* v. *Wilson*, 22 Gr. 39; 24 Gr. 377; *Re White, Kersten* v. *Tane*, 22 Gr. 547; 24 Gr. 224; *Thompson* v. *Torrance*, 28 Gr. 253; 9 Ont. App. 1.

This section provides that the Court may pronounce wills void for fraud and undue influence or otherwise in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments. The cases in which Courts of Equity are accustomed to set aside deeds and other instruments for fraud, where they are voidable and not merely void, are first where there is actual fraud in the party defendant in which the party plaintiff has not participated. Secondly, where there is a constructive fraud against public policy, and the party plaintiff has not participated therein. Thirdly, where there is a fraud against public policy and the party plaintiff has participated therein, but public policy would be defeated by allowing it to stand. And lastly, where there is a constructive fraud by both parties, but they are not in *pari delicto*: Story s. 695.

34. The High Court shall also have jurisdiction— Jurisdiction.

1. In matters testamentary as provided in sections 30 to 32 inclusive of *The Surrogate Courts Act*. R. S. O. 1877, c. 40, s. 42. In matters testamentary. Rev. Stat. c. 50.

2. On any appeal from the judgment or decision of the Commissioners under *The Act to Prevent Trespasses to Public Lands*, as provided in said Act. R. S. O. 1877, c. 40, s. 88; c. 27, s. 19. Appeals against judgment of Commissioners under Rev. Stat. c. 29.

3. In respect of lunatics and infants and their property and estates, as provided by *The Act respecting Lunatics* and *The Act respecting Infants*. R. S. O. 1877, c. 40, ss. 58, 75. Lunatics and Infants. Rev. Stat. cc. 53, 137.

Secs. 35, 36.

Testamentary guardians. Rev. Stat. c. 137.

4. In respect of guardians and trustees, as provided by *The Act respecting Infants*. R. S. O. 1877, c. 40, s. 84.

Partition. Rev. Stat. c. 104.

5. In respect of partition and sale of real estate as provided in *The Partition Act*. R. S. O. 1877, c. 101, ss. 5, 7.

Matters Testamentary.—The clauses of the Surrogate Courts Act referred to, provide for the transfer of contentious matters regarding the grant of probate or administration from the Surrogate Court to the High Court (*a*) where the parties agree, or (*b*) where a Judge of the High Court so orders.

The High Court has also an original jurisdiction to grant letters of administration, or letters of administration *ad litem*: *Rule* 311; but it has no original jurisdiction to grant probate of a will; and where a case is transferred to the High Court from the Surrogate Court, it is usually ultimately remitted to the Surrogate Court, to issue probate or administration as the case may require: *Thompson* v. *Torrance*, 28 Gr. 253; see Decree in that case: D. B. 37, fo. 192.

Infants.—The jurisdiction by this section conferred on the High Court over infants is cumulative on that already conferred under section 21, s-s. 2, and s. 23. As to the general jurisdiction of the Court over infants: see Story's Eq., c. 35.

Guardians and Trustees.—The same observation applies in regard to the jurisdiction over trustees: see *ante* s. 21, s-s. 2 and s. 23.

Partition.—The like observation applies in regard to the jurisdiction in Partition: see sect. 23, *ante* and Story's Eq., chap. 14, and see *ante* s. 28. The jurisdiction under the *Partition Act* may be exercised in any ordinary action of partition; and it would seem that it is not essential that the procedure prescribed by that Act should be strictly pursued, in order to enable the Court to exercise any special powers conferred by that Act: see *Bennett* v. *Bennett*, 8 Gr. 446; *Cassey* v. *Cassey*, 15 Gr. 399.

General jurisdiction.

35. The High Court shall have, generally, all the jurisdiction which, prior to the 22nd day of August, 1881, was vested in, or capable of being exercised by, the Court of Queen's Bench, Court of Chancery, Court of Common Pleas, and Courts of Assize, Oyer and Terminer, and Gaol Delivery (whether created by commission or otherwise), and the High Court shall be deemed to be and shall be a continuation of the said Courts respectively (subject to the provisions of this Act) under the said name of "The High Court of Justice for Ontario." 44 V. c. 5, s. 9 (1).

Criminal Jurisdiction.—Some doubt has been expressed as to whether under *The Judicature Act* any criminal jurisdiction had been conferred on the Chancery Division: see 23 C. L. J. 181. The Chancery Division has on several occasions exercised criminal jurisdiction without objection: see *Regina* v. *Webster*, 16 Ont. 187; *Regina* v. *Brierly*, 14 Ont. 525; *Regina* v. *Fee*, 13 Ont. 590. See, however, *Reg.* v. *Beemer*, 15 Ont. 266, 272.

Any Division of the High Court is a Court for Crown Cases reserved: R. S. C. c. 174, s. 2.

Existing jurisdiction of Judges continued.

36. The jurisdiction of the High Court shall include (subject to the exceptions hereinafter contained) the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by the Judges of the said Courts, respectively, sitting in Court or Chambers,

or elsewhere, when acting as Judges in pursuance of any statute or law; and all powers given to any such Court, or to any such Judges, by any statute; and also all ministerial powers, duties, and authorities incident to any and every part of the jurisdiction. 44 V. c. 5, s. 9 (2). Secs. 37, 38.

See Eng. Jud. Act of 1873, s. 16.

In the corresponding English section 16 the same Courts are mentioned as above, and several others; and the jurisdiction is said to be "transferred to" the High Court—an expression which is not used in this Act.

Where a person fraudulently personating a testator had forged mortgages of the testator's estate and an action was brought to obtain a declaration that certain mortgages were void, and to have them delivered up, Kay, J., looking at this enactment said that he was not administering equity merely, and should therefore give the plaintiff his legal remedy as to the deeds, and direct them to be delivered up as well as declare them void: *Cooper* v. *Vesey*, 51 L. J., Chy. 149; see also *Manners* v. *Mew*, 29 Ch. D. 725.

Rights and privileges of Judges.

37. Every Judge of the High Court shall have, use and exercise all the rights, incidents and privileges of a Judge of a Court of Record, and all other rights, incidents and privileges as fully to all intents and purposes as the same were, prior to the 5th day of December, 1859, used, exercised or enjoyed by any of the Judges of any of Her Majesty's Superior Courts of Common Law at Westminster. R. S. O. 1877, c. 39, s. 6.

A Judge to sit in Chambers.

38. The Judges of the High Court shall, in rotation or otherwise as they may agree among themselves, sit in Chambers or elsewhere, and there transact any such business as may be transacted by a single Judge out of Court, whether such business be in the Division of the High Court to which such Judge is attached or in another Division, subject to the right of appeal as provided in this Act and the Rules from time to time in force. R. S. O. 1877, c. 39, s. 26.

As to the business which may be transacted in Chambers: see *Rule* 542; as to the jurisdiction of the Master in Chambers, Local Judges, and Local Masters, in Chambers, and the various matters excluded from their jurisdiction: see *Rules* 30, 41, 138.

It was held by Armour, J., that an appeal from the Master in Chambers might be brought before the Judge of any Division, and that the different Divisions merely exist for convenience in the distribution of work, but that there is no reason why a Judge of any Division should not hear a motion in Chambers in an action in any other Division: *Laidlaw Manufacturing Co.* v. *Miller*, 11 P. R. 335; but *In re Christie, Christie* v. *Christie*, 12 P. R. 15, Ferguson, J., held that under *The Judicature Act, 1881*, sec. 25, a cause must be set down to be heard in the Division to which it is assigned. It may be well to note that only part of s. 25 referred to by Ferguson, J., has been continued: see *Rule* 225; and the clause requiring all proceedings to be taken in the Division to which the cause is attached, does not appear to be now in force, although it must be confessed if any other practice be followed it is likely to produce serious confusion.

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Secs. 39-41. It seems clear from section 38 that the Judge of any Division has jurisdiction to dispose of applications in Chambers in actions in any other Division; but where the application has to be set down it would seem to be improper to set it down in any other Division than that in which the action is pending.

Any one whilst acting as Judge of Assize in Toronto, may act as Judge in Chambers.

39. Any person sitting or acting as Judge at any Assizes or Sittings of the High Court for the trial of causes, matters, and issues, in the City of Toronto, may, while so sitting or acting as such Judge, or while the Assizes or Sittings last, act as a Judge in Chambers in all matters as if he were a Judge of the High Court. R. S. O. 1877, c. 39, s. 27; c. 41, s. 10.

This section applies to the acting Judge of Assize at the City of Toronto, a similar provision is made by the following section in regard to the acting Judge of Assize in any outer County.

The power to act in chambers hereby conferred, may be exercised not only by a Judge of the Supreme Court, but by any retired Judge of the Supreme Court, Judge of a County Court, or Queen's Counsel, appointed to hold the assizes under s. 94 *post*.

The jurisdiction in Chambers under this section would seem to extend to all actions, and not merely those entered for trial: see sec. 40, *post*.

Orders made by a Judge at the assizes in actions set down for trial thereat should be signed by the officer who acts as registrar at such sittings: *Waghorn* v. *Hawkins*, 12 P. R. 145. The same rule probably applies to orders made in Chambers by the Judge of Assize.

It is the duty of the officer signing the order to see that it is in proper form and correctly embodies the order actually made by the Judge, and that the Court fees thereon are duly paid.

Any one sitting as Judge of Assize may during sittings, act as Judge in Chambers.

40. Any person acting as a Judge at any Assizes or Sittings of the High Court for the trial of causes, matters, and issues, may, in and for the County in which he is acting, and while the sittings of the said Court last, act as a Judge in Chambers in all matters entered for trial before him, as if he were a Judge of the High Court. R. S. O. 1877, c. 39, s. 28; c. 41, s. 9.

See note to sec. 39. It will be noticed that this section is not so wide in its terms as sec. 39, and the jurisdiction in Chambers hereby conferred on the Judge of Assize is not general, but limited to the "matters entered for trial before him."

Jurisdiction to be exercised in name of High Court.

41. The several jurisdictions vested in the said High Court, shall not be exercised except [in the name of] the said High Court as provided by this Act, save as otherwise in this Act provided. 44 V. c. 5, s. 10.

In Eng. J. A. 1873, s. 22, was the word "by" instead of the words in brackets.

Orders made by a single Judge in Court, or in Chambers, are not drawn up as the order of the Judge making them, but of the High Court. All judgments and orders, whether made by a single Judge or by a Divisional Court, are to show the names of the judge or judges who pronounced the same: *Rule*

779. This is usually done by inserting the name or names of the Judge or Judges in the margin of the order under the title of the Court, *e. g.* "In the High Court of Justice, Chancery Division, Proudfoot J." Secs. 42, 43.

42. The jurisdiction (*a*) [of] the High Court of Justice and the Court of Appeal, respectively, shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by Rules and Orders of Court now in force or to be made pursuant to this Act; and where no special provision is contained in this Act or in any such Rules or Orders with reference thereto, it shall be exercised as nearly as may be in the same manner as prior to the 22nd day of August, 1881. 44 V. c. 5, s. 12. Jurisdiction to be exercised according to rules of Court.

(a) Instead of the word "of," the English Act has the words "by this Act transferred to."

The concluding clause must be taken to be modified by *Rule* 3 *post*, which repeals the practice and procedure existing prior to 22nd Aug. 1881 (except in certain cases in which it is expressly continued in the Con. *Rules*) and provides that in the absence of any special provision the practice is to be regulated by analogy to the Con. *Rules*: see Notes to *Rule* 3 and sec. 110.

The Consolidated *Rules* were confirmed, and all inconsistent enactments in the Revised Statutes repealed by 51 V. c. 2. s. 4.

JURISDICTION OF COURT OF APPEAL.

43. The Court of Appeal shall be a Superior Court of Record and shall (*a*) [have appellate jurisdiction in civil and criminal cases; and] in civil cases shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of the High Court, or of any Judges thereof, subject to the provisions of this Act, and to such Rules and Orders of Court for regulating the terms and conditions on which appeals shall be allowed, as are now in force or to be made pursuant to this Act. 44 V. c. 5, s. 13. Jurisdiction of Court of Appeal.

(a) Here the original sec. (13) of Jud. Act, 1881, had the words "continue to have all the jurisdiction and power which the said Court has heretofore had, save as varied by or under this Act." The substituted words follow the language of the R. S. O. c. 38 s. 18, which defined the jurisdiction of the Court of Appeal.

The words in brackets are not in the English section. The section otherwise corresponds with the first part of the English J. A. sec. 19.

In civil and criminal cases, the jurisdiction of the Court of Appeal is appellate only: see *Brown* v. *Collins*, W. N. 1883, 155. It has original jurisdiction in Election cases (s. 45).

The pre-existing appellate jurisdiction in civil cases was if anything enlarged by the original of this section (J. A. 1881 c. 13) which conferred the jurisdiction to entertain an appeal from any "judgment or order"; see *Atty.-Gen.* v. *Bradlaugh*, 14 Q. B. D. 667, and notes to sec. 70. The right of appeal was then also made subject to new restrictions: see secs. 65 *et. seq.* and notes.

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Secs. 44, 45. In the Revision of the Statutes the words "any judgment or order" have evidently been considered wide enough to include the cases particularly mentioned in R. S. O. 1877 c. 38 s. 18, viz.: judgments in cases arising in arbitration matters, motions for mandamus and to quash by-laws.

In giving an opinion on a special case, the jurisdiction exercised by a Court is judicial, not consultative, so that its decision is a "judgment or order": *Overseers of Walsall* v. *L. & N. W. Ry. Co.*, 4 App. Cas. 30.

In *Harmon* v. *Park*, 29 W. R. 750; 17 C. L. J. 389, it was held that an appeal would lie to the Court of Appeal from the C. P. Div. on a question as to whether a petition against a municipal election was properly instituted as being an order of the High Court of Justice though the Act, under which the petition was presented, provided that a decision upon the hearing of the petition should not be appealable. See also *Corporation of Peterboro'* v. *Wilthorpe*, 12 Q. B. D. 1. See further the notes to sec. 70.

The same. **44.** The Court of Appeal shall also have jurisdiction, as provided elsewhere in these Revised Statutes, and generally shall have all the jurisdiction and power which the said Court has heretofore had (save as varied by or under this Act.)

Rev. Stat. cc. 47, 137. 1. In appeals from County and District Courts, as provided in *The County Courts Act*, and *The Act Respecting Infants*.

Rev. Stat, c 50. 2. In appeals from Surrogate Courts, as provided in *The Surrogate Courts Act*. (*See also* Cap. 137, s. 19.)

Rev. Stat. c. 51. 3. In appeals from Division Courts or a Surrogate Judge as provided in *The Division Courts Act*. 43 V. c. 8, s. 17; 47 V. c. 10, s. 9.

Rev. Stat. c. 91. 4. In appeals from Provisional Judicial District Courts as provided in *The Unorganized Territories Act*.

Rev. Stat. c. 91. 5. In appeals from Stipendiary Magistrates, as provided in section 31 of *The Unorganized Territories Act*.

Rev. Stat c. 194. 6. In appeals from a Judge of a County Court upon an appeal from a conviction or order arising out of or under *The Liquor License Act*, as provided in the said Act. 47 V. c. 34, s. 19.

Rev. Stat. c. 119. 7. In appeals from a Judge of a County Court, as provided in *The Act respecting Water Privileges*. R. S. O. 1877, c. 38, s. 19. (*See also* Cap. 120, s. 15.)

Jurisdiction in election cases. Rev. Stat. cc. 8-10. **45.** The Court of Appeal shall also have jurisdiction in Election cases, as provided by *The Voters' Lists Act*, *The Ontario Election Act*, and *The Controverted Elections Act*. R. S. O. 1877, c. 38, s. 20; 45 V. c. 7, s. 7.

Secs. 46, 47.

May quash proceedings: when.

46. The Court of Appeal shall have power to quash proceedings in cases brought before it, in which appeal does not lie, or where such proceedings are taken against good faith. R. S. O. 1877, c. 38, s. 21.

To make whatever order may be required.

47. The Court shall have power to dismiss an appeal, or give any judgment and make any decree or order which ought to have been made, and to direct the issue of any process, or the taking of any proceedings in the Court below, or to award restitution and payment of costs, or to make such further or other order as the case may require. R. S. O. 1877, c. 38, s. 23.

The Court may make such order as is justified by the law as then existing, though the effect be to vary a decision of the Court below, which was in accordance with the then existing law: *Quilter* v. *Mapleson*, 47 L. T. N. S. 561.

Review of questions of fact.

The rule generally followed by the Courts is not to review the findings of the Judge of first instance, when his decision depends upon the balance of testimony: *Hale* v. *Kennedy*, 8 Ont. App. 157; *Cook* v. *Patterson*, 10 Ont. App. 645.

The Appellate Court, however, is not deterred from reversing such a judgment merely by the consideration that the Judge of first instance had the advantage of seeing the demeanour of the witnesses and their manner of giving their evidence, unless the decision of the case rests upon the credibility of the witnesses, and the Judge in determining the credit to be given to them proceeded upon their demeanour: see *Day* v. *Brown*, 18 Gr. 681; *Morrison* v. *Robinson*, 19 Gr. 480; *Armstrong* v. *Gage*, 23 Gr. 1; *Ryan* v. *Ryan*, 5 S. C. R. 406; *The Picton*, 4 S. C. R. 648; *Little* v. *Brunker*, 28 Gr. 191; *The Glannibanta*, 1 P. D. 283; *Bigsby* v. *Dickinson*, 4 Ch. D. 24; *Symington* v. *Symington*, L. R. 2 Sc. App. 424; *Gray* v. *Turnbull*, *ib.* 53; *Redgrave* v. *Hurd*, 20 Ch. D. 22; *Trumpour* v. *Saylor*, 1 Ont. App. 104; *Taylor* v. *Taylor*, *ib.* 264; *Re Randolph*, *ib.* 331; *The Milanese*, 43 L. T. N. S. 107.

Where the Appellate Court has the same materials before it as the Court whose decision it is reviewing, the above considerations do not apply: *Redgrave* v. *Hurd*, 20 Ch. D. 23; and the Court will exercise its judgment on the evidence just as it would on a question of law. It will reverse the judgment if satisfied that it is wrong: *Berdan* v. *Greenwood*, 20 Ch. D. 769 *n*; *Jones* v. *Hough*, 5 Ex. D. 122; *Prentice* v. *Consolidated Bank*, 13 Ont. App. 69; otherwise it will affirm it: *Symington* v. *Symington*, sup.; *Hale* v. *Kennedy*, 8 Ont. App. 157. See also *Card* v. *Cooley*, 4 C. L. T. 248; *Berthier Election Case*, 9 S. C. R. 102; *Grasett* v. *Carter*, 10 S. C. R. 105.

Where the case does not so turn upon the credibility of the witnesses but upon the proper inference to be drawn from all the evidence in the case, it is the duty of the Court to review the conclusion arrived at by the Court below upon the questions of fact: *Russell* v. *Lefrancois*, 8 S. C. R. 335; *Cameron* v. *Bickford*, 11 Ont. App. 52. Thus, where, without differing from the Judge as to the credibility of the witnesses, the Appellate Court came to a different conclusion upon the evidence, documentary and written, the judgment was reversed: *Cameron* v. *Bickford*, 11 Ont. App. 52.

Read v. *Anderson*, 13 Q. B. D. 781, where Brett, M.R., said that the Court of Appeal was not bound by the findings of fact by a Judge who tried the case without a jury is not inconsistent with the above cases.

In appeals to the Judicial Committee of the Privy Council, where there have been concurrent findings of fact by the Courts below, the question in appeal in the P. C. is not what conclusion the P. C. would have arrived at

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Secs. 48-51. if the matter had come for the first time before them, but whether it has been established that the Courts below were clearly wrong: *Allen* v. *Quebec Warehouse Co.*, 12 App. Cas. 111.

Powers of Court of Appeal.

48. The powers of the Court of Appeal may be exercised, notwithstanding that the appeal is brought against part only of the judgment of the Court below; and may be exercised in favor of all or any of the respondents or parties, although such respondents or parties may not have appealed from, or complained of the judgment. R. S. O. 1877, c. 38, s. 25; 45 V. c. 6, s. 7.

Powers of a single Judge in Court of Appeal.

49. In any cause or matter pending before the Court of Appeal, any direction incidental thereto, not involving the decision of the appeal, may be given by a single Judge of the Court of Appeal; and a single Judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal, as he may think fit; but every such order made by a single Judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof. 44 V. c. 5, s. 41.

Identical with Eng. J. A. 1873, s. 52.

On an appeal from the High Court, Court of Appeal to have all powers of HighCourt.

50. For all the purposes of and incidental to the hearing and determination of any such appeal, and the amendment, execution, and enforcement of any judgment or order made on such appeal, and for the purpose of every other authority given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority and jurisdiction by this Act vested in the High Court. 44 V. c. 5, s. 14.

This corresponds substantially with the second part of the English J. A., 1873, section 19.

This section only confers additional powers on the Court of Appeal without interfering with the practice under the *Rules*; so that execution for costs, etc., awarded by the Court of Appeal is to be issued out of the Court appealed from *Freed* v. *Orr*, 2 C. L. T. 90; see *Lowson* v. *Canada Farmers' Ins. Co.*, 8 Ont. App. 613, and *Rule* 830.

Jurisdiction subject to rules, etc.

51. The jurisdiction and power of the Court of Appeal, in respect of the said matters and all others, shall be and are subject to the provisions of this Act, and to such Rules and Orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as are now in force or as may be made pursuant to this Act. 44 V. c. 5, s. 15.

Same in effect as Eng. J. A., 1873, s. 19, first part.

RULES OF LAW.

52. In every civil cause or matter commenced in the High Court of Justice, law and equity shall be administered by the High Court and the Court of Appeal respectively according to the rules following: Sec. 52. Law and equity to be concurrently administered.

1. If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right which heretofore could only have been given by a Court of Equity, the said Courts respectively, and every Judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of *The Ontario Judicature Act, 1881.* 44 V. c. 5, s. 16 (2).

Taken from Eng. J. A., 1873, s. 24, sub-sec. 1.

This and the next section deal with the old anomaly of different Courts, recognizing different rights and duties, applying different remedies to the same case, and in some cases even enforcing rules of law in conflict with one another. The removal of the conflict of law is provided for by sec. 53. The rest of the matter is dealt with in the present section, the provisions of which have been summarised thus:—

The plaintiff may assert an equitable claim in any Division of the High Court (sub-s. 1); and may obtain an equitable remedy in any Division (*ibid*); the defendant may raise any equitable answer or defence to any claim; that is to say, anything which would formerly have been good by way of answer if the suit had been brought in Chancery (sub-s. 6), or would have afforded ground for an injunction if the action had been brought at law (sub-s. 9); and he may assert, by way of counter claim against the plaintiff, any claim, legal or equitable, which he might have raised by a cross suit at law, or in equity (sub-s. 7); the defendant may also obtain relief relating to, or connected with, the original subject of the action, against other persons, whether already parties or not (*ibid*). All Courts are to recognise equitable rights incidently appearing (sub-s. 8); no cause is to be restrained by injunction; what would have been ground for injunction is to be raised by way of defence, or upon an application to stay proceedings (sub-s. 9). Subject to these provisions, common law rights and duties are to be recognised (sub-s. 11). Every Court is to apply all appropriate remedies, and dispose of all matters in controversy (sub-s. 12). (Wilson Jud. Act, 7th ed., p. 15).

By the operation of the Act each Division of the High Court is to administer justice according to so much of the principles of the two old systems as may be necessary to give complete and effectual relief to suitors: *Gibbs* v. *Guild*, 9 Q. B. D., 66 per Lord Coleridge citing *Pugh* v. *Heath*, 7 App. Cas. 237; therefore concealed fraud, and the absence of means of discovery, will, if pleaded, prevent the application of the Statute of Limitations, as formerly in pure Equity proceedings: *Gibbs* v. *Guild*, 8 Q. B. D., 296, 9 Q. B. D., 59; *Barber* v. *Houston*, 14 L. R. Ir. 273; irrespective of the question whether such matters formerly constituted at law a good answer to a plea of the Statute.

Sec. 52 (1)-(4).

In *Adamson* v. *Adamson*, 7 Ont. App. 592, the opinion was expressed by Burton, J. A., that the owner of an equitable estate cannot notwithstanding the Jud. Act, proceed to recover possession of land against a trespasser in possession, but was bound to sue in the name of the person having the legal estate. This opinion did not form part of the judgment of the Court in the case, and was founded upon the view that before the Administration of Justice Act, 1873, ejectment would not lie in such a case, and that the latter Act only enabled the Court of Chancery to entertain suits for ejectment in the same way as the Courts of Common Law. The point, which did not there distinctly arise, as the proceedings were before the Jud. Act, has since been considered in *Heenan* v. *Heenan*, 3 C. L. T. 163, and *Thorne* v. *Williams*, 13 Ont. 577; see also *Jones* v. *McGrath*, 16 Ont. 617, where the opinion was expressed that since the Jud. Act, such an action may be maintained by the equitable owner in his own name. But see *Saylor* v. *Cooper*, 2 Ont. 398; *Fairclough* v. *Marshall*, 4 Ex. D. 37; and *Goodrich* v. *Everglyn Coal Co.*, W. N. 1889, 152.

For definitions of "plaintiff," "petitioner," "defendant," see s. 2.

Jurisdiction as to validity of Provincial Statute.

2. The High Court shall have jurisdiction to entertain an action at the instance of either the Attorney-General for the Dominion, or the Attorney-General of this Province for a declaration as to the validity of any statute, or any provision in any statute of this Legislature, though no further relief should be prayed or sought; and the action shall be deemed sufficiently constituted if the two officers aforesaid are parties thereto. A judgment in the action shall be appealable like other judgments of the said Court. (See sec. 55.) 49 V. c. 16, s. 38.

Relief against penalties, etc.

3. (Subject to appeal as in other cases,) the High Court shall have power to relieve against all penalties, forfeitures and agreements for liquidated damages, and in granting such relief to impose such terms as to costs, expenses, damages, compensation and all other matters as the Court thinks fit. 49 V. c. 16, s. 38.

See also secs. 25, 52 (8) to which this section is supplementary. Similar power was at the same time (see 49 V. c. 16, s 38) conferred upon the County and Division Courts: see R. S. O. c. 47 s. 21, and c. 51 s. 73. It has not been determined whether power is given to relieve against a forfeiture which a Court of Equity would not formerly relieve against; *e. g.* for breach of a covenant not to assign or sublet without leave. A forfeiture for such a breach was not formerly relieved against in Equity: *Hill* v. *Barclay*, 18 Ves. 63, and the relief does not seem to be contemplated by R. S. O. c. 143 (see sec. 11 sub-s. 6, passed in 1886 in the same Session in which the present section was enacted.

Appointment under power.

4. No appointment, which after the 25th day of March, 1886, is made in exercise of a power to appoint any property real or personal among several objects, shall be adjudged to be invalid on the ground that any object of the power has been altogether excluded, and an appointment shall be valid and effectual notwithstanding that one or more of the objects shall not thereby or in default of

appointment take a share or shares of the property which is subject to the power. Sec. 52, (5), (6).

But nothing in this sub-section shall prejudice or affect any provision in any deed, will, or other instrument creating a power, which shall declare the amount or the share or shares from which no object of the power shall be excluded, or shall declare some one or more object or objects of the power who shall not be excluded. 49 V. c. 16, s. 38.

Adopted from Imp. Act, 37, 38 V. c. 37.

As to the law before the Act, see *Bulteel* v. *Plummer*, L. R. 6 Chy. 160. The Act applies only to an appointment made after 25th March, 1886, not to one made before, though only taking effect after that date: see *Moynan* v. *Moynan*, 1 L. R. Ir. 382.

5. No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not. 48 V. c. 13, s. 5. Declaratory judgments and orders.

This section is an amended reproduction of Chy. O. 538.

That order was held only to apply to cases where the plaintiff was entitled to relief consequent upon the declaration he asked, if he chose to claim it, but it was held not to apply to cases where the plaintiff was not entitled to claim any relief consequent upon the declaration: *Rooke* v. *Lord Kingsdown*, 2 K. & J. 753; *Clarke* v. *Cook*, 23 Gr. 110; *Cogswell* v. *Sugden*, 24 Gr. 474; *Brookes* v. *Conley*, 8 Ont. 549. Thus, a decree was pronounced declaring the true construction of a will, without directing administration, in a case where the plaintiff was entitled to the latter relief if he desired it: *Murphy* v. *Murphy*, 20 Gr. 575; and see *Canada Central Ry. Co.* v. *The Queen*, *Ib.* 303. This section was passed to enable the Court to pronounce a declaratory decree whether consequent relief could be claimed or not. But notwithstanding the power thus conferred the jurisdiction will be exercised with great caution: *Austen* v. *Collins*, 54 L. T. N. S. 903. Declaratory judgment not granted in favour of party who would not be entitled to relief.

A declaratory decree was refused under the former practice where it was sought for the purpose of protecting the plaintiff, against a contingent claim by the defendant: *Jackson* v. *Turnley*, 1 Drew 617; and see *Cogswell* v. *Sugden*, *supra*; and also where it was sought to affect future rights in events which had not happened: *Langdale* v. *Briggs*, 8 D. M. & G. 391; *Dowling* v. *Dowling*, L. R. 1 Chy. 612; or persons entitled in reversion: *Garlic* v. *Lawson*, 10 Ha. App. xv; or not *in esse*, *Bright* v. *Tyndall*, 4 Ch. D. 189; or to declare a purely legal question as against infants, even by consent; *Webb* v. *Byng*, 8 D. M. & G. 633; *De Windt* v. *De Windt*, 1 L. R. H. L. 87; or to declare a merely legal right: *Trustees of Birkenhead Docks* v. *Laird*, 4 D. M. & G. 732; *Bristow* v. *Whitmore*, 4 K. & J. 743; *Metropolitan Board of Works* v. *Sant*, L. R. 7 Eq. 197; *Jenner* v. *Jenner*, L. R. 1 Eq. 361. Cases in which declaratory decrees have been refused.

But in some cases the Court made a decree declaring future rights. Thus the question of the right of renewal, on which a lessee's claim to compensation for land taken by a railway depended, was declared: *Bogg* v. *Midland Ry. Co.*, L. R. 4 Eq. 310; and, to save expense, it has construed executory marriage articles: *Byam* v. *Byam*, 19 Beav. 58. Cases in which declaration of right made.

6. If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground Equitable claims.

Sec. 52, (7). against any deed, instrument, or contract, or against any right, title or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts respectively, and every Judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of *The Ontario Judicature Act, 1881.* 44 V. c. 5, s. 16 (3).

Identical with Jud. Act, 1873, s 24, sub-s. 2.

See this section applied in *Mostyn* v. *W. Mostyn*, 1 C. P. D. 145; *Hughes* v. *Metropolitan*, etc., *ib.* 120; *Eyre* v. *Hughes*, 2 Ch. D. 148; *Marshall* v. *Marshall*, 5 P. D. 19; *Emmerson* v. *Ind.*, 12 App. Cas. 300. See also sub.-sec. 8.

7. The said Courts respectively, and every Judge thereof shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any Judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant. 44 V. c. 5, s. 16 (4).

This sub-section is identical with the Eng. J. A. 1873 s. 24 (3).

The *Rules* respecting set-off and counter-claims (*Rule* 373, etc.,) and third parties (*Rules* 328-332) were made in furtherance of the powers conferred by this sub-section. See notes to those *Rules*. Sec. 52, (8).

As to how far *Rules* made have been made to regulate the exercise of the powers conferred by this section of granting relief between co-defendants, see *Treleavan* v. *Bray*, 45 L. J., Chy. 113; and notes to *Rule* 328.

In *Mudge* v. *Adams*, 50 L. J. Pro. 49; 17 C. L. J. 369, an action propounding the will of a married woman made after she had obtained a protection order, and become possessed of separate estate, the defendant set up that the protection order had been fraudulently obtained, and claimed by way of cross relief to have it set aside, the will pronounced against, and administration granted to the defendant; and it was held to be within this section as asserting by counter-claim what might be asserted in a suit against the same plaintiff.

A defendant is not bound to make his cross claims in the same action, but may assert them by cross action. Thus where an action was brought against shippers and consignees for damages for detention at the port of lading, and for freight, and the defendants brought a cross action for a larger sum for damages for loss of cargo by the shipowners' negligence and the writs were issued on the same day and statement of claim delivered first in the former action, a Master stayed proceedings in the second action with liberty to the plaintiffs in it to file a counter claim in the first action; but it was held on appeal that though there was jurisdiction to make such an order, it should only be exercised where the points in issue are the same, and that in the case in question the right to bring a cross action should not be interfered with: *Adamson* v. *Tuff*, 44 L. T. N. S. 420. See also the notes to sec. 52 (9) and *Rule* 652.

As to the effect of the concluding words of this section, see *Fowler* v. *Knoop* in note to *Rule* 328.

8. The said Courts respectively, and every Judge thereof shall recognize and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognized and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act. 44 V. c. 5, s. 16 (5).

Identical with the Eng. J. A. 1873 section 24 (4).

In *Williams* v. *Snowden*, W. N. 1880, 124, a plaintiff in ejectment was ordered specifically to perform an agreement to lease the premises to defendant, which agreement though not raised by defence, appeared incidentally in the cause. See *Mostyn* v. *W. Mostyn, etc.*, 1 C. P. D. 145, where it incidentally appeared that a party was entitled to have a deed rectified. See also cases in note to sub-sec. 6.

The doctrine of Equity whereby part performance furnishes a ground for enforcing a contract not enforceable at Law by reason of s. 4 of the Statute of of Frauds, is confined to suits as to the sale of interests in land, and has not been extended by the Jud. Act. The Jud. Act confers no new rights, but alters procedure only: *Britain* v. *Rossiter*, 11 Q. B. D. 123. See also *Gibbs* v. v. *Guild*, 9 Q. B. D. 67, and notes to sec. 53, sub-sec. 8.

Under this sec. relief was given against a forfeiture in an action to re-enter for breach of covenant for payment of taxes which the defendant paid before statement of claim delivered: *Buckley* v. *Beigle*, 8 Ont. 85.

Sec. 52 (3) also now enables the Court to relieve against penalties and forfeitures.

Sec. 52, (9). Restraining causes.

9. No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, prior to *The Ontario Judicature Act, 1881*, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto:

Staying proceedings where formerly an injunction obtained.

Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it, if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, prior to *The Ontario Judicature Act, 1881*, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be just. 44 V. c. 5, s. 16 (6).

Identical with Eng. J. A. 1873. s. 24 (5).

The effect of this sub-section is that, in ordinary cases, whatever would formerly have been ground for an injunction restraining an action must now be raised in the action, either by way of defence, or upon an application to stay proceedings: *Garbutt* v. *Fawcus*, 1 Ch. D. 155.

Staying proceedings, general rule.

An application to stay proceedings in an action must be made in the Division in which the action is pending. No other Judge or Division has jurisdiction to stay proceedings: *Garbutt* v. *Fawcus*, 1 Ch. D. 155; *Re Morriston Patent Fuel Company*, W. N. 1877, N. S. 20; *Re South of France Pottery Works Syndicate*, 37 L. T. N. S. 260; *Re People's Garden Company*, 1 Ch. D. 44; *Walker* v. *Banagher Distillery Company*, 1 Q. B. D. 129; *Rose* v. *Garden Lodge, etc., Company*, 3 Q. B. D. 235; *Wright* v. *Redgrave*, 11 Ch. D. 24. Two decisions to the contrary, *Kingchurch* v. *People's Garden Company*, 1 C. P. D. 45, and *Needham* v. *Rivers Protection Company*, 1 Ch. D. 253, are overruled. See also *Searle* v. *Choate*, 25 Ch. D. 723.

Thus actions for claims provable (as to which see *Crowle* v. *Russell*, 4 C. P. D. 186), in pending administration proceedings must be restrained by motion in the actions and not in the Division in which the administration proceedings are: see *Cobbold* v. *Pryke*, 4 Ex. D. 315; *Powell* v. *Jewsbury*, 9 Ch. D. 39; *Bailey* v. *Monteith*, 3 C. L. T. 599.

In *Wright* v. *Redgrave*, 11 Ch. D. 24, goods had been taken under a *fi. fa.*, and the trustees of a settlement claimed them as separate estate of defendant's wife. The Sheriff thereupon took out an interpleader summons in the C. P. Div., upon which an order was made that, upon the trustee paying into Court £115 within a limited time, the Sheriff should withdraw, but that in default of such payment he should sell, and pay the proceeds into Court, and that the

parties should proceed to the trial of an issue as to the title to the goods. The money was not paid into Court within the time and the Sheriff advertised the goods for sale. The wife thereupon commenced an action in the Ch. D. to have the trusts of the settlement carried into execution, a new trustee appointed, and in the meantime the appointment of a receiver. An injunction to restrain the Sheriff was held, on appeal, to be an order inconsistent with the above sub-section and was discharged.

Sec. 52, (9). Staying proceedings.

In *Besant* v. *Wood*, 12 Ch. D. 630, it was said that though a pending motion cannot be restrained a person may, in a proper case, be restrained from instituting proceedings. See also *Cercle Restaurant Co.* v. *Lavery*, 18 Ch. D. 555, and *Hart* v. *Hart*, 18 Ch. D. 670.

See also *Hedley* v. *Bates*, 13 Ch. D. 498; *Re Artistic Colour Printing Co.*, 14 Ch. D. 502; *Crowle* v. *Russell*, 4 C. P. D. 186.

Where a partnership, had by order of the Court been dissolved, the plaintiff and defendants signed an agreement of compromise; the plaintiff subsequently repudiated the agreement, and proposed to proceed with his action, alleging that his signature had been obtained by fraud, it was held that the Court had jurisdiction on summons to stay further proceedings in the action without a fresh action being commenced to enforce the agreement: *Eden* v. *Naish*, 7 Ch. D. 781; *Re Gaudet* 12 Ch. D. 882. An action to enforce the agreement might be brought: *Hart* v. *Hart*, 18 Ch. D. 670. See also notes to sec. 52 (12).

Stay, to enforce a compromise of action.

Actions or proceedings which are absolutely groundless are frivolous and vexatious. The institution of them is an abuse of the process of the Court, and they may be stayed summarily upon motion: *Edmunds* v. *Attorney-General*, 26 W. R. 550; 38 L. T. N. S. 213; W. N. 1878, 64. See also *Tucker* v. *Collinson*, 34 W. R. 355; 54 L. T. N. S. 128, 263; or dismissed: *Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210; *Ker* v. *Williams*, 79 L. T. Jour. 229; W. N. 1886, 76; *Willis* v. *Earl Beauchamp*, 11 P. D. 59; *Blair* v. *Cowder*, 36 W. R. 64; *Grepe* v. *Loam*, 37 Ch. D. 168; *Lawrance* v. *Lord Norreys*, 39 Ch. D. 213; *Warwick* v. *East*, W. N. 1889, 8; *e. g.* actions against a public officer for an act plainly in accordance with his duty: *Castro* v. *Murray*, L. R. 10 Ex. 213; against a Judge for any act done in that capacity; *Cobbett* v. *Field*, W. N. 1877, 8; *Hind* v. *Brett*, W. N. 1883, 37; where the point has already been decided against the plaintiff in another action: *Dawkins* v. *Saxe Weimar, etc.*, 1 Q. B. D. 499; *Edmunds* v. *Attorney-General*, supra; *Mortlock* v. *Mortlock*, 20 L. T. N. S. 773; where the plaintiff has no *locus standi*: *Robson* v. *Dodds*, L. R. 8 Eq. 302; *Vale* v. *Oppert*, 5 Ch. D. 969; where the claim though stating a sufficient case is shewn by admission of the plaintiff to be without foundation: *Jameson* v. *Laing*, 7 P. R. 404. Where a right to sue, however slight, appears on the face of the proceedings, and is not displaced by any admission, the plaintiff will not be prevented from having his action disposed of in the regular way: *Bloxam* v. *Metropolitan, etc.*, L. R. 3 Chy. 337; *Seaton* v. *Grant*, L. R. 2 Chy. 459; but he may be directed to facilitate an early disposition of the action: *Jameson* v. *Laing*, *supra*.

Staying vexatious proceedings.

An action in which relief is claimed which had been already claimed in another action will be stayed, only in so far as it claims relief included in the former action: *Morton* v. *Quick*, 26 W. R. 441.

A stay was refused where an action had been settled by the plaintiffs' solicitor, the settlement having been provisional and not adopted by the plaintiff: *McDonald* v. *Field*, 12 P. R. 213.

There was no rule of practice at Common Law by which a plaintiff ordered to pay costs in the course of an action, but not paying them, was liable to have his action stayed till they were paid: *Morton* v. *Palmer*, 9 Q. B. D. 89; but the Court had power in its inherent jurisdiction to direct a stay if that appeared to be equitable. The *onus* of shewing the propriety of a stay was on the party asking for it. In Equity the *onus* was on the other party, and he was required to shew that a stay would be inequitable. The Common Law rule is adopted in Ont. as the most convenient: *Stewart* v *Sullivan*, 11 P. R. 529, followed in *Wright* v. *Wright*, 12 P. R. 42. See also, in addition to the cases there cited, *Re Wickham, Marony* v. *Taylor*, 35 Ch. D. 272.

Staying for non-payment of costs.

Sec. 52,(10). An action may be stayed till security ordered to be given for damages has been given: *Richards* v. *Howell*, W. N., 1883, 159, 168.

Cross actions. One of two cross actions between the same parties, arising out of the same matter may be stayed, and a consolidation in fact thus effected; and where such an application is made the action against the party on whom the burden of proof lies ought in general to be stayed, and the action brought by him ought to be allowed to proceed, the other party being at liberty to raise by defence, set off or counter-claim all questions intended to be raised by him in the action which is stayed: *Thomson* v. *Eastern Ry. Co.*, 9 Q. B. D. 320. See further the notes to sec. 52 (7), and *Rule* 652.

Practice. An application to stay must in general be on notice. "In a summary way" does not mean *ex parte* except in cases of emergency: see *Blewitt* v. *Dowling*, W. N. 1875, 202; *Kevers* v. *Michell*, W. N. 1876, 53, and notes to s. 53, sub-s. 8.

Stay of proceedings if action for same cause is pending out of Ontario.

10. If any action is brought in the High Court for any cause of action for which any suit or action has been brought and is pending between the same parties or their representatives in any place or country out of Ontario, the Court or any Judge thereof may make an order to stay all proceedings in the High Court until satisfactory proof is offered to the Court or Judge, that the suit or action so brought in such other place or country out of Ontario is determined or discontinued. R. S. O. 1877, c. 40, s. 98; c. 50, s. 72.

No corresponding clause in the Eng. Act.

English rule. The rule in England is, that where one of two actions for the same cause is pending abroad, the Court, has jurisdiction to stay, but the party applying must make out a special case for relief; whereas where all the actions are in England, or *semble* in the Queen's Courts anywhere, the concurrent proceedings are *prima facie* vexatious: *McHenry* v. *Lewis*, 21 Ch. D. 202; 22 Ch. D. 397: *The Christiansborg*, 10 P. D. 141. The Court will not consider the double litigation vexatious where there are substantial reasons to induce the plaintiff to sue in both countries; as when he can get judgment in each action, but execution is more easily obtained in one than in the other: *Peruvian Guano Co.* v. *Bockwoldt*, 23 Ch. D. 225; *Hyman* v. *Helm*, 24 Ch. D. 531; *Direct U. S. Cable Co.* v. *Dom. Tel. Co.*, 8 Ont. App. 416.

Whether a Court having ample authority to decide the matter brought before it should await the expected adjudication of another tribunal having only similar authority is merely a question for the exercise of judicial discretion: *Phosphate Sewage Company* v. *Molleson*, 1 App. Cas. 780. See *Hounston* v. *M. of Sligo*, W. N. 1884, 29, reversed p. 151.

There is a discretion to stay proceedings in the High Court for damages for a collision, in respect of which proceedings are being taken *in rem* in a Vice-Admiralty Court: *The Peshawur*, 48 L. T. N. S. 796; 8 P. D. 32.

Rule in Ontario. Under the above clause 10, proceedings were stayed in this Province, where the matter could more conveniently be disposed of in the foreign Court, by reason of the suit being there in a more advanced stage, and the parties being personally subject to the jurisdiction of the foreign Court, and the latter was the most convenient, in view of the evidence to be procured: *Howell* v. *Jewett*, 7 P. R. 69. A stay was also ordered pending an appeal in a foreign Court, terms as to diligence in prosecuting the appeal being imposed: *Huntingdon* v. *Attrill*, 12 P. R. 36.

As to staying an action in Ont. where the plaintiff's claim is being prosecuted in bankruptcy proceedings in England, see *Maritime Bank* v. *Stewart*, 13 (11), (12). P. R. 86. Sec. 22,

11. Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and the other express provisions of this Act, the said Courts respectively, and every Judge thereof, shall recognize and give effect to all legal claims and demands, and all estates, rights, duties, obligations, and liabilities existing by the Common Law or created by any statute, in the same manner as the same would have been recognized and given effect to, prior to *The Ontario Judicature Act, 1881*, by any of the Courts then existing and whose jurisdiction is now [vested in] the High Court. 44 V. c. 5, s. 16 (7). Giving effect to legal claims.

Same as Eng. J. A. 1873 s. 24 (6) except that the latter has the words "transferred to" instead of "vested in;" and after the words "Common law" has the words "or by any custom."

12. The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided. 44 V. c. 5, s. 16 (3). Multiplicity of proceedings to be avoided. All matters in controversy to be determined in one proceeding.

Same as the Eng. J. A. 1873, s. 24 (7).

Sir W. T. Charley, M.P., in his edition of the Judicature Act said; "If the closing words of this section be verified by experience, this Act will prove a second Magna Charta to the suitor."

A cause or matter is pending within the meaning of this section so long as final judgment remains unsatisfied: *Salt* v. *Cooper*, 16 Ch. D. 544; *Smith* v. *Cowell*, 6 Q. B. D. 75. See also *Re Clagett*, *Fordham* v. *Clagett*, 20 Ch. D. 637, where it was said that a "pending matter" in any Court of Justice is one in which some proceeding may still be taken. "Pending matter."

The meaning of this and the preceding sub-section is, that whenever a subject of controversy arises in an action which can *conveniently* be determined between the parties to the action, the Court should, if possible, determine it, so as to prevent further and needless litigation: *Re Tharp*, 3 P. D. 81;

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McDougall v. *Hall*, 13 Ont. 166. The right of the parties is limited by the opinion of the Court as to the practical convenience of trying incongruous claims in the same action. See notes to *Rules* 373 and 374.

Enforcing agreements of compromise in the same action.

Under the last provision the Court has power to enforce a compromise entered into pending an action and stay the action on a summary application in that action: *Eden* v. *Naish*, 7 Ch. D. 781; *Scully* v. *Lord Dundonald*, 8 Ch. D. 658; *Re Gaudet Frères Steamship, etc., Co.*, 12 Ch. D. 882; *Smythe* v. *Smythe*, 18 Q. B. D. 544, followed in *Farran* v. *Hunter* (before Ferguson, J., 25th Sept., 1888). The former Chy. practice required a fresh suit to be brought for specific performance of the agreement for compromise, unless it related merely to the prosecution of the suit: *Pryor* v. *Gribble*, L. R. 10 Chy. 534, or unless where the compromise was entered into before answer, and was set up by the answer and specific performance prayed by way of cross-relief: *Small* v. *Union Perm. B. S.*, 6 P. R. 206.

A separate action to enforce a compromise may still be brought: *Hart* v. *Hart*, 18 Ch. D. 670; *Knowles* v. *Roberts*, 58 L. T. N. S. 259, and perhaps must be brought where the question whether the compromise is invalid is raised: *Gilbert* v. *Endean*, 9 Ch. D. 259; but see *Eden* v. *Naish*, *etc.*, *supra*.

A compromise may be enforced by a stay of the action being ordered under sec. 52 (9). See notes to that section.

See also *Hedley* v. *Bates*, 13 Ch. D. at p. 501; *Dowdeswell* v. *Dowdeswell*, 9 Ch. D. 294; *Baker* v. *Blaker*, 55 L. T. N. S. 723.

The Court may, nevertheless, decline to decide questions relating to contingent interests which may never come into possession: *Kevan* v. *Crawford*, 6 Ch. D. 29.

Rules of law upon certain points.

53. The law to be administered in Ontario, as to the matters next hereinafter mentioned, shall be as follows:

See Eng. J. A., 1873, s. 25; J. A., 1875, s. 10.

The object of this section is to render uniform the rules of law administered in the several Divisions of the Court on the points as to which such rules were formerly in conflict. This had been done to a considerable extent in Ontario by the Administration of Justice Act, 1873, 36 Vict. c. 8 (R. S. O. c. 49, ss. 4, 5, 21, 23; R. S. O. c. 40, ss. 86, 87; c. 50, ss. 131-133, etc).

The method which has been adopted in the present section is to deal in the first eleven sub-sections with specific cases in which conflicting rules formerly existed, and to provide what rule is to prevail for the future.

The first sub-section in the English Act, and one substituted for it under section 10 of the Jud. Act 1876, provide for the administration of the estate of a deceased person who is insolvent, and make applicable thereto the same rules as the Bankrupt Law provides for estates administered thereunder. "The British North America Act" gives exclusive jurisdiction to the Dominion Parliament in matters of "Bankruptcy and Insolvency" (s. 91, No. 21); but the subject is not without legislative provision in Ontario, for by 29 Vict. c. 28, s. 28 (now R. S. O. c. 110, s. 32), it was enacted, that "on the administration of the estate of any deceased person, in case of a deficiency of assets, debts due to the Crown, and to the executor or administrator of the deceased person, and debts to others, including therein, respectively, debts by judgment, decree or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as by statute are payable in like order of administration as simple contract debts, shall be paid *pari passu* and without any preference or priority of debts of one rank or nature over those of another; but nothing herein contained shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal estate."

Statutes of Limitation not to

1. No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any

breach of such trust, shall be held to be barred by any Statute of Limitations. 44 V. c. 5, s. 17 (2). Sec. 58, (2, 3). apply to express trusts.

Same as the English sub-section.

See *Petre* v. *Petre*, 1 Drew, 393, and *Nugent* v. *Nugent*, 15 L. R. Ir. 321, for the difference in Equity between express and implied trusts. In the case of an express trust it has always been the doctrine of Courts of Equity that no time, as between the trustee and *cestui que trust*, operates as a bar to the equitable right of the latter; and this sub-section is only a statutory declaration of that doctrine: *Harston* v. *Tenison*, 20 Ch. D. 109; see also *Thompson* v. *Eastwood*, 2 App. Cas., 215. As to what nevertheless amounts to laches and acquiescence which will be a bar to relief, see *Ib.* and Lewin on Trusts 6th Ed. 714, and Fisher Dig. 1880, p. 2200. It is not necessary that the express trust be evidenced by writing to bring the case within this provision: *Cook* v. *Grant*, 32 C. P. 511, 521.

R. S. O. c. 111, s. 30, is as follows:—

"30. Where any land or rent is vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him to bring an action against the trustee or any person claiming through him, to recover such land or rent shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent has been conveyed to a purchaser for a valuable consideration, and then shall be deemed to have accrued only as against such purchaser, and any person claiming through him."

It has been said by Kay, J., *Banner* v. *Berridge*, 18 Ch. D. 262, that that enactment is in effect extended to personalty by the present sub-section, which is also repeated in c. 111, as sec. 30 (2).

2. An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate. 44 V. c. 5, s. 17 (3). Equitable waste.

Same as Eng. J. A. 1873 s. 25 (3).

For the difference between legal and equitable waste see the notes to *Garth* v. *Cotton*, 1 W. & T. Lead Cas., 751 (5th Ed.); *Seagram* v. *Knight*, L. R. 2 Chy. 628. A tenant for life without impeachment of waste is not permitted to make an excessive use of his legal power as such, by cutting down ornamental trees, defacing the mansion-house, etc.

See also Seton on Decrees (4th Ed.) 190; and s. 21, sub-s. 3 *ante* and notes p. 16.

3. There shall not be any merger by operation of law only of any estate, the beneficial interest in which would not prior to *The Ontario Judicature Act, 1881*, have been deemed, merged or extinguished in equity. 44 V. c. 5, s. 17 (4). Merger.

Same as Eng. J. A. 1873 s. 25 (4).

Merger is where a greater estate and a less coincide and meet in one and the same person in the same right without any intermediate estate; in which case the less is immediately annihilated, or "merged" in the greater; as, if the fee comes to a tenant for years or life, the particular estates are merged in the fee; but, in Equity, if the merger which would take place at Law would occasion

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Sec. 53, (4, 5).

prejudice to a party having a previous equitable interest in the estate, such interest is not deemed to be merged: see *Tyrwhitt* v. *Tyrwhitt*, 32 B. 249; *Finlayson* v. *Mills*, 11 Gr. 218; *Maclennan* v. *Gray*, 16 Ont. 326. By R. S. O. c. 102 ss. 8-9, a mortgagee may take a release of the equity of redemption without merging his debt as against any other mortgagee or person having a charge on the property. The cases on the construction of this enactment will be found in Robinson & Joseph's Digest, 2312, *et seq.* See also *Ib.* 2246 *et seq.*

Where C. an administrator, granted an underlease for a term of years of land held by him as administrator, and shortly afterward the underlessee assigned the land to C. for the residue of the term, it was held that there was in Equity no merger of the term: *Chambers* v. *Kingham*, 10 Ch. D. 743; see also *Hyde* v. *Warden*, 3 Ex. D. 72.

Actions for possession of land by mortgagors.

4. A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or sue or distrain for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person (*a*) and in that case he may sue or distrain jointly with such other person. 44 V. c. 5, s. 17 (5).

(*a*) Up to this point this sub-section corresponds with the Eng. J. A. 1873 c. 25 (5); what follows is not in the English sub-section.

In cases under this sub-section the mortgagor may sometimes have to make the mortgagee a party; but "unless there is a probability that the relief for which the mortgagor sues will injuriously affect the interest of the mortgagee, the mortgagee ought not to be brought before the Court on a mere suggestion of a possibility that he may be prejudiced": *Fairclough* v. *Marshall*, 4 Ex. D. 37 and 49.

A mortgage having been assigned, the assignee served notice on the tenants to pay him rent. A judgment creditor of the mortgagor obtained an order on the tenants to pay. The rents due at the date of the assignment were not thereby assigned to the transferee, but were assigned to him by the mortgagee after the garnishee order. It was held that under this sub-section the rents attached were debts due to the mortgagor: *Paterson* v. *O'Reilly*, 10 L. R. Ir. 304.

Assignment of debts and choses in action.

5. In case of an assignment of a debt or other chose in action, (*a*) if the debtor, trustee, or other person liable in respect of the debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court under and in conformity with the provisions of law for the relief of trustees. 44 V. c. 5, s. 17 (6).

(a) What follows corresponds with the latter part of sub-section 6 of the English J. A. 1873 s. 25 (6). Sec. 33.

A debtor, against whom an action has been brought for a debt of which notice of assignment has been given, may interplead in respect of part of the debt and dispute the remainder: *Reading* v. *School Board for London*, 16 Q. B. D. 686. An application may be in a pending action or by a separate proceeding under this section: *Ib.* and *McElheran* v. *London Masonic, etc.*, 11 P. R. 181. On a separate application under this clause an action commenced against the debtor cannot be stayed: *Reading* v. *School Board (sup)*, otherwise if a summary application is made in the action: *McElheran* v. *London Masonic (sup)*.

The first part of Eng. J. A. 1873 s. 25 (6) makes choses in action assignable, and differs a little from the Ontario enactments on the same subject, which continue to be the law in this Province. The English enactment is as follows: Law in England as to assignment of debts.

"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor; provided always that if," etc., as above, except that the word "act" is used instead of the word "law."

The following are decisions under this provision:—

The enactment does not make anything an assignment which was not theretofore an assignment either at Law or in Equity: *Schroeder* v. *The Central Bank*, 24 W. R., 710; *Re Haycocks Policy*, 1 Ch. D. 611; *In re Sutton's Trusts*, 12 Ch. D. 175, nor does this Act affect the rule that the assignee of a chose in action takes it subject to all equities: *West of England Banking Co.* v. *Batchelor*, W. N., 1882, 11: see *R. S. O.* c. 116 s. 11 *infra*. This rule, however, does not apply in the case of a chose in action assignable at common law. *Taylor* v. *Blakelock*, 33 L. T. N. S. 8, 32 Ch. D. 560.

A cheque is a mere order to pay and a revocable request, and does not purport to be an absolute assignment: *Schroeder* v. *City Bank, supra*. After a cheque has been marked good by the bank, however, the drawer is discharged and the bank becomes the principal debtor: *Boyd* v. *Nasmith*, 17 Ont. 40.

The assignment of money accruing due but not yet due may be an absolute assignment: *Brice* v. *Bannister*, 3 Q. B. D. 569; *British Waggon Co.* v. *Lea*, 5 Q. B. D. 149, 154; *Walker* v. *Bradford*, 12 Q. B. D. 511, 516. A letter from a landlord to a tenant directing him to pay rent to another person till further order, was held to be so: *Knill* v. *Prowse*, 33 W. R. 163.

A deed by which debts are assigned to a trustee to receive them and thereout pay himself a sum due from the assignor, and pay the surplus to the assignor, is an absolute assignment (not purporting to be by way of charge only): *Burlinson* v. *Hall*, 12 Q. B. D. 347; so is a mortgage of debts due by the mortgagor in the ordinary form with proviso for redemption and reconveyance: *Tancred* v. *Delagoa Bay Ry.*, 23 Q. B. D. 239, in which *Nat. Provincial Bank of England* v. *Harle*, 6 Q. B. D. 626, was disapproved of and not followed.

In *Lee* v. *Magrath*, 10 L. R. Ir. 45, 313, the payee of a promissory note not negotiable and not then payable indorsed it as follows: "I indorse the within promissory note for £100 to my sister L.," and delivered it to L. There was no consideration for the indorsement and delivery, but it was found as a fact that the intention was to vest in L. the beneficial interest. The payee died before the note was due, and bequeathed to one of the makers all moneys he should die possessed of, and appointed the legatee executor. Express notice in writing of the indorsement was given to the maker after the payee's death and before action. It was held that as the appointment of the maker of the note, executor of the payee, extinguished the debt prior to service of notice of the indorsement, there had been no legal transfer of the debt to L. within this sub-section so as to enable her to bring an action thereon.

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Sec. 53.

Where the statement of claim alleged that the plaintiff sued as assignee by deed of a debt due from the defendant to the assignor on a building contract, and the defendant pleaded by way of set-off and counter-claim that he was entitled to damages for breaches of contract by the assignor to complete and deliver the buildings at the specified time, whereby the defendant lost the use of them, it was held, on demurrer, that the defendant was not entitled to recover any damages against the plaintiff; but was entitled, by way of set-off or deduction from the plaintiff's claim, to the damages which he had sustained by the non-performance of the contract by the assignor: *Young* v. *Kitchin*, 3 Ex. D. 127.

A banking company, having received notice in writing of conflicting claims to moneys placed with them on deposit, paid such moneys into Court under the Trustee Relief Acts after first deducting therefrom their costs of payment in. Upon petition by one of the claimants for payment out, it was held that the proviso in this sub-section applied only to debts of which there had been an absolute assignment in writing, and that the banking company, not being trustees within the Trustee Relief Acts, were not entitled to pay the deposit moneys into Court thereunder; but it was also held that the petitioner must be taken to have submitted to the jurisdiction under the Trustee Relief Acts by petitioning the Court; and that the bank was entitled to taxed costs of paying in the money, and of the petition: *In re Sutton's Trusts*, 12 Ch. D. 175; see *In re Haycock's Policy*, 1 Ch. D. 611.

See also *ex parte Culley*, 9 Ch. D. 307; *Greenway* v. *Atkinson*, W. N. 1881, 47; *Southwell* v. *Scotter*, 49 L. J. Q. B. 356, and a discussion in 78 L. T. Jour. 439.

Law in Ontario under R. S. O. c. 122.

The Ontario Law continues to be regulated by The Mercantile Amendment Act (R. S. O. c. 122, ss. 6 to 12,) which provides as follows:

"6. In the six next succeeding sections of this Act,

Interpretation of the word "assignee."

"'Assignee' shall include any person now being or hereafter becoming entitled by any first or subsequent assignment, or any derivative or other title, to a chose in action, and possessing at the time of action brought the beneficial interest therein, and the right to receive and to give an effectual discharge for the moneys, or the charge, lien, incumbrance, or other obligation thereby secured. *R. S. O.* 1877, c. 116, s. 6.

The assignee must take the beneficial interest. He cannot sue in his own name where the assignment has been made only to enable him to bring an action: *Wood* v. *McAlpine*, 1 Ont. App. 234. In *Ward* v. *Hughes*, 8 Ont. 138, it was held that where an assignment was absolute in form, though the assignor intended to retain a beneficial interest, an action upon it must be brought in the name of the assignee.

Chose in action made assignable.

"7. Every debt and chose in action arising out of contract shall be assignable at law by any form of writing, but subject to such conditions or restrictions with respect to the right of transfer as are contained in the original contract; and the assignee thereof shall (*a*) sue thereon in his own name in such

Assignee to sue in his own name.

action, and for such relief as the original holder or assignor of such chose in action would be entitled to sue for in any Court of Law in this Province. *R. S. O.* 1877, c. 116, s. 7.

The imperative construction is apparently to be given to the word "shall," in the case of assignments within the operation of the Act: see *Dawson* v. *Graham*, 41 U. C. Q. B. 532, and *Ward* v. *Hughes*, 8 Ont. 138.

Debts payable at a future time may be assigned: *Brice* v. *Bannister*, 3 Q. B. D. 569, and other cases *supra*.

Assignment of property to self and others.

"8. Any property, real or personal, may be conveyed or assigned by a person to himself jointly with another person by the like means by which it might be conveyed or assigned by him to another person, and may in like manner be conveyed or assigned by a husband to his wife, and by a wife to her husband alone or jointly with another person. *R. S. O.* 1877, c. 95, s. 10; 49 V. c. 20, s. 6.

See Imp. Act, 22-23 V. c. 35, s. 21.

"9. (1) The bonds or debentures of corporations made payable to bearer, or to any person named therein or bearer, may be transferred by delivery, and if payable to any person or order shall (after general indorsation thereof by such person) be transferable by delivery from the time of such indorsation. Sec. 53. Bonds of corporations.

"(2) Any such transfer shall vest the property of such bonds or debentures in the holder thereof to enable him to maintain an action thereon in his own name. *R. S. O.* 1877, c. 116, s. 8.

"10. Subject to the provisions of *The Judicature Act*, the plaintiff in any action or suit where the assignment is required by this Act to be in writing may claim as assignee of the original party or first assignor, setting forth briefly the various assignments under which the said chose in action has become vested in him; but in all other respects the pleadings and proceedings in such action shall be as if the action was instituted in the name of the original party or first assignor. *R. S. O.* 1877, c. 116, s. 9. Pleadings and proceedings.

"11. In case of any assignment of a debt or chose in action arising out of contract, and not assignable by delivery, such transfer shall be subject to any defence, or set-off, in respect of the whole or any part of such claim as existed at the time of, or before notice of the assignment to the debtor or other person sought to be made liable, in the same manner and to the same extent as such defence would be effectual, in case there had been no assignment thereof; and such defence or set-off shall apply as between the debtor and any assignee of such debt or chose in action. *R. S. O.* 1877, c. 116, s. 10. Original right of set-off and defence continued.

See *The Exchange Bank* v. *Stinson*, 32 C. P. 158. Assignee entitled free from contra

"12. In case of any assignment in writing as aforesaid and notice thereof given to the debtor or other person liable in respect of a chose in action, arising out of contract, the assignee shall have, hold and enjoy the same, free from any claims, defences, or equities which might arise after such notice as against his assignor. *R. S. O.* 1877, c. 116, s. 11. claims to arise after notice for the persons liable.

"13. The next preceding seven sections of this Act shall not be construed to apply to bills of exchange or promissory notes. *R. S. O.* 1877, c. 116, s. 12. Secs. 6-12 not to apply to bills and notes.

6. Stipulations in contracts, as to time or otherwise, which would not before the passing of *The Ontario Judicature Act, 1881*, have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would, prior to the passing of said Act, have received in Equity. 44 V. c. 5, s. 17 (7). Stipulations not of the essence of contracts.

Same as Eng. J. A. 1873, s. 25 (7).

This sub-section has no application in an action commenced before the Act came into operation: *Noble* v. *Edwardes*, 5 Ch. D. 378.

Time is not the essence of a contract in Equity except in cases of express stipulation: *Oakden* v. *Pike*, 34 L. J. Chy. 620, or by necessary implication: *Parker* v. *Thorold*, 16 Beav. 59; see also *Patrick* v. *Milner*, 2 C. P. D. 342. The stipulation cannot be made by giving a notice, where not originally part of the contract, unless there has been such delay as to entitle the party giving the notice to be relieved from his contract: *Green* v. *Sevin*, 13 Ch. D. 589. See *Crossfield* v. *Gould*, 9 Ont. App. 218.

As to the equitable construction of stipulations in contracts as to time, see further *Tilley* v. *Thomas*, L. R. 3 Chy. 61.

As to the rule at Common Law and in Equity regarding the rescission of a contract obtained by a material false representation, see *Redgrave* v. *Hurd*, 20 Ch. D. 1; *Peck* v. *Derry*, 37 L. T. Jour. 184.

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Sec. 53. Satisfaction of obligations by performance in part.

7. Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation. 48 V. c. 13, s. 6.

This clause changes the law as settled by the decision of the House of Lords in *Foakes* v. *Beer*, 9 App. Cas. 605. Since the old case of *Cumber* v. *Wane*, 1 Str. 426, it had been held that a debtor being under a legal obligation to pay the whole of his creditor's demand, an agreement upon payment of part to discharge the whole was *nudum pactum*, unless there was some new consideration. Many subsequent cases exemplified circumstances under which *Cumber* v. *Wane* might be distinguished, such as where some dispute existed as to the exact amount due, or the money was to be paid in advance, or there was the acceptance of some new consideration however slight, or a negotiable instrument was given for the smaller sum: 1 Smith L. C. 9th Ed. *Bidder* v. *Bridges*, 37 Ch. D. 406. In *Foakes* v. *Beer*, the House of Lords was asked to overrule *Cumber* v. *Wane*, but held that legislation was requisite for that purpose, the doctrine of that case having been part of the law of England for 280 years.

In *Day* v. *McLea*, 22 Q. B. D. 610, the plaintiffs made a claim for damages for breach of contract, the defendant sent a cheque for a less sum, saying that it was in full of all demands; plaintiffs kept the cheque stating that they did so on account, and brought an action for the balance of the claim. It was held that keeping the cheque was not as a matter of law conclusive that there was an accord and satisfaction, and that it was a question of fact on what terms the cheque was kept.

This clause was applied in *Bank of Commerce* v. *Jenkins*, 16 Ont. 215, where it was held that an agreement of composition by which notes for 40c. on the dollar were to be given was irrevocable, when entered into by a creditor, though other creditors had not given their assent.

Injunctions and receivers.

8. A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court, in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally, or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable. 44 V. c. 5, s. 17 (8).

Identical with the English J. A. 1873, s. 25 (8).

Where an injunction or receiver is a substantial object of the action, the writ should be indorsed with a claim for that relief: *Colbourne* v. *Colbourne*, 1 Ch. D. 690, but may be had though not so claimed: *Norton* v. *Gover*, W. N. 1877, 206.

An "interlocutory order" means not merely an order made between writ and final judgment, but an order other than final judgment whether before or after final judgment: *Smith* v. *Cowell*, 6 Q. B. D. 75. See also *Salt* v. *Cooper*, 16 Ch. D. 544, and *Agnew* v. *McDowell*, 14 L. R. Ir. 445, where, after a verdict an injunction was granted against a continuance of the trespasses complained of in the action, no injunction having been granted at the trial. Sec. 53, (8).

As to the practice on such application see notes to *Rule* 1134.

Mandamus.—The jurisdiction as to mandamus before the Ont. Jud. Act, 1881, related to writs of two kinds, (1) the old prerogative writ of mandamus and (2) a writ which was grantable under various statutory provisions. Mandamus.

The prerogative writ was one which did not issue as of strict right like the writs which the subject had the right to call for under the clause of Magna Charta by which the Crown is bound not to refuse or delay justice or right, but issued at the discretion of the Crown, and the power to issue it was not delegated to the ordinary Judges between party and party, but the discretion of the Crown was exercised through that one of the Courts in which the Sovereign is supposed to be personally present: see 3 Bl. Com. 110, 132; 4 Mod. 340; *Reg.* v. *Cowle*, Burr. 855; Tapping 4; Shortt 223. For this reason it is still in England only granted on application to the Q. B. D. being considered one of the flowers of the old Court of Queen's Bench, now belonging to the Q. B. D.: *Glossop* v. *Heston Local Board*, 12 Ch. D. 115-116. The discretion which the Court possessed was not an arbitrary but a judicial discretion: see *Reg.* v. *Wigan*, 1 App. Cas. 622; but was only exercised where there was no other effectual remedy: *Rex.* v. *University of Cambridge*, 1 W. Bl. 552; *Re Barlow*, 30 L. J. Q. B. 271; *Rex.* v. *Halls*, 3 A. & E. 497. Prerogative writ.

In Ont. the Court of Q. B. had no special jurisdiction in the matter; and all the Divisions of the High Court have the same jurisdiction that any of the Courts formerly existing had: see sec. 20 of the Act, *Re Stratford & Huron Railway and County of Perth*, 38 U. C. Q. B. 156, *per* Moss, J.A., and *Board of Education, Napanee*, v. *Napanee*, 29 Gr. 395; *Re Paris Skating Rink Co.*, 6 Ch. D. 731.

Of the writs of mandamus of the second kind there are examples under particular statutes, but of special importance, are two, viz.: (1) the mandamus authorized under the Imp. Act, 17 & 18 Vict. c. 125, s. 69, adopted here as C. S. U. C., c. 23, s. 1, now embodied in *Rule* 1112, and (2) the extension of that writ by the above sec. 53 (8) of the Jud. Act. Other writs of mandamus.

Rule 1112 is as follows:

The plaintiff in any action in the High Court of Justice except replevin or ejectment may indorse upon the writ and copy to be served a notice that the plaintiff intends to claim a mandamus; and the plaintiff may thereupon claim in the statement of claim, either together with any other demand which may be enforced in such action or separately, a mandamus commanding the defendant to fulfil any duty in the fulfillment of which the plaintiff is personally interested. R. S. O., 1877, c. 52, s. 4. Under Rule, 1112.

The decisions under the Act from which this *Rule* was taken (as to which see notes to *Rule* 1112 and the elaborate notes of Chief Justice Harrison in his edition of the C. L. P. Act, pp. 462 *et seq.*) somewhat limited its application, possibly by reason of some confusion of the new writ with the old prerogative writ, (though a distinction between them is made in the Act: see R. S. O. 1877 c. 52 s. 10, where the right to issue the old writ is preserved) and it would seem that the intention of the above sec. 53 (8) of the Jud. Act was to enlarge the scope of the writ which was obtainable in an action.

This enactment goes further than the previous statutes and than *Rule* 1112, and enacts that a mandamus may be granted "by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." Under the Jud. Act.

The object of this clause was probably two-fold (1) to enlarge the discretion of the Court in granting writs of mandamus, and (2) to enable the writ to be obtained on interlocutory application, and not merely as part of the judgment

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Sec. 53, (5). in an action. The latter matter possibly did not require legislation in this Province, as the Act 35 Vict. c. 14 s. 1 (now *Rule* 1124) enabled parties to obtain a mandamus on motion in Chambers.

The mandamus referred to in this section is not the old prerogative writ, "but only a mandamus which may be granted to direct the performance of some act, of something to be done, which is the result of an action where an action will lie," per Brett, L.J. in *Glossop* v. *Heston, etc.*, 12 Ch. D. 122.

Although the Court or a Judge has power to grant a mandamus on an interlocutory application, it will not be done unless the plaintiff clearly shows that he will suffer some injury by waiting for the result of the action: *In re Paris Skating Rink Co.*, 6 Ch. D. 731; *Widnes Alkali Co.* v. *Sheffield and Midland Railway's Co's Committee*, 37 L. T. N. S. 131.

Decisions as to the prerogative writ.

The perogative writ of mandamus is not interfered with by any enactment. It is preserved for the extraordinary cases where without it a party would be left without effectual remedy. See cases *supra* and *Bush* v. *Beavan*, 1 H. & C. 500; *Tp. of Moulton and Haldimand*, 12 Ont. App. 503; *Re Massey M'g Co.* 11 Ont. 444; 13 Ont. App. 446; *Reg.* v. *Lambourne Ry.*, 22 Q. B. D. 463.

It is not the appropriate remedy for the enforcement of rights arising out of contract: *Re London H. and B. Ry. and Tp. Wawanosh*, 36 U. C. Q. B. 93; *Re Hamilton and N. W. Ry. and Halton*, 39 U. C. Q. B. 93. If a mandamus be grantable in such a case it is the mandamus which may be claimed in an action under *Rule* 1112, or the above sec. 53 (8).

Formerly the existence of another remedy in Equity was not sufficient reason for refusing the writ, the Court dealing with the matter being a Court of Law only considered whether there was another specific remedy at Law: see *R.* v. *Stafford*, 3 T. R. 652: *Re Hamilton and N. W. Ry.* v. *Halton*, 39 U. C. Q. B. 93. The question was much discussed in the Court of Appeal in *Re Stratford and Huron Ry. Co. and Perth*, 38 U. C. Q. B., 112, whether after the Admin. of Justice Act 1873 (which made all the Courts auxiliary to one another) a party who disclosed a case entitling him to relief in Equity should succeed, though he had chosen to proceed in one of the Courts of Law by way of motion for a mandamus. The Court was divided, and therefore this view did not prevail.

Since the Ont. Jud. Act, by which there is but one Court administering both Law and Equity, the existence of any other remedy, legal or equitable, which the Court can apply will probably be sufficient reason for not interfering by way of the prerogative writ of mandamus.

A petition of right has been considered to be other appropriate remedy: *Reg.* v. *Commissioners of Inland Revenue*, 32 W. R. 543.

Where a peremptory mandamus is granted the decision is subject to review: *Reg.* v. *Churchwardens of All Saints*, 1 App. Cas. 611: *Reg.* v. *Bangor*, 18 Q. B. D. 349, 360. A mandamus will not be granted against a public body when the performance of the duty sought to be enforced is impossible by reason of want of funds: *Re Bristol and Somerset Ry.*, 3 Q. B. D. 10. See *Atty.-Gen.* v. *Dorking*, 20 Ch. D. 595.

Practice.

As to the practice on motions for mandamus, see notes to *Rules* 1124 and 1134.

When a mandamus is granted, as to the return thereto, and practice thereon, see *Rules* 1120-1123 and notes.

Motions under this section in an action are made in Court, but in the case of a mandamus provision is made for a summary application in Chambers: see *Re Brookfield, etc.*, 12 P. R. 485, and *Rules* 1117, 1124 and 1134.

Injunctions.

Injunctions—*Scope of the Act*—The meaning of the words "just and convenient" and whether they have enlarged the powers of the Court, has been considerably discussed.

Scope of enactment as to injunctions.

An injunction may be granted where the Court thinks that it is just and convenient: *Thorley's Cattle Food Company* v. *Massam*, 6 Ch. D. 582; *Hinrichs* v. *Berndes*, W. N. 1878, 11; *Saxby* v. *Easterbrook*, 3 C. P. D. 339; *Re Cambrian Mining Co.*, 29 W. R. 881, and the words of the section rather enlarge than

diminish the arm of the Court in respect of injunction: *per* Fry, J., in *Thomas* v. *Williams*, 43 L. T. N. S. 94; 49 L. J. Chy. 605. But it is with regard to settled legal reasons or principles that the Court will decide what is just and convenient: *Beddow* v. *Beddow*, 9 Ch. D. 89; *Shaw* v. *E. of Jersey*, 4 C. P. D. 359; *Gaskin* v. *Balls*, 13 Ch. D. 324; *Fletcher* v. *Rogers*, 27 W. R. 97; *Aslatt* v. *Corporation of Southampton*, 16 Ch. D. 143; and this sub-section does not in the least alter the principles upon which the Court should act: *Day* v. *Brownrigg*, 10 Ch. D. 294, and does not empower the Court to grant an injunction in a case where before the Act the party applying would have had no remedy either at Law or in Equity: *N. London Ry. Co.* v. *Great Northern Ry. Co.* 31 W. R. 490; 48 L. T. N. S. 695; 52 L. J. Q. B. 380; W. N. 1883, 33; *Banner* v. *G. W. Ry.* 24 Ch. D. 1. See also *Robinson* v. *Pickering*, 16 Ch. D. 660. Sec. 53, (8).

In *London & Blackwell Ry. Co.* v. *Cross*, 55 L. J. Chy. 313, it was held that the enlarged powers as to injunctions given by this section did not enable the Court to restrain a person from proceeding for compensation under the Lands Clauses Act, though the claim be futile or vexatious and made in the name of a third party without his authority. The Court acts in such case on the ground that its process is being abused.

There is no right to restrain the removal of exigible goods where there is no subsisting judgment or order under which execution might be issued: see *Newton* v. *Newton*, 55 L. J. Pro. 13; nor the alienation of her separate property by a married woman pending an action against her to recover a debt: *Nat. Prov. Bank* v. *Thomas*, 24 W. R. 1013.

No Court will issue an injunction where if the thing sought to be restrained is allowed to go on, no legal injury is done to any one: *per* Brett, L.J.: *N. London Ry. Co.* v. *G. N. Ry. Co.*, 48 L. T. N. S. 696.

In *Street* v. *Union Bank of Spain and England*, 30 Ch. D. 156, an injunction restraining the use of the telegraphic name "Street London" was refused, it being held that defendants had done no injury, and that the matter was simply one of inconvenience, which the Court had no jurisdiction to restrain, though mistakes had occurred and plaintiff's telegrams had been received and opened by defendants.

But the Court has jurisdiction to grant an injunction to give effect to a legal right, and the only limit to such jurisdiction then is, that it shall be just and convenient to make the order: *Corporation of Cork* v. *Rooney*, 7 L. R. Ir. 191. To use the words of Jessel, M.R., in *Aslatt* v. *Corporation of Southampton* (*supra*) at p. 148: "Of course the words 'just and convenient' do not mean that the Court is to grant an injunction simply because the Court thinks it convenient. It means that the Court should grant an injunction for the protection of rights, or for the prevention of injury according to legal principles. The moment it is found that there is a legal principle, that a man is about to suffer serious injury and that there is no pretence for inflicting that injury upon him, the Court ought to interfere."

The granting of an injunction to restrain the doing of a particular thing is an act dependent on the discretion of the Court and in exercising its discretion the Court will consider amongst other things whether the Act complained of will produce injury to the applicant, whether the injury can be atoned for by damages, and whether the damages must be sought in successive suits or may be obtained once for all: *Doherty* v. *Allman*, 3 App. Cas. 709.

As to the term of imprisonment of persons in contempt for breach of an order of the Court: see *Re Davies*, 21 Q. B. D. 236.

The right to an injunction to restrain trespassers formerly depended on whether the person sought to be restrained was in possession or not, and if in possession whether he was a mere trespasser or acted under colour of right: see Kerr on Injunctions 289, *Loundes* v. *Bettle*, 33 L. J. Ch. 451; 10 Jur. N. S. 226; *Stansford* v. *Hurlstone*, L. R. 9 Chy. 116. But the Canadian Legislature long since dealt with this difficulty by enacting (20 Vict. c. 56, s. 4; Con. Stat. U. C. c. 12, s. 27; R. S. O. c. 40 s. 39) that "the Court may grant an injunction to stay waste in a proper case notwithstanding that the party in possession claims by an adverse legal title." The enactment in the above clause 53 (8) is to the same effect. Restraining trespassers.

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Sec. 53, (8). In *Anon* W. N. 1876, 38, an *ex parte* application for an injunction restraining a man from trespassing with a horse and cart was refused, the Judge remarking that "injunctions are not ordinarily granted for mere trespass unless serious injury is threatened to the property." On a fresh application being made in this case, after notice to the defendant, no order was made on the defendant consenting that damages should be assessed up to the date of the trial: *Makin* v. *Barrow*, *ib.* 165.

Interlocutory injunctions. *Interlocutory Injunctions.*—The office of an interlocutory injunction is simply to retain matters in *statu quo* till the trial; *Erie and Niagara Ry. Co.* v. *G. W. R. Co.*, 21 Gr. 171; and the Court will not determine legal rights on such an interlocutory application: *G. T. Ry. Co.* v. *Credit Valley R. Co.*, 26 Gr. 572. See also *Lybbe* v. *Harte*, W. N. 1883, 127; and *Attenborough* v. *London, etc., Telephone Co.*, W. N. 1884, 2, where the Court declined to consider the questions involved till the hearing.

The Court will not by an interlocutory order interfere on behalf of one party in a way which might injure the other in case he should succeed: *Hill* v. *Kirkwood*, 28 W. R. 358; 42 L. T. N. S. 105; *Evans* v. *Puleston*, W. N., 1880, 127.

A plaintiff was held not entitled to have matters kept in *statu quo* by an injunction, not merely until the trial, but until the case could be heard by the Court of Appeal, where the decisions in Courts of first instance were against the plaintiff, and therefore unless time was given to take the case to the Court of Appeal he would be without substantial relief: *Wyld* v. *McMaster*, 4 Ont. 717.

The Court may interfere by mandatory injunction on an interlocutory application, but the right must be very clear indeed: *Toronto Brewing and Malting Co.* v. *Blake*, 2 Ont. 175; *Bonner* v. *G. W. Ry Co.*, 24 Ch. D. 10. A mandatory injunction to pull down buildings will not be granted upon an interlocutory application: *Johnston* v. *Royal Courts of Justice*, W. N. 1883, 5.

Any injunction which can be granted by interlocutory order, can *a fortiori* be granted at the trial: *Beddow* v. *Beddow*, 9 Ch. D. 93.

As to the mode of disposing of the costs where a party obtains the relief he seeks on an interlocutory motion, see *Sonnenschein* v. *Barnard*, 57 L. T. N. S. 712.

The plaintiff must shew upon his own material a *prima facie* right to the injunction, otherwise it will not be granted, however much the balance of convenience may be in favor of granting it: *Société Anonyme, etc.*, v. *Tilghman, etc.*, 25 Ch. D. 1.

Balance of convenience. The Court on an interlocutory application for an injunction should consider the balance of convenience, and if on the one hand irreparable injury may be caused by withholding the injunction, while on the other hand any injury occasioned by the injunction may be compensated for by damages, the injunction should be granted: *Corporation of Cork* v. *Rooney*, 7 L. R. Ir. 191; see also *Atty-Gen.* v. *Dorking*, 20 Ch. D. 595; *Bonner* v. *G. W. Ry. Co.*, 24 Ch. D. 10; and *Mason* v. *Grand Junction Ry. Co.*, 26 Gr. note p. 289; *Grafton* v. *Watson*, 51 L. T. N. S. 141; 27 Ch. D. 43; *Walker* v. *Clarke*, 56 L. T. N. S. 111; 35 W. R. 245; *Hamilton, etc., Road Co.* v. *Raspberry*, 13 Ont. 466.

In patent cases. The principles on which the Court ought to act in determining whether to grant an interlocutory injunction to restrain an alleged infringement of a patent, or only to require the defendant to keep an account, were discussed in *Plimpton* v. *Spiller*, 4 Ch. D. 286.

Mandatory injunctions. *Mandatory Injunctions.*—These may be granted as formerly: see *Strelley* v. *Pearson*, 28 W. R. 752; *Mullins* v. *Howell*, 11 Ch. D. 763; *Smith* v. *Smith*, L. R. 20 Eq. 504; *Gaskin* v. *Balls*, 13 Ch. D. 324; *Hermann Loog* v. *Bean*, 26 Ch. D. 306; but an injunction will not be granted where the proper remedy is a prerogative writ of mandamus: *Glossop* v. *Heston Loc. Board*, 12 Ch. D. 120; *Attorney-Gen.* v. *Dorking*, 20 Ch. D. 595.

For a statement of the function of a mandatory injunction, see *Glossop* v. *Heston*, 12 Ch. D. 120.

Miscellaneous Decisions.—The following are further decisions since the Jud. Act, illustrating the principles on which the Court acts in regard to injunctions: Sec. 53, (8). Miscellaneous cases.

The Court has no jurisdiction to prevent a foreign sovereign from removing his property in this country, though it be an article made in infringement of a patent; and a foreign sovereign who submits to be made a defendant in an action for the purpose of empowering the Court to make an order does not thereby part with any of his rights: *Vavasseur* v. *Krupp*, 9 Ch. D. 351. Foreign sovereign.

In the absence of any sufficient equity to justify it the Court will not restrain by injunction a plaintiff from proceeding in a foreign Court. Mere hardship or inconvenience will not be sufficient reason: *Fletcher* v. *Rodgers*, 27 W. R. 97, but where a foreigner has appeared in an English Court the Court has a discretion to restrain him from litigating the same subject matter in his own country: *Dawkins* v. *Simonetti*, 29 W. R. 228. Proceedings in foreign Courts.

In *Ex parte McPhail*, 12 Ch. D. 632, Jessel, M.R., refused leave to serve a writ out of the jurisdiction on the ground that the plaintiff could have as effectual a remedy by application to the local Court. As to providing for an injunction where the writ is to be served out of the jurisdiction, see *Young* v. *Brassey*, 1 Ch. D. 277.

Property which is the subject of an action may be preserved under *Rule* 1135, by means of an injunction: *Strelley* v. *Pearson*, 43 L. T. N. S. 155. Preservation of property.

In *Velati & Co.* v. *Braham & Co.*, 46 L. J., C. P. 415, which was an action against a jeweller for the return of goods deposited with him, the defendant was ordered to deliver up the goods to an officer of the Court to abide the event of the action.

In London and County Banking Co. v. *Lewis*, 21 Ch. D. 490, an equitable mortgagee who had commenced an action for foreclosure obtained an injunction restraining the defendant from parting with the legal estate.

In *Anon*, W. N., 1876, 21, a defendant was restrained from parting with a bill of exchange. See also *Anon*, *ibid* 37.

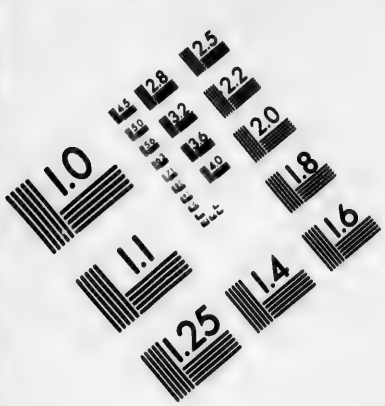
Injunctions have been granted restraining the committee of a club from acting improperly in expelling a member: *Fisher* v. *Keane*, 11 Ch. D. 353; *Labouchere* v. *Earl of Wharncliffe*, 13 Ch. D. 346; see also *Dawkins* v. *Antrobus*, 17 Ch. D. 615; *Foster* v. *Harrison*, W. N. 1881, 171; restraining the publication of libels: *Thorley Cattle Food Co.* v. *Massam*, 14 Ch. D. 763; *Saxby* v. *Easterbrook*, 3 C. P. D. 339; *Hayward* v. *Hayward*, 34 Ch. D. 198; or slanderous oral statements injuriously affecting property or trade: *Hermann Loog* v. *Bean*, *sup.*; or tending to injure a friendly society or a joint stock company: *Hill* v. *Hart Davies*, 31 W. R. 22; 47 L. T. N. S. 82. Though the jurisdiction in the case of such libels is clear, even on an interlocutory application, the Court only acts in a strong case and in general not unless satisfied that the statements complained of are untrue: *Quartz Hill Gold Mining Co.* v. *Beall*, 20 Ch. D. 501, and are clearly libellous; nor where there would be great difficulty in framing an order so as not to prejudice the trial: *Liverpool, etc., Stores Assocn.* v. *Egerton*, 57 L. T. N. S. 770; 58 L. T. N. S. 204; 37 Ch. D. 170. See also *Hinrichs* v. *Berndes*, W. N. 1878, 11; and *Liverpool, etc.* v. *Smith*, 37 Ch. D. 170, where an injunction was refused. Restraining action of clubs. Libels.

The Court has jurisdiction to restrain the commission of acts which if committed would be a contempt of Court, *e. g.*, the threatened publication of a statement of claim with comments, as calculated to prevent a fair trial: *Kitcat* v. *Sharp*, 31 W. R. 227; 48 L. T. N. S. 64; publication of advertisements warning the public that an invention claimed by the plaintiff is an infringement of defendant's patent rights: see *Barney* v. *United Telephone Co.*, 28 Ch. D. 394. Threatened contempt.

To maintain an action *quia timet* to restrain an apprehended injury the plaintiff must prove imminent danger of a substantial kind, or that the apprehended injury, if it does come, will be irreparable: *Fletcher* v. *Bealey*, 28 Ch. D. 688. Apprehended injury.

An injunction may be granted restraining an act, though a statute imposes a penalty for its commission: *Hamilton, etc., Road Co.* v. *Raspberry*, 13 Ont. 466.

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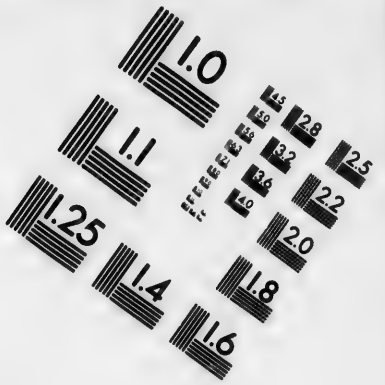
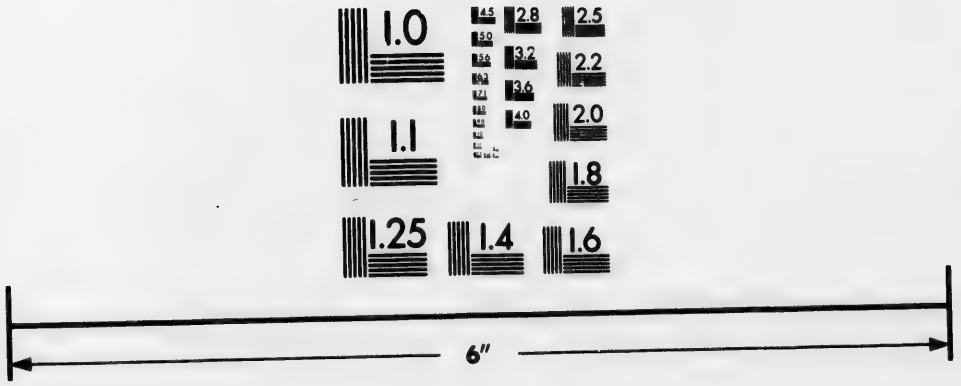
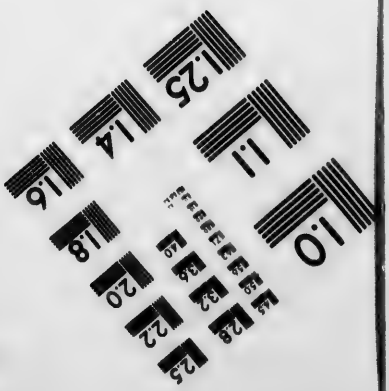


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Sec. 53, (8). An injunction is granted against a person not a party, only when he is agent of a party, or in cases where he is doing something which amounts to contempt of the Court or its process: *Re Gay & Gay* v. *Hancock*, 80 L. T. Jour. 392.

Arbitrator. The Court will restrain an arbitrator from acting in any case in which he is, in the opinion of the Court, unfit or incompetent to act: *Malmesbury* v. *Budd*, 2 Ch. D. 89; *Beddow* v. *Beddow*, 9 Ch. D. 89. In *Nicholas* v. *Bracachis*, 1 P. D. 72, (see also *The Horlock*, 36 L. T. N. S. 226), the Court restrained all persons from dealing with shares in a ship forming part of the estate of a deceased p[illegible]. See also *Boyle* v. *Bettws Llantwit Colliery Co.*, 2 Ch. D. 726.

Trade marks. An injunction will be granted to restrain the exportation of goods under a trade mark likely to deceive a foreign though not a home purchaser: *Orr Ewing* v. *Johnston*, 13 Ch. D. 434.

Landlord and tenant. Where an injunction was applied for to restrain a landlord from exercising his [illegible] of distress, until the determination of an action brought by the tenant against the landlord, to try his right to the rent, the injunction was granted for a fortnight, and continued only if the rent should in the meantime be paid into Court: *Shaw* v. *Earl of Jersey*, 4 C. P. D. 120, 359.

An injunction will not be granted at the suit of a landlord or reversioner to restrain a trespass or nuisance not of a permanent character, or not actually injuring the reversion: *Cooper* v. *Crabtree*, 47 L. T. N. S. 5; 51 L. J. Chy. 189.

In *Blewitt* v. *Dowling* W. N. 1875, 202, an action of ejectment against a landlord, the plaintiff was restrained from issuing writs against the tenants. In *Drakes Patent Concrete* v. *Dower*, *Ib.* 230, an order was granted restraining the defendant from pulling down partially erected houses. In *Fenner* v. *Bedford*, *Ib.* 238, an order was made on an *ex parte* application restraining the continuance of trespasses and destruction of property, and liberty was given to serve the order on any persons found on the premises as well as the defendant. In *Tozer* v. *Walford*, *Ib.* 250, a defendant who had covenanted not to do any act dangerous to his co-tenants, was restrained from working an engine, in consequence of the working of which the plaintiff's insurance company had refused to continue his insurance, whereby he had become liable under a covenant with his superior landlord.

An injunction restraining a landowner from taking proceedings before Justices of the Peace on an irregular notice under a Drainage Act, was granted as shorter and cheaper than a prohibition: *Hedley* v. *Bates*, 13 Ch. D. 498; but this was because the Court was seised of the case *aliunde*. Where it is a mere case of prohibition and the Court is not called upon to decide the question on other grounds, between the same parties, there is no reason for changing the proceeding from prohibition to injunction: *Stannard* v. *Vestry of St. Giles*, 20 Ch. D. 196, 197.

It was held that an action for an injunction may be commenced against a Local Board without the month's notice required by the Public Health Act, in all cases where before the Judicature Act, a bill would have been sustained in Chancery for an injunction; and although damages are claimed by way of subsidiary relief: *Flower* v. *Low Leyton Local Board*, 5 Ch. D. 347; and when the action is *bona fide* brought for an injunction, damages may be awarded in lieu of the injunction, though no notice of action has been given: *Chapman* v. *Auckland*, 23 Q. B. D. 294.

Where if the defendant succeeded in the House of Lords her success would be useless unless the fund was protected in the meantime, it was held that the injunction ought to be continued pending the appeal: *Polini* v. *Gray*; *Sturla* v. *Freccia*, 12 Ch. D. 438.

Delay. Delay is, in general, no bar to an injunction in aid of a legal right, unless the legal remedy is barred by the lapse of time: *Fullwood* v. *Fullwood*, 47, L. J. Chy. 459; but where buildings (which transgressed the provisions of restrictive covenants) had been allowed to remain for five years without complaint, an injunction was refused: *Gaskin* v. *Balls*, 13 Ch. D. 324.

Hearing *in camera*. In *Mellor* v. *Thompson*, 31 Ch. D. 55, an injunction motion was heard *in camera* on the ground that a public hearing would defeat the object of the action.

As to awarding damages with, or in lieu of, an injunction, see sec. 53 (9). **Sec. 53, (8).**

Undertaking as to Damages.—An interlocutory injunction ought to be conditional upon an undertaking as to damages: *Graham* v. *Campbell*, 7 Ch. D. 491; *Corp. of Cork* v. *Rooney*, 7 L. R. Ir. 191; *Re Johnston ex p. Abrams*, 50 L. T. N. S. 184. Damages.

An order having been made restraining the defendant from proceeding with certain buildings, he appealed, offering an undertaking to abide by any order the Court might make at the hearing as to pulling down or altering any buildings erected by him; the Court of Appeal, being of opinion that the right to an interlocutory injunction was not established, discharged the order, taking from the defendant an undertaking in the terms of his offer, but held that, without any undertaking, the Court would have jurisdiction at the trial to order the pulling down of any buildings erected after the commencement of the action, or after notice had been given to the defendant that the plaintiff objected to the building: *Smith* v. *Day*, 13 Ch. D. 651. Undertaking as to damages.

The undertaking of a married woman as to damages is sufficient: *Re Prynne*, 53 L. T. N. S. 465.

As to enforcing an undertaking as to damages, see note to *Rule* 1134.

Notice, and enforcement, of Injunctions.—A notice granting an injunction may be given by telegram. A sheriff's officer who receives such a notice should inquire by telegraph to see if it be *bona fide*: *Ex parte Langley*, 13 Ch. D. 110, in which case it was held that a London solicitor obtaining an order restraining a sale in the country ought to telegraph to his agent at the place and ask him to give notice to the persons affected. See also *Re Bryant*, 4 Ch. D. 98. A defendant is bound to obey an injunction of which he is made aware before being served with it: *Stewart* v. *Richardson*, 17 Gr. 150; and a wilful breach of the injunction may be punished by committal, even though there had been ample time to serve the order, and it had not been served: *United Telephone Co.* v. *Dale*, 25 Ch. D. 778. See *The Seraglio*, 10 P. D. 120. Notice of injunction.

Receivers.—This sub-section seems to have enlarged the right to a receiver. In *Anglo-Italian Bank* v. *Davies*, 9 Ch. D., at p. 293, Cotton, L.J., said, "Under that (the present) sub-section the Court may and does grant receivers where it never could have done so before. Thus, for instance, it has the power to grant a receiver under that section where a plaintiff has himself the power of obtaining possession at law." See also *Tillet* v. *Nixon*, 49 L. T. N. S. 598; 25 Ch. D. 238; *The Ampthill*, 5 P. D. 224, and *Gawthorpe* v. *Gawthorpe*, W. N., 1878, 91, where Jessel, M.R., considered that there was no limit to the power of the Court to grant a receiver on motion, except that it was only to be exercised where it appeared just and convenient. (In *Habershon* v. *Gill*, W. N., 1875, 231, Quain, J., had indicated an opinion that the words "just and convenient" were to be interpreted by the old practice.) Scope of the enactment as to receivers.

The former Common Law Courts had no power to appoint Receivers.

In Chancery a Receiver would not be appointed at the instance of a mortgagee having the legal estate, or other person able to obtain protection at law: *Berney* v. *Sewell*, 1 J. & W. 647; *Buxton* v. *Monkhouse*, G. Coop, 41; *Kelsey* v. *Kelsey*, L. R. 17 Eq. 495. But see now *Tillett* v. *Nixon*, 25 Ch. D. 238, and *Mason* v. *Westoby*, 32 Ch. D. 206, and note *supra*, as to the power of the Court now in all cases where it is "just and convenient."

Thus in *Pease* v. *Fletcher*, 1 Ch. D. 273, where the plaintiff was mortgagee of property, as to some of which his title was legal and as to some equitable, Bacon, V.C., on an interlocutory application, appointed a receiver for the whole. In *Truman* v. *Redgrave*, 18 Ch. D. 547, a receiver was granted on application of a legal mortgagee who was prevented by the mortgagor from taking possession, and an injunction restraining the mortgagor from interfering with the management of the business and possession of the premises. (See the form of order in that case.) So the Court has power now to appoint a receiver where the title to the property is uncertain and disputed: *Berry* v. *Keen*, 51 L. J. Chy. 912. Such cases as *Talbot* v. *Hope Scott*, 4 K. & J. 139, and *Dunn* v. *Ferrior*, L. R. 3 Chy. 719, are not now law (*ib*).

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Sec. 53, (8). An interim receiver of rents has been, however, refused to the plaintiff in an action of ejectment: *Powell* v. *Powell*, 73 L. T. Jour. 140, but granted in an action by a landlord against his tenant for recovery of land, under a proviso for re-entry: *Gwatkin* v. *Bird*, 52 L. J. Q. B. 263, and granted in *Real and Personal Advance Co.* v. *McCarthy*, 27 W. R. 706; 40 L. T. N. S. 878, an action of ejectment by a sub-mortgagee, where the property was wasting and insufficient, and the plaintiff's action had been stayed till another action by defendant against the plaintiff and others should be ready for trial.

In an action for partition, where one of the co-owners is in occupation, though not in exclusive occupation of the property, the Court has jurisdiction under this sub-section to appoint a receiver until the hearing: *Porter* v. *Lopes*, 7 Ch. D. 358. So in an action to enforce specific performance of a parol agreement to execute a bill of sale of personal chattels upon an *ex parte* motion before appearance of defendant, there being evidence of immediate danger of the chattels in question being disposed of: *Taylor* v. *Eckersley*, 2 Ch. D. 302. Where in an administration action the defendant, the sole surviving executor and trustee of the testator, had been personally condemned in costs in an action to test the validity of the will, and an execution had been issued against him, and there had been a return of *nulla bona* on the application of the present plaintiffs, who were executors of the deceased executor of the testator, who was also a creditor of the testator and a residuary legatee, a receiver of the proceeds of the sale of part of the testator's real estate, and of the rent of the other part, and of the outstanding personal estate was granted: *Gawthorpe* v. *Gawthorpe*, W. N., 1878, 91.

An interpleader issue being ordered to try the right to goods seized in execution a receiver and manager of the property may be appointed under this section instead of a sale by the Sheriff; *e. g.*, where the property was a cab business, a going concern: *Howell* v. *Dawson*, 13 Q. B. D. 67.

A simple contract creditor of a joint stock Co. cannot obtain an interim order appointing a receiver of the assets of the Co. on the ground that the Co. is insolvent, or has made an assignment of its assets: *McCall* v. *Canada Farmers' Mort. Ins. Co.*, 18 C. L. J. 117 following, *Mills* v. *Northern Ry. of Buenos Ayres Co.*, 5 Chy. 621.

As to the rights of debenture holders of a company, see *Hubbuck* v. *Helms*, 56 L. T. N. S. 232.

In a creditor's action for administration against an executrix, a decree had been made and a summons taken out for a receiver; but pending the summons the sole defendant died. The Court, on the application of the plaintiff, appointed an interim receiver, whose powers were to extend for ten days after the appointment of an administrator *de bonis non*, the plaintiff undertaking to use all possible speed in obtaining the appointment of such administrator, and to accept short notice of motion to discharge the receiver: *In re Parker, Cash* v. *Parker*, 12 Ch. D. 293.

Receivers by way of equitable execution. Receivers have till recently been often appointed as a means of enforcing judgments and reaching property not capable of being seized under an execution, *e. g.* at the instance of the plaintiff who had recovered judgment, and sued out an elegit against the debtor whose only interest in land was an equity of redemption in fee, for the protection of the property until a decree could be obtained, under which the equity of redemption could be reached: see *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275, also *Re Watkins*, 13 Ch. D. 252; and in *Re Pope*, 34 W. R. 693, without first suing out an elegit.

In Ontario the Sheriff can sell an equity of redemption.

Similarly a receiver has been appointed to reach the life interest of a married woman in stock: *Bryant* v. *Bull*, 10 Ch. D. 153; a legacy to a debtor expectant upon the death of a tenant for life: *Macnicoll* v. *Parnell*, 35 W. R. 773; a judgment debtor's interest in subsisting life insurance policies and in a charge upon land: *Beamish* v. *Stephenson*, 18 L. R. Ir. 319; moneys secured by mortgage held by the debtor who was resident out of the Province: *Parent* v. *Lortie*, 7 C. L. T. 195; and in other cases where proceedings for equitable execution are not applicable: see *Westhead* v. *Riley*, 25 Ch. D. 413; *Book* v. *Ruth*, 20 C. L. J. 193.

On such application the plaintiff was sometimes appointed the receiver. Thus a judgment creditor of a husband and wife, was upon his own application appointed receiver of the income of the wife's reversionary interest under a will: *Fuggle* v. *Bland*, 11 Q. B. D. 711. See also *Book* v. *Ruth*, *sup.*; *Hewett* v. *Murray*, 52 L. T. N. S. 380; *McGarry* v. *White*, 16 L. R. Ir. 322. Sec. 53, (8).

In *Kincaid* v. *Kincaid*, 12 P. R. 462, this was called "one of the now usual and ordinary methods of execution," and it was held to be no answer to the motion that the judgment creditor could probably make the amount of his judgment by sale of other property under common law process, but in *Manchester, etc.* v. *Parkinson*, 22 Q. B. D. 173, it was held that in the absence of any legal impediment to obtaining execution of the judgment in the ordinary course of law by *fi. fa.*, or attachment of debts, and of any special circumstances showing it to be just or convenient, an appointment of a receiver should not be made. Street, J., in *Trust & Loan Co.* v. *Gorsline*, 12 P. R. 654, refused an order in a case where a garnishing order would afford a remedy. In view of the enlarged powers of attachment under *Rule* 935, a garnishing order will in general suffice, and it has now been decided in the Chancery Division, that a receiver can only be appointed at all, since the Creditors' Relief Act, to receive and distribute in accordance with the principle of that Act: *Silvester Mfg. Co.* v. *McEachon*, 9 C. L. T. 138, and he should probably be an officer of the Court. *Kirk* v. *Burgess*, 15 Ont. 608.

Except in cases of emergency the application should be on notice. Still, in cases of emergency a receiver will be appointed *ex parte* not only before appearance: *Taylor* v. *Eckersley*, 2 Ch. D. 302; but before service of writ: *re H.'s estate*, 1 Ch. D. 276; *Colbourne* v. *Colbourne*, 1 Ch. D. 690; *Hyde* v. *Warden*, 1 Ex. D. 309: *Evans* v. *Lloyd*, W. N. 1889, 171. Practice.

In an action for the specific performance of an agreement to accept a lease of a farm in which judgment had been given for the defendant, the plaintiff having appealed, the Court of Appeal (no previous application having been made to the Divisional Court or a Judge) appointed the plaintiff receiver and manager of the farm without security, on his undertaking to abide by any order which the Court might make in the matter: *Hyde* v. *Warden*, 1 Ex. D. 309.

The plaintiff may be appointed receiver in cases of emergency: *Taylor* v. *Eckersley*, 2 Ch. D. 302; and under special circumstances; *Hyde* v. *Warden*, 1 Ex. D. 309; but not the plaintiff's solicitor: *In re Lloyd Allan* v. *Lloyd*, 12 Ch. D. 447; one of the members of a dissolved partnership in certain cases may be appointed receiver: *Sargant* v. *Read*, 1 Ch. D. 600. The manager of a mining company was appointed receiver in an action by debenture holders against the company for foreclosure: *Peek* v. *Trinsmaran Iron Company*, 2 Ch. D. 115.

An unpaid vendor of property of a company in voluntary liquidation, and unable from insolvency to carry on its works, was appointed without security or salary: *Boyle* v. *Bettws Llantwit Colliery Company*, 2 Ch. D. 726.

The receiver must, as a rule, give security, but, in case of emergency, an interim receiver will be appointed without security: *Taylor* v. *Eckersley*, 2 Ch. D. 302. Persons who are deeply interested in the proper management of a concern will not always be required to give security: *Boyle* v. *Bettws, etc.*, *Co.*, 2 Ch. D. 726.

Where security is required, the receiver has no title until his security is perfected: *Edwards* v. *Edwards*, 2 Ch. D. 291; but he is liable to account for all moneys coming to his hands in that capacity at any time, and his sureties are responsible for any moneys: *Smart* v. *Flood*, 49 L. T. N. S. 467.

A defendant may apply for an injunction and a receiver: *Sargant* v. *Read*, 1 Ch. D. 600, in which case both plaintiff and defendant applied, and the plaintiff was appointed personally, on the ground that he was the most suitable person, as the business required almost professional skill. Formerly the defendant could not apply before decree: *Robinson* v. *Hadley*, 11 Beav. 614.

The appointment of a receiver is in the discretion of the Court, and the Court of Appeal will not, as a rule, interfere with that discretion: *Nothard* v. *Proctor*, 1 Ch. D. 4.

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Sec. 53, (9, 10).

A person who is not a party to an action is not entitled to apply by motion for payment of money to him by a receiver appointed in the action, even though his claim is made in respect of a debt properly payable out of the funds in the receiver's hands: *Brocklebank* v. *East London Railway Company*, 12 Ch. D. 839; see *Neate* v. *Pink*, 15 Sim. 450; 3 Mac. & G. 476.

Court may award damages, etc.

9. In all cases in which the Court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, the Court, if it thinks fit, may award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be ascertained in such manner as the Court may direct, or the Court may grant such other relief as it may deem just. R. S. O. 1877, c. 40, s. 10.

Taken from Lord Cairn's Act 21 & 22 Vict. c. 27, s. 2 (6). This section does not enable the Court to grant damages in a case where before the Act damages were not recoverable, *e. g.*, in the case of an oral agreement not capable of specific performance in Equity, and in respect of which the defendant, in an action at law for damages, might have successfully pleaded the Statute of Frauds: *Re Northumberland Avenue Hotel Co., Sully's Case*, 54 L. T. N. S. 76, 33 Ch. D. 16. See also *Lavery* v. *Pursell*, 37 W. R. 163.

Where a plaintiff has established his right to a perpetual injunction, the Court has no power to oblige him to accept damages in lieu of an injunction: *Krehl* v. *Burrell*, 11 Ch. D. 146, and *Greenwood* v. *Hornsey*, 33 Ch. D. 471, in which *Holland* v. *Worley*, 26 Ch. D. 378, was distinguished. See also *Allen* v. *Ayres*, W. N. 1884, 242.

When the wrongful act has ceased before trial the Court may under this Act in lieu of an injunction, which would be useless, assess at the trial the damages from the commencement of the wrongful act, including damages accrued since the writ: *Fritz* v. *Hobson*, 14 Ch. D. 542, 557.

Where the wrongful act has been discontinued before suit without the plaintiff's knowledge it was held that the Court had no jurisdiction under the above enactment to make a decree for damages: *Brockington* v. *Palmer*, 18 Gr. 488.

See also *White* v. *Boby*, 37 L. T. N. S. 652; *Kino* v. *Rudkin*, 6 Ch. D. 160; *National Provincial Plate Glass Ins. Co.* v. *Prudential Ass. Co.*, 6 Ch. D. 761; *Krehl* v. *Burrell* 7 Ch. D. 551; *Fritz* v. *Hobson*, 14 Ch. D. 542; *Rock Portland Cement Co.* v. *Wilson*, 52 L. J. Chy. 217; *Sayers* v. *Collyer*, 28 Ch. D. 103, and *Serrao* v. *Noel*, 15 Q. B. D. 549.

Purchaser not affected by irregularities in orders of Court.

10. An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, whether with or without notice be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service. 49 V. c. 20, s. 20.

See *Calvert* v. *Godfrey*, 6 Beav. 97; and *Blean* v. *Blean*, 10 Ont. 693.

11. In questions relating to the custody and education of infants, the Rules of Equity shall prevail. 44 V. c. 5, s. 17 (9). Sec. 53, (11). Infants.

Sar. as English J. A. 1873 s. 25 (10).

The Common Law rule upon these subjects is thus stated in *Re Andrews*, L. R. 8 Q. B., at p. 158:—"It appears to have been the invariable practice of the Common Law Courts, on an application for a *habeas corpus* to bring up the body of the child detained from the father (and the case would be the same as to a testamentary guardian, or guardian appointed by the Court; *Wellesley* v. *Beaufort*, 2 R. & M. 639) to enforce the father's right to the custody, even against the mother, unless the child be of an age to judge for himself, or there be an apprehension of cruelty from the father, or contamination in consequence of his immorality or gross profligacy. If the infant be of an age to elect for himself, the Court will merely interfere so far as to get it free from illegal restraint, without handing it over to anybody. This was the course adopted in *Rex* v. *Delaval*, 3 Burr. 1435, in the case of a girl eighteen years of age, who was delivered from a custody considered illegal, and left at liberty to go where she pleased. But, in the absence of any right of choice, the Court goes further, and transfers the infant to the proper legal custody. The right to such an election, it has now been clearly decided, depends upon age alone, and not on mental capacity: see *Reg.* v. *Clarke*, 7 E. & B. 186; and it may be taken as settled that no such choice can be made, at all events by a female infant, under the age of sixteen." Common Law rule.

The English Court of Chancery had an original jurisdiction, springing from the right of the Crown as *parens patriæ* over the persons and property of infants, to interfere with the Common Law rights of the father, in the interest of the infant on the ground of the father's cruelty, immorality, etc., (as to the father's rights in such case see further notes below, and *Swift* v. *Swift* 6 N. R. 137; 34 L. J. Chy. 209, 394); or of his agreement, express or implied, to waive his rights (see Simpson on Infants, 136 *et seq*). But this jurisdiction was not exercised except where the Court had the means of applying property for the use and maintenance of the infant (*Ib.*) Equity rule.

Under the Judicature Act, all the Divisions of the High Court have now jurisdiction with regard to the care and custody of infants; and, in the exercise of that jurisdiction, the rules of Equity are to prevail. Under Judicature Act.

In *Re Smart*, 12 P. R. 312, it was held that a more comprehensive adjudication could be had upon a petition than by *habeas corpus* proceedings, and in the interest of the infants and all concerned a petition was directed to be filed. This was affirmed on appeal by the Divisional Court with the variation that the *habeas corpus* proceedings should run concurrently with the petition, 12 P. R. 435; and afterwards by the Court of Appeal, but only on the ground that there was a waiver of objection by filing a petition. But for this the opinion of the Court was that the form of remedy chosen being competent and regular the applicant could not be compelled to adopt another mode of procedure: 12 P. R. 635. The Supreme Court quashed an appeal by the mother from the decision that the two proceedings should be tried together: see 9 C. L. T. 260.

A father has a legal right to control and direct the education and bringing up of his children until they attain the age of 21, even though they are wards of Court, and the Court will not interfere with him in the exercise of his paternal authority except (1) where by his gross moral turpitude he forfeits his rights, or (2) where he has by his conduct abdicated his paternal authority, or (3) where he seeks to remove his children being wards of Court out of the jurisdiction without the consent of the Court; *Re Agar Ellis*, 24 Ch. D. 317. *Prima facie* rights of the father.

Before the jurisdiction of the Court to deprive a father of the guardianship of his children can be called into action, the Court must be satisfied that he has so conducted himself or placed himself in such a position as to render it not merely better for the children, but essential to their safety or welfare in some very serious and important respect, that the father's ordinary rights should be interfered with: see *Re W———*5. N. R. 363.

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Sec. 33,(11). The affidavits of the mother and others, in answer to a rule for a *habeas corpus* by a father to remove his child (a boy of nine years) from the custody of the child's maternal grandfather, disclosing facts which shewed the applicant to be a person of intemperate and vicious life, and in the habit of using gross and disgusting language, as well as personal violence to his wife,—the Court declined to interfere, the present custody of the child being unobjectionable: *In re Goldsworthy*, 2 Q. B. D. 75. So the Court, in the interest of the children, declined to interfere where it was contended that there had been a gross breach of marital duty on the husband's part, he not desiring or intending that his wife should live with him, or if she insisted on doing so he declined to meet or speak to her except at meals, and when the interests of the children required: *Re Elderton*, 25 Ch. D. 220.

See also *Re Ferguson*, 8 P. R. 556, where the father being imbecile the Court refused to take a child out of the custody of its grandmother and her brother-in-law.

The father, a medical officer in the army and who was under a covenant to allow his wife access to his children, was held entitled to take his children with him wherever his duties called him: *Hunt* v. *Hunt*, 28 Ch. D. 606.

A wife who left her husband's home without reasonable cause, taking with her their only child, was ordered forthwith to deliver the child into the custody of the father with liberty to either party to apply in Chambers as to access: *Constable* v. *Constable*, 34 W. R. 649.

It is no answer to a *habeas corpus* for the production of a child that the child has been delivered by the defendant to some third person who has conveyed the child out of the jurisdiction before the writ issued,—if the delivery of such child were made to such third person after the child had been demanded by the parent from the defendant: *Reg.* v. *Barnardo*, 23 Q. B. D. 305.

Modification by R. S. O. 1877, c. 130. In modification of the father's rights, 18 Vict. c. 126, s. 1 (R. S. O. 1877, c. 130) was passed, by which it was provided that the Courts of Law or Equity, or any Judge of such Courts, on the application of the mother might make order allowing her access to the infant "at such times and subject to such regulations as such Court or Judge thinks convenient and just; and if such infant is within the age of *twelve* years may make order for the delivery of such infant to the" mother to remain in her care and custody "until such infant attains the age of *twelve* years, subject to such regulations as such Court or Judge may direct; and such Court or Judge may also make order for the maintenance of such infant by payment by the father thereof, or by payment out of any estate to which such infant may be entitled of such sum or sums of money from time to time as according to the pecuniary circumstances of such father or the value of such estate, such Court or Judge thinks just and reasonable."

The Imp. Act 36 & 37 Vict. c. 12, was not very different. See that Act and *Re Ethel Brown*, 13 Q. B. D. 614.

In *Re Smart*, 11 P. R. 482, it was held to be a good return to a *habeas corpus* obtained on the father's motion to say that the infants were under 12 years, that being the age mentioned in the statute and that there was no need for a petition on the part of the mother, as she already had the custody of the children.

By R. S. O. 1887, c. 137. In 1887 was passed the Act now R. S. O. c. 137 s. 1, by which R. S. O. 1877, c. 130 s. 1, was superseded, and it was enacted as follows:

Court may make order as to custody and right of access to infants. 1.—(1) The High Court or Surrogate Court, or any Judge of either Court, may, upon application of the mother of an infant (who may so apply without next friend) make such order as the Court or Judge sees fit regarding the custody of the infant, and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may afterwards alter, vary or discharge the order on the application of either parent, or, after the death of either parent, or any guardian under the Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as the Court or Judge may think just.

(2) The Court or Judge may also make order for the maintenance of the infant by payment by the father thereof, or by payment out of any estate to which the infant is entitled, of such sum or sums of money from time to time as according to the pecuniary circumstances of the father or the value of the estate the Court or Judge thinks just and reasonable. 50 V. c. 21, s. 1. Sec. 33,(11.) Order as to maintenance.

Sec. 2 provides (as did also R. S. O. 1877, c. 130 s. 4) as follows :—

2. "No order directing that the mother shall have the custody of or access to an infant shall be made by virtue of this Act, in favour of a mother against whom adultery has been established by judgment in an action for criminal conversation at the suit of her husband against any person." R. S. O. 1877 c. 130 s. 4.

The first section of this Act is taken from the Imp. Act 45 & 50 V. c. 27, s. 5.

It will be noticed that this Act, unlike the previous Act, mentions no age within which the mother may be given the custody of her children. In case application is made under the Act the matter is left entirely open for the Judge to deal with the infants as may seem best for them: see *Re Witten*, 57 L. T. N. S. 336, W. N. 1887, 167; *Skinner* v. *Skinner*, 36 W. R. 912.

The Act does not affect the right of a father to decide as to the religious education of his children: sec. 22, and see *Re Scanlan*, 36 W. R. 842.

Where a father had secreted two of his children, aged 8 and 11, from their mother to prevent their being brought up in the Roman Catholic religion, he was on petition of the mother under R. S. O. 1887, c. 130, directed to disclose the whereabouts of the younger child, and access by the mother was provided for. No order was made as to the other child, who was nearly 12: *Re Keith*, 7 P. R. 138.

The best interests of the children were considered on petitions under the former Act and will be under the present Act. In *Re Murdoch*, 9 P. R. 132, the Court refused under the circumstances to remove a child from its mother's custody, but allowed the father to have access. In *Re Scott*, 8 P. R. 58, a child was allowed to remain with a stranger, having been originally placed there by the mother, the father being dead, and the mother having married again and being in poor circumstances. See also *Re Dickson*, 12 P. R. 659.

Under enactments in England allowing an application by a mother it was held that a married woman may petition in her own name without naming a next friend: *Re Groom*, 7 Hare, 83; and this is expressly provided by R. S. O., c. 137, s. 1; or in *forma pauperis*: *Ex parte Hawkewill*, 3 D. M. & G. 116; and that the order may be made *ex parte* if the necessity of the case requires it: *Re Taylor*, 11 Sim. 178.

In exercising its general jurisdiction the conduct of the mother is taken into consideration: *Re Taylor*, 11 Sim. 178; *Re Bartlett*, 2 Collyer, 661; *Shilleto* v. *Collet*, 8 W. R. 683; *Re Winscom*, 2 H. & M. 541; *Re Shaw*, referred to in 11 Sim. 182-195; *Re Halliday*, 17 Jur. 56.

As to the custody of illegitimate children: see *Re Holshed*, 5 P. R. 251; *Re Brandon*, 7 P. R. 347; *Re Smith*, 8 P. R. 23.

The Court has jurisdiction to summarily order the personal attendance before it of any persons who are supposed to be in a position to give information as to the place of concealment of wards of Court: *Rosenberg* v. *Lindo*, 48 L. T. N. S. 478.

On a *habeas corpus* under R. S. O. c. 70, s. 6, the Court may direct evidence to be taken *viva voce* to examine into the truth of the return: *Re Smart*, 12 P. R. 2.

Guardians.

R. S. O. c. 137 s. 13, repealing R. S. O. 1877, c. 132 ss. 9 and 10, is as follows :— On death of father, mother to be guardian alone, or jointly with others.

13.—(1) On the death of the father of an infant, the mother, if surviving, shall be the guardian of the infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father.

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Sec. 53,(12). (2) Where no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is, or are, dead, or refuses or refuse to act, the High Court or Surrogate Court, or any Judge of either Court, may from time to time appoint a guardian or guardians to act jointly with the mother, as such Court or Judge shall see fit. 50 V. c. 21, s. 2.

Mother may appoint guardian in certain cases. 14.—(1) The mother of an infant may, by deed or will, appoint any person or persons to be guardian or guardians of the infant after the death of herself and the father of the infant (if the infant be then unmarried), and where the guardians are appointed by both parents they shall act jointly.

(2) The mother of an infant may, by deed or will, provisionally nominate some fit person or persons to act as guardian or guardians of the infant after her death jointly with the father of the infant, and the Court or a Judge, after her death, if it be shown to the satisfaction of the Court or a Judge that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians, who shall thereupon be empowered to act as aforesaid, or make such other order in respect of the guardianship as the Court or Judge shall think right. 50 V. c. 21, s. 3.

This Act is in the same terms as Imp. Act 49 & 50 Viot., c. 27.

Religious education of infants. As to the father's right to control the religious education of his children, recognized by the above Act, (sec. 22,) see *Re Agar Ellis*, 10 Ch. D. 49, where the father was held not to have forfeited his right by promising his wife on their marriage that their children should be brought up of her religion: see also *Re Besant*, 11 Ch. D. 508.

In *Condon* v. *Vollum*, 57 L. T. N. S. 154, a child was allowed to be brought up of its mother's religion, where it was maintained by her and the father was indifferent and made opposition only for the sake of vexing the mother. It was also held that the father's living in adultery was not a relevant fact to the question of his right to control the religious education of his child.

A Protestant on his marriage with a Roman Catholic agreed that their children should be brought up as Roman Catholics, but a son should when old enough be permitted to change his religion. A boy was born, baptised and brought up a Roman Catholic. The father died intestate only expressing a wish that his son should go to an English Protestant School. It was held that having regard to the indication of intention on the father's part and the present and future benefit of the son, his mother ought to be appointed his guardian and he be brought up as a Roman Catholic: *Re Clarke*, W. N. 1882, 135; 31 W. R. 37: 47 L. T. N. S. 84.

Where infants interested in real estate in England, whose father was dead, were living with their mother out of the jurisdiction, and she was one of their testamentary guardians, an order was made at the instance of their two other guardians declaring in what faith they should be educated: *Re Montagu*, 28 Ch. D. 82.

Cases of conflict not mentioned. **12. Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail. 44 V. c. 5, s. 17 (10).**

Same as Eng. J. A. 1873, s. 25 (11).

This sub-section relates to matters of substantive law, not mere practice: *Friendly* v. *Carter*, 9 P. R. 41. As to matters of practice, see secs. 42 and 110 and *Rule* 3.

Examples. The following decisions illustrate this sub-section:—

The old learning on the subject of "conversion" at law is not imported into the Judicature Act: *Stimson* v. *Block*, 11 Ont. 96, 103.

Where the terms of a bill of sale are such as to bind after acquired goods in Equity, the title of the claimant must now prevail as against the execution creditor, under, this sub-section: *per* Lush, J., W. N. 1875, 203; *per* Archibald, J., W. N. 1876, 64. Sec. 54.

The rule of Equity now prevails that letters of administration, when obtained, relate back to the death, and it is sufficient if a plaintiff suing as administrator qualifies before trial: *Trice* v. *Robinson*, 16 Ont. 433.

Where assets have come into possession of the executor and are afterwards lost to the estate, the rule in all Courts now is, that the executor cannot be charged without some wilful default: *Job* v. *Job*, 6 Ch. D. 562; and see *Barber* v. *Mackrell*, 12 Ch. D. 534.

Since the Judicature Act a tenant in possession under an agreement for a lease has no longer two estates, one a legal tenancy from year to year and the other an equitable tenancy under the agreement. There is only one Court and the rule of Equity prevails, viz: that the tenant is in the same position as if he were lessee under a lease granted in terms of the agreement. The landlord cannot distrain by virtue of his legal title if he cannot distrain under the agreement: *Walsh* v. *Lonsdale*, 21 Ch. D. 9; and see *Lowther* v. *Heaver*, 41 Ch. D. 248. So in actions to re-enter for breach of covenant in a lease the Court will dispose of questions in their equitable rather than their legal aspect in cases where under the former practice the Court of Chancery would have relieved against a forfeiture: *Buckley* v. *Beigle*, 8 Ont. 85.

Where the solicitor of a lessee fraudulently procured from him a memorandum of deposit of the lease as security for a loan by the solicitor, and upon the security of the lease and memorandum procured a loan from an innocent lender, it was held in an action by lessee against the latter, for the delivery up of the lease, that this section did not apply to enable the defendant to say that he was a purchaser for value without notice, and retain the lease: *James* v. *Giles*, W. N. 1880, 170.

It has been held in England that where an executor or administrator, after the commencement of a creditor's action for administration and before judgment, has voluntarily paid any creditor in full, the rule in Equity and not at law must prevail under this sub-section, and he will be held to have made a good payment, and will be allowed it in his accounts, even though he may have had notice of the action before payment: *Re Radcliffe, European Soc.* v. *Radcliffe*, 7 Ch. D. 733; but *quære* whether in Ont. this was the rule in Equity: see R. S. O. c. 110, s. 32.

The rule of Equity, in the administration of partnership assets was applied in administering a fund in the Sheriff's hands, and joint estate was applied to joint debts and separate estate to separate debts, to the exclusion of any legal lien acquired by an execution creditor. Equitable rules are, however, only applied where they would have formerly been applied by a Court of Equity; *e. g.*, the plea of purchase without notice had no effect in a case under the concurrent jurisdiction of Equity where a plaintiff was pursuing a legal title for legal relief: *Manners* v. *Mew*, 29 Ch. D. 725, 734.

See also *Ryan* v. *Fish*, 4 Ont. 335; *Re Hodgson Beckett* v. *Ramsdale*, 55 L. J. Chy. 241, and Trower on the prevalence of Equity.

54. The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in Ontario, so far as the matters to which such rules relate shall be respectively cognizable by such Courts. 44 V. c. 5, s. 80. Rules of law to apply to all Courts.

Taken from Eng. J. A. 1873, s. 91.

The provision of *Rule* 1170, that in an action tried by jury the costs shall follow the event unless the Judge otherwise orders, was considered to be a rule of Law

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Secs. 55,56. and not one of practice, and therefore under the corresponding English section was held to be applicable to the Passage Court of Liverpool: *King* v. *Hawkesworth*, 4 Q. B. D. 371. *Quaere*, whether notwithstanding this decision it was not the intention of this section to apply in all Courts, the Rules of Law only which are enacted by sec. 53; see *Building and Loan, etc.*, v. *Heimrod*, 19 C. L. J. 256, and *Pryor* v. *City Offices*, 10 Q. B. D. 504. The transfer of this section in the Revision of the Statutes from the end of the Act to its present position immediately following sec. 53 seems to give some support to the latter view.

See also *Speers* v. *Daggers*, 1 Cab. & E. 503.

Notice to be given to Minister of Justice and Attorney-General of Ontario before any Act is declared invalid.

55.—(1) When, in any action or other civil proceeding, the constitutional validity of any Act of the Parliament of Canada or of the Legislature of Ontario comes into question the same shall not be adjudged to be invalid until after notice thereof has been served on the Minister of Justice and the Attorney-General of Ontario, or at their offices respectively.

(2) The notice in such case shall be entitled in the cause; shall state what the Act or section of an Act is which is in question, and the day on which the case or the said question is to be argued; and shall give such other particulars as are necessary to shew the constitutional point proposed to be argued.

(3) The notice shall be served six days before the day of the argument unless a Judge authorizes a shorter notice.

(4) Upon every such question the said Minister of Justice and the said Attorney-General shall be entitled as of right to be heard, either in person or by counsel, notwithstanding that the Crown is not a party to the action or proceeding. 46 V. c. 6, s. 6.

SITTINGS AND DISTRIBUTION OF BUSINESS.

Abolition of terms.

56. The division of the legal year into Terms shall be abolished so far as relates to the administration of justice,(*a*) and there shall not (*b*) be Terms applicable to any sitting or business of the High Court, (*c*) or of any commissioners to whom any jurisdiction may be assigned under this Act, or of any Commissioners of Assize; (*d*) but in all cases in which, under the law existing prior to the 22nd day of August, 1881, the Terms into which the legal year was divided were used as a measure for determining the time at or within which any act was required to be done, the same may continue to be referred to for the same or

the like purpose, unless and until provision is otherwise made by any lawful authority. 44 V. c. 5, s. 18. Secs. 57,58.

With the exceptions mentioned below this clause corresponds with Eng. J. A. 1873, s. 26, first part.

(a) Terms survive as measures of time for the purpose of marking time; *e.g.*, formerly in the time for making a motion to set aside an award: *College of Christ's Hospital* v. *Martin*, 3 Q. B. D. 28; *Giles* v. *Morrow*, 4 Ont. 649; *Kean* v. *Edwards*, 12 P. R. 625; but see now 52 Vict. c. 13, ss. 4-6.

The service of notice of motion within the time limited would seem to be sufficient, though the motion is made returnable after the time: see *Sweetman* v. *Gosfield*, 13 P. R. 293; *Smith* v. *Parkside Mining Co.*, 6 Q. B. D. 67, following *Huddersfield* v. *Jacomb*, L. R. 17 Eq. 476; 10 Chy. 92.

By *Rule* 216, sittings are appointed which are to be held by the Queen's Bench and Common Pleas Divisions at the same time and during the same periods as Michaelmas, Hilary and Easter (not Trinity) Terms; nevertheless, Trinity Term still exists as a measure of time: see *Kean* v. *Edwards*, *supra*.

(b) The English section has the words "no longer," instead of the word "not."

(c) The English section has here the words "or the Court of Appeal;" the Court of Appeal in Ontario had no "Terms."

(d) The words "commissioners of assize" are not in the English Act.

As to commissions of Assize, etc., see note to sec. 160 of this Act.

(e) The English Act has the additional word "other" here.

57.—(1) Subject to Rules of Court, the High Court of Justice, and the Court of Appeal, and the Judges thereof respectively, or any such commissioners as aforesaid shall have power to sit and act, at any time and at any place, for the transaction of any part of the business of such Courts respectively, or of such Judges or commissioners, or for the discharge of any duty which by any Statute or otherwise, is required to be discharged *(a)*. R. S. O. 1877, c. 38, s. 15; 44 V. c. 5, s. 19. Sittings of Courts.

(2) Subject to the preceding provision the Divisional sittings of the High Court shall be held at the City of Toronto. R. S. O. 1877, c. 39, s. 5; c. 40, s. 19. Where to be held.

For "Statute" the Eng. J. A. 1873, s. 26, has "Act of Parliament," and at *(a)* both in the Eng. J. A. and the Ont. J. A. 1881, are the words, "during or after Term."

58. The Lieutenant-Governor in Council may from time to time, upon any report or recommendation of the Council of Judges of the Supreme Court hereinafter mentioned, make, revoke or modify, orders regulating the vacations to be observed by the High Court of Justice and the Court of Appeal, and in the offices of the said Courts respectively; Vacations.

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Secs. 59,60.

and any Order in Council made pursuant to this section shall, so long as it continues in force, be of the same effect as if it were contained in this Act; and Rules of Court may be made for carrying the same into effect in the same manner as if such Order in Council were part of this Act. 44 V. c. 5, s. 20.

Commissions of Assize and other Commissions.

59. Commissions of assize or any other commissions, either general or special, may be issued, by the proper authority(*a*) assigning to the persons to be therein named,(*b*) the duty of trying and determining within any place or district specially fixed for that purpose by such commission, any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter, depending in the said High Court; or the exercise of any civil or criminal jurisdiction capable of being exercised by the said High Court; and any commission so issued shall be of the same validity as if it were enacted in the body of this Act; and any commissioner or commissioners shall, when engaged in the exercise of any jurisdiction so assigned to him or them, be deemed to constitute a Court of the said High Court. 44 V. c. 5, s. 22.

(a) The English J. A. 1873, s. 37, gives this authority expressly to Her Majesty. In Canada it has been questioned whether the authority belongs under the B. N. A. Act to the Governor-General or the Lieutenant-Governor; the present section provides for the issuing "by the proper authority." A commission in its ordinary form both constitutes the Court and names the Judges, while under the B. N. A. Act the creation of Courts belongs to the Province, and the appointment of Superior Court Judges belongs to the Dominion: see *Regina* v. *Amer*, 42 U. C. Q. B. 391.

(b) The English section limits the appointment to "any Judge or Judges of the High Court or other persons usually named in commissions of assize." The Dominion Government is understood to claim that a Provincial Legislature has no authority to limit the class of persons from which Judges are to be selected.

Rules of Court to provide for distribution of business.

60. All causes and matters in the High Court shall be distributed among the several Divisions and Judges of the said High Court, in such manner as may from time to time be determined by any Rules of Court, or orders of transfer, to be made under the authority of this Act. 44 V. c. 5, s. 23.

See Eng. J. A. Act, ss. 33 and 42.

The last part of the original s. 23 of the Ont. J. A. 1881, providing for the marking of documents in a cause or matter with the name of the Division to which the cause or matter is assigned is now embodied in *Rule* 225.

All the proceedings in any action or matter should be taken in the Division of the High Court to which the action or matter is for the time being attached.

The setting down of a motion in an action in the Chancery Division to be heard in another Division was held to be a nullity in *Re Christie, Christie* v. *Christie*, 12 P. R. 15. See note to sec. 38, p. 31. Sec. 61, (2, 3).

61.—(1) Every action and proceeding in the High Court and all business arising out of the same, except as hereinafter provided, shall, so far as is practicable and convenient, be heard, determined, and disposed of, before a single Judge (*a*). Business to be disposed of by one Judge as far as practicable.

(2) A Judge sitting elsewhere than in a Divisional Court, is to decide all questions coming properly before him, and is not to reserve any case, or any point in a case, for the consideration of a Divisional Court (*b*).

(3) In all such cases any Judge sitting in Court shall be deemed to constitute a Court (*c*). 44 V. c. 5, s. 28.

See Eng. J. A. 1873, s. 46; J. A. 1875, s. 22, and J. A. 1876, s. 17.

(*a*) This is the same in effect as the enactment in the Eng. J. A. 1876, s. 17; and is an extension of the authority previously to Ont. J. A. 1881, possessed in Ontario by a Judge of the Common Law Courts under the Administration of Justice Act, 1874 (R. S. O. 1877, c. 50, s. 281).

Trial at Bar is not abolished. See *Rule* 657 and notes.

(*b*) A Judge in England had the power of reserving a case, or any point in a case, to be argued before a Divisional Court, until the J. A. 1876, s. 17, the effect of which Act and the Rules made under it, was to take away this power. In Chancery there had never been the Common Law practice of a Judge reserving a case, or some point in it, for argument before himself and his brother Judges or any of them. The section in the present Act is in accordance with the probable intention of R. S. O. 1877, c. 50, s. 281.

In *Benschor* v. *Coley*, 52 L. J. Q. B. 398; 48 L. T. N. S. 533, it was held that notwithstanding the first clause of this section a Judge at *Nisi Prius* may leave any party to move a Divisional Court for judgment, and that the words "so far as is practicable and convenient" above, should be interpreted to authorize that course. This decision would not seem to be applicable in Ontario as the Imp. Act contains no clause similar to sub-sec. (2) above.

Where "a special case on the pleadings" had been referred to a Divisional Court in forgetfulness of the above sections, the application was turned into a motion and heard under *Rules* 748, 755 and 757: *Till* v. *Till*, 15 Ont. 133.

A hearing *in camera* may be allowed in a proper case: see *Mellor* v. *Thompson*, 31 Ch. D. 55, an application to restrain a solicitor from disclosing communications made to him confidentially as such solicitor; and see 82 L. T. Jour. 207, and observations of Lord Fitzgerald in *Macdougall* v. *Knight*, 14 App. Cas. 206-7.

(*c*) The English J. A. 1873, s. 39, last part, is the same. See *Cooper* v. *Central Ont. Ry. Co.*, 4 Ont. 280.

The ordinary purpose for which it is necessary or allowable to apply to the Divisional Court is to reverse or vary a judgment at the trial, or for a new trial. See *Rules* 789 and 219 *post*.

There is no appeal to a Divisional Court from a single Judge (except under *Rule* 798, from a judgment at the trial, or by consent under *Rule* 219.) *Re Galleno, Grant* v. *McAlpine*, 46 U. C. Q. B. 379; *McTiernan* v. *Fraser*, 9 P. R. 246. The appeal, if any, is to the Court of Appeal: see s. 37. A hearing

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on Further Directions is not to be regarded as a continuation of the trial so as to enable an appeal to be brought to the Divisional Court under *Rule* 798: see *Wansley* v. *Smallwood*, 10 P. R. 233.

Rule 219 regulates the business of Divisional Courts.

As to the comparative authority of decisions of a single Judge sitting as the High Court and those of a Divisional Court: see *Tancred* v. *Delagoa Bay, etc. Co.*, 23 Q. B. D. 242.

Divisional Courts of the High Court.

62.—(1) All business which may from time to time be so ordered by Rules of Court shall be transacted and disposed of by Divisional Courts of the High Court, which shall for that purpose exercise all or any part of the jurisdiction of the said High Court.

(2) Any number of such Divisional Courts may sit at the same time.

(3) A Divisional Court of the High Court shall be constituted by two or three, and no more, of the Judges thereof; and, except when through pressure of business or any other cause it may not conveniently be found practicable, shall be composed of three such Judges (*a*).

(4) Every Judge of the High Court shall be qualified and empowered to sit in any of such Divisional Courts.

(5) But where the Divisional Court is constituted of two Judges only, such Court shall not hear or adjudicate upon any application against the judgment of either of such Judges (*b*).

(6) The President of every such Divisional Court of the High Court shall be the senior Judge of those present, according to the order of their precedence under this Act or otherwise. 44 V. c. 5, s. 29.

Sub-section (5) has no corresponding provision in the English Acts. In other respects the section corresponds in effect with Eng. J. A. 1873, s. 40. Section 17 of the Eng. J. A. 1876 provided that two Judges and no more should sit unless there were special reasons for having a larger number. This restriction to two has not been followed in the Ontario Act.

The three Divisions of the High Court do not necessarily correspond with the Divisional Courts referred to in this section and elsewhere in the Act and *Rules*. See next two sections. The Divisional Courts are a district organization under the Jud. Act and invested with special functions: *Reg.* v. *Beemer*, 15 Ont. 266. For the business assigned to Divisional Courts see *Rule* 219.

(*a*) Where two Judges sit and differ, the old practice of the Court of Queen's Bench, that the junior Judge shall withdraw his judgment, is resorted to in the Queen's Bench Division in England: *Atty.-Gen.* v. *Noyes*, 44 L. T. 801, 809; but in Ontario where the motion before the Court is in the nature of an appeal, the judgment or order appealed from is in such a case affirmed.

(b) Where a motion against the judgment of the C. J. was made before a full Court of three Judges, but when judgment was delivered one of the puisne Judges was absent, being engaged in another Court, on a motion for leave to appeal, the judgment of the C. J. and the remaining puisne Judge was held to be invalid, and therefore there was no judgment which could be appealed against: *Cochran* v. *Boucher*, 19 C. L. J. 349; 3 C. L. T. 544; 8 Ont. App. 555. For the subsequent proceedings taken in consequence of this decision, see 3 C. L. T. 547, and 19 C. L. J. 402. Secs. 63-65.

63. Divisional Courts shall, as far as may be found practicable and convenient, include one or more Judge or Judges attached to the particular Division of the said Court to which the cause or matter out of which such business arises has been assigned. 44 V. c. 5, s. 30. Constitution of Divisional Courts.

To the same effect as Eng. J. A. 1873, s. 41.

64.—(1) Subject to any Rules of Court, it shall be the duty of every Judge of the High Court who shall not for the time being be occupied in the transaction of any business specially assigned to him, or in the business of any other Divisional Court, to take part, if required, in the sittings of such Divisional Courts as may from time to time be deemed necessary for the transaction of the business of any of the Divisions of the High Court. Judges to take part in business of any Division.

(2) All such arrangements as may be necessary or proper for that purpose, or for constituting or holding any Divisional Courts of the said High Court for any other purpose authorized by this Act, and also for the proper transaction of that part of the business of the said Divisions respectively which ought to be transacted by one or more Judges not sitting in a Divisional Court, shall be made from time to time under the direction and superintendence of the Judges of the said High Court;

(3) And in case of difference among them, in such manner as a majority of the said Judges shall determine. 44 V. c. 5, s. 31.

This section corresponds with the Eng. J. A. 1873, s. 41, except that the latter is confined to the Queen's Bench, Common Pleas and Exchequer Divisions, omitting the Chancery Division; and except also that in case of difference among the Judges, the English section requires the concurrence of the Lord Chief Justice of England in the decision of the majority in order to give it effect.

APPEALS.

65. No order made by the High Court or any Judge thereof, by the consent of parties, or as to costs only which Orders not subject to appeal.

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Sec. 65. **by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order. 44 V. c. 5. s. 32.**

Identical with Eng. J. A. 1873, s. 49.

The rule laid down in this section had always been the rule in the Court of Chancery: see Daniel's Practice, 5th ed., pp. 837, 1329, 1332, and cases there cited.

An interpleader matter tried summarily by consent by a Judge in Chambers under R. S. O., 1877, c. 54, s. 5, was formerly within this section: *Edd* v. *Winsor*, W. N. 1878, 88; *Turner* v. *Bridgett*, 9 Q. B. D. 55; *Lyon* v. *Morris*, 19 Q. B. D. 139; but now *Rule* 1171, which has superseded the above sec. 5, provides for an appeal.

A judgment in which part of the terms have been inserted at the suggestion of a party in struggling for the best possible terms, in a decision adverse to him, cannot be regarded as a consent judgment: *Sweeney* v. *Sweeney*, 16 Ont. 92.

Appeals as to costs.

By *Rule* 1170 the right which certain classes of persons, such as trustees, mortgagees, etc., had in Equity to costs (as being given them by contract) out of a particular estate or fund, is preserved. Such costs are not in the discretion of the Court, and are therefore a proper subject of appeal if no other restriction on the right of appeal applies *e.g.*, secs. 66-68. (See notes to *Rule* 1170.)

Where a settlement is set aside in an action by the settlor, the trustee has no claim to his costs as a matter of right, there being no contract in existence, and therefore where costs were given against him, it was held that, under this section, no appeal lay: *Dutton* v. *Thompson*, 23 Ch. D. 278.

Where a Judge decided that a defendant had committed a breach of an injunction, and no committal being pressed for on the other side, simply ordered the defendant to pay the costs, it was held that the order was not one as to costs only in the discretion of the Court, within the meaning of this section, and that an appeal lay: *Witt* v. *Corcoran*, 2 Ch. D. 69; followed in *Stevens* v. *Metropolitan Ry.*, 29 Ch. D. 60. On the other hand, where a Judge, being asked to commit for contempt made an order, within his power but of a different kind, viz.: to deliver a deed within a certain time and disposed of the costs: *Krehl* v. *Burrell*, W. N. 1883, 177, and in another instance refused to commit, and made the costs, costs in the cause: *Ashworth* v. *Outram*, 5 Ch. D. 943, it was held that no appeal lay. See also *Jarmain* v. *Chatterton*, 20 Ch. D. 493.

The effect of this section is that a mortgagee may appeal from an order depriving him of costs out of the estate for misconduct (because if there was no misconduct the costs are not in the discretion of the Court under *Rule* 1170) but a mortgagor cannot appeal from an order negativing misconduct and allowing a mortgagee costs out of the estate (because misconduct if proved would bring the costs within the discretion of the Judge, and even though he does not exercise it there would be no appeal): *Charles* v. *Jones*, 33 Ch. D. 80.

Cases where appeals as to costs not permitted.

The following are instances of costs in the discretion of the Court and therefore within this section:—

Costs of an interpleader issue disposed of in Chambers: *Hartman* v. *Foster*, 8 Q. B. D. 82; costs ordered in Chambers to be paid by a solicitor personally by reason of misconduct or negligence but not otherwise: *Re Bradford*, 15 Q. B. D. 635, overruling 11 Q. B. D. 373; costs given over to a defendant against a third party: *Hornby* v. *Cardwell*, 8 Q. B. D. 329; costs refused to a third party: *Tomlinson* v. *Northern Ry.*, 11 P. R. 526; costs given or refused to a plaintiff on confessing a defence under *Rule* 440: *Perkins* v. *Beresford*, 47 L. T. N. S. 515; and costs of inspection of property under *Rule* 1135: *Mitchell* v. *Darley*, 10 Q. B. D. 457; costs refused to a mortgagee who has unreasonably instituted or carried on, or resisted, proceedings: *Smallpiece* v. *Lee*, 20 Sol. J. 61, and costs on dismissal of an action for want of prosecution: *Snelling* v. *Pulling*, 29 Ch. D. 85.

Costs ordered to be paid personally by a solicitor are not in the discretion of the Court, in the absence of misconduct or negligence: *Re Bradford*, 15 Q. B. D. 635, overruling 11 Q. B. D. 373. Sec. 66.

In a suit to settle the priorities between incumbrancers, B., one of the defendants, was ordered to pay the costs of the plaintiff and his co-defendant. B. appealed, and the decision being affirmed on the merits the Court refused to vary the order as to costs, as that would be practically allowing an appeal for costs: *Harpham* v. *Shacklock*, 19 Ch. D. 215; *Harris* v. *Aaron*, 4 Ch. D. 749.

Leave to appeal on a question of costs should be asked for when the judgment in question is given: *May* v. *Thompson*, W. N. 1882, 53.

Cases where appeals as to costs permitted.

The following are instances in which appeals involving questions of principle on the subject of costs have been permitted:

Where the question was the right of a claimant in interpleader proceedings to recover from the execution creditor the charges of the Sheriff as costs: *Goodman* v. *Blake*, 19 Q. B. D. 77; where costs were directed to be first paid out of a fund, and then various incumbrancers in order of priority, and the fund, after payment of costs, was not sufficient to pay the first incumbrancer, who appealed: *Johnstone* v. *Cox*, 19 Ch. D. 17; where an order imposed, as a condition of a new trial, the payment within a certain time of the costs of the first trial: *Metropolitan Asylum District* v. *Hill*, 5 App. Cas. 582; where at the trial of an action for the infringement of a copyright of a novel, it appeared that the defendant before trial discontinued the use of the title of the novel objected to, and therefore the only order made was that defendant pay the costs of the action: *Dicks* v. *Yates*, 18 Ch. D. 76.

On appeals, where allowed on questions of costs in the discretion of the Court, the Appellate Court ought to have the same regard to the discretion of the Judge as in other cases in which his discretion is subject to review, and it ought not to interfere unless there has been a manifest disregard of principle or misapprehension of facts: *per Baggallay*, J.L., in *Re Gilbert*, *Gilbert* v. *Huddlestone*, 28 Ch. D. 549.

An appeal lies from the decision of a Judge as to the taxation of costs on the higher or lower scale, but the Court will not interfere unless he has proceeded upon a wrong principle, or made a manifest slip: *Re Terrell*, 22 Ch. D. 473. See also as to charges the allowance of which is in the discretion of the taxing officer: *McGannon* v. *Clark*, 9 P. R. 555.

Where upon an interlocutory application the Judge has based his decision upon the merits of the whole case, the Court of Appeal will decide the question of costs both below and in appeal: *Wilkinson* v. *Hull*, 30 W. R. 617; 46 L. T. N. S. 455.

Appeals from discretionary orders.

An appeal lies from discretionary orders, but the Court does not in general interfere, though it may disapprove, unless in a strong case or the discretion was exercised on a wrong principle: see *Golding* v. *Wharton*, 1 Q. B. D. 374; *Watson* v. *Rodwell*, 3 Ch. D. 380; *Huggons* v. *Tweed*, 10 Ch. D. 359, cases respecting the striking out of pleadings; *Byrd* v. *Mann*, 7 Ch. D. 286, 287; *Laird* v. *Briggs*, 16 Ch. D. 663; respecting allowance of amendments: *Swindell* v. *Birmingtom Syndicate*, 3 Ch. D. 127; *Ormerod* v. *Todmorden*, 8 Q. B. D. 664, respecting the mode of trial; *Papayanni* v. *Coutpas*, W. N. 1880, 109; *Wallingford* v. *Mutual Soc.*, 5 App. Cas. 685, 709, as to allowing a defendant to defend on a motion under *Rule* 739. See also *Jarmain* v. *Chatterton*, 20 Ch. D. 493.

Limitation of appeal where amount does not exceed $200.

66. In any action respecting property or civil rights whether for damages or for specific relief, no appeal shall lie from the judgment or order of any Divisional Court or Judge of the High Court to the Court of Appeal without the special leave of the Judge or Divisional Court whose judgment or order is in question, or of the Court of Appeal

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unless the title to real estate or some interest therein or the validity of a patent is affected; or unless the matter in controversy on the appeal exceeds the sum or value of $200, exclusive of costs; or unless the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights. 44 V. c. 5, s. 33; 48 V. c. 13, s. 7.

These restrictions on appeals are not in the English Acts.

The test as to determining the matter in controversy on an appeal was defined in *Macfarlane* v. *Leclaire*, 15 Moo. P. C. C. 181. The judgment is to be looked at as it affects the interest of the party who is prejudiced by it. This test has been recognized as the correct one by the Jud. Committee of the Privy Council which has accordingly determined that on ar appeal by a defendant, the proper measure of value for determining the question of the right to appeal is the amount recovered in the action, not the amount claimed by the plaintiff in his pleadings: *Allan* v. *Pratt*, 59 L. T. N. S. 674.

In *Joyce* v. *Hart*, 1 S. C. R. 321 (which seems to decide the contrary, and where *Macfarlane* v. *Leclaire* was referred to), the plaintiff claimed $2,000 and only recovered $100. The defendant was held entitled to appeal, but the case was under 38 V. c. 11, s. 17, which prohibits appeals where less than $2,000 is in dispute, and it was considered that the amount claimed, as the amount in dispute in the case, should be looked at, not the amount of the judgment.

See also *O'Donohue* v. *Whitty*, 9 P. R. 361, where bills of costs amounting to $250.10 were, on taxation, reduced to $187.10, and the client desired to appeal; the Court held, following *Macfarlane* v. *Leclaire*, that the matter in controversy was whether the appellant was liable to pay as much as $187.10. The Divisional Court in that case subsequently granted leave to appeal, as the case involved the construction of clause 14 of the form appended to R. S. O. c. 107, a question of general interest and affecting solicitors at large and other parties besides the parties to the litigation: S. C. 19 C. L. J. 9.

Where leave to appeal is necessary it should be applied for, if not when the judgment was given, at any rate within the three months mentioned in sec. 71: see *McCrae* v. *White*, 9 P. R. 288; *May* v. *Thompson*, W. N., 1882, 58

Limitation of appeal where amount does not exceed $500.

67. In any action respecting property or civil rights, whether for damages or for specific relief, in case there has been no difference of opinion among the Judges of the Divisional Court as to any order of such Court, or where on a motion to set aside or discharge a rule, order, or decision of a Judge, the order of the Divisional Court did not substantially vary the rule, order, or decision moved against, no appeal shall lie from the order of the Divisional Court of the High Court to the Court of Appeal without such leave as aforesaid, unless the title to real estate or some interest therein or the validity of a patent is affected; or unless the matter in controversy on the appeal exceeds the sum or value of $500, exclusive of costs; or unless the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand

of a general or public nature affecting future rights. 44 V. c. 5, s. 34; 48 V. c. 13, s. 7. Sec. 68.

These restrictions on appeals are not in the English Act.

As to the proper measure of value to determine the right to appeal, see notes to sec. 66.

Where the amount involved in an interpleader issue was under $500, but it was alleged that the decision of the Divisional Court, desired to be appealed from, affected the right to other property amounting to $2,000, it was held that the decision in this matter was not conclusive as to the right to the other property and therefore there was no sufficient ground for granting leave to appeal: *Beaty* v. *Bryce*, 19 C. L. J. 9.

See also *Baddin* v. *Sutherland*, 20 C. L. J. 146; 4 C. L. T. 205; and *Hamilton Prov. Loan Co.* v. *Dumble*, 20 C. L. J. 147; 4 C. L. T. 205.

In *Armstrong* v. *Farr*, (before Proudfoot, J., 3 June 1884) it was held that no leave to appeal was necessary in an action to enforce a vendor's lien for $160 as "the title to real estate" was affected thereby.

68. There shall be no appeal to a Divisional Court from any interlocutory order, whether made in Court or Chambers, in case prior to *The Ontario Judicature Act, 1881*, there would have been no relief from a like order by an application to a Superior Court; and there shall be no appeal to the Court of Appeal from any interlocutory order in case prior to *The Ontario Judicature Act, 1881*, there would have been no relief from a like order by an appeal to the Court of Appeal (*a*). Any doubt which may arise as to what orders, or judgments, are interlocutory, shall be determined by the Court of Appeal. 44 V. c. 5, s. 35. Appeals from interlocutory orders.

(*a*) What follows is taken from the English section referred to. The former part of the section is not in the English Act. For the cases in which, before the Ont. Jud. Act, there was an appeal to the Court of Appeal, see R. S. O. 1887, c. 38, s. 18, and *Whiting* v. *Hovey*, 12 Ont. App. 119.

An order over-ruling a demurrer is not an interlocutory order: *Trowell* v. *Shenton*, 8 Ch. D. 318.

The decision of the Court upon a special case stated by an arbitrator who is thereupon to make his award is an interlocutory order: *Collins* v. *Vestry of Paddington*, 5 Q. B. D. 368. See also *Sherbrooke* v. *Tuffnell*, 9 Q. B. D. 621, where it was held that the decision upon the special case must be treated as a final order, unless the decision of the Court could not, in any event, necessitate the entering of final judgment.

The following have been held to be interlocutory orders:—An order that a case be tried by jury: *Swindell* v. *Birmingham*, 3 Ch. D. 127; a rule absolute for a new trial: *Highton* v. *Treherne*, 48 L. J. Ex. 167; an order discharging a rule for a new trial: *Wilks* v. *Judge*, W. N., 1880, 98; a refusal to remit an award to an arbitrator: *Re Delagoa Bay Ry., etc.*, 37 W. R. 578; an order on the trial of an interpleader issue: *McAndrew* v. *Barker*, 7 Ch. D. 701; an order for final judgment under *Rule* 739: *Standard Discount Co.* v. *La Grange*, 3 C. P. D. 67; an order setting aside a demurrer as frivolous: *Kandick* v. *Morrison*, 2 S. C. R. 14; an order providing for defendant's costs, the action not being further proceeded with: *Re Lewis, Lewis* v. *Williams*, 31 Ch. D. 623; the judgment of a Div. Court affirming the judgment of a County Court in an interpleader issue: *Hughes* v. *Little*, 18 Q. B. D. 32, reversing 17 Q. B. D. 204. The following has been held to be final:—A judgment in a foreclosure suit: *Smith* v. *Davies*, 55 L. J. Chy. 496, 54 L. T. N. S. 478.

Secs. 69,70. *Semble*, an order by a Judge in Court, directing the execution by defendants (mortgagees) of a reconveyance or discharge directed by a previous judgment, is not in its nature interlocutory. But if interlocutory it would be appealable under this sec. : *Bull* v. *N. British, etc., Co.*, 12 P. R. 284.

See generally as to the distinction between final and interlocutory orders: *White* v. *Witt*, 5 Ch. D. 589, 591; *Pheysey* v. *Pheysey*, 12 Ch. D. 305, 307: *Whiting* v. *Hovey*, 12 Ont. App. 119; *Hateley* v. *Merchants Despatch Co.*, *ib.* 640.

Discharging orders made by a single Judge.

69. Save as aforesaid, every rule, order, or decision made by a Judge of the said High Court in chambers (*a*), may be set aside or discharged upon notice by any Divisional Court; and no further appeal shall lie to the Court of Appeal from the Divisional Court unless by special leave of the said Court or of the Court of Appeal. 44 V. c. 5, s. 36; 49 V. c. 16, s. 39; 50 V. c. 8, Sched.

This section varies from section 50 of English J. A. 1873, which is as follows: "Every order made by a Judge of the said High Court in Chambers, except orders made in the exercise of such discretion as aforesaid, may be set aside or discharged upon notice, by any Divisional Court or by the Judge sitting in Court, according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made, may be assigned; and no appeal shall lie from any such order to set aside or discharge which no such motion has been made, unless by special leave of the Judge by whom such order was made, or of the Court of Appeal."

(*a*) The Ont. Jud. Act, 1881, had here the words "except orders made in the exercise of such discretion as by law belonged to him," (as to which see *Conmee* v. *C. P. R.*, 12 Ont. App. 748). These words were struck out by 49 V. c. 16, s. 39. An appeal thus lies from a discretionary order, but the amendment has not affected the rule that in such cases a very strong case must be made out to induce the Court to reverse the order: *Powell* v. *Peck*, 12 P. R. 34. See also note to sec. 65.

Leave to appeal where necessary should in general be asked for when the judgment complained of is given: *May* v. *Thompson*, W. N. 1882, 53.

All parties should be represented on an application for special leave: *Downes* v. *Somerville*, 56 L. T. N. S. 424.

Appeal from decision of a Divisional Court, or a Judge in Court.

70. Save as aforesaid and subject to the other provisions of this Act, any [judgment,] rule, order or decision [of a Divisional Court, or] of a Judge in Court, may be appealed against to the Court of Appeal. R. S. O. 1877, c. 38, s. 18; 44 V. c. 5, ss. 18, 37.

See Eng. J. A. 1873, ss. 18, 19, 50.

The words in brackets were inserted on the Revision of the Statutes in 1887.

In England an appeal lies from any judgment or order of the High Court or a Judge thereof, save that an order made by a Judge in Chambers must first be moved against before a Divisional Court unless by special leave: see *Dawson* v. *Fox*, 14 Q. B. D. 377; *Robinson* v. *Tucker*, *ib.* 372; *ex. p. Dawes Re Moon*, 34 W. R. 752; *Re Hall* v. *Railway Commissioners*, 54 L. T. N. S. 713; *Lister* v. *Wood*, 37 W. R. 738; *Kay* v. *Briggs*, 60 L. T. N. S. 775. The 69th section of the present Act regulates appeals from a Judge's order made in Chambers.

Quære whether an appeal may be had from an order obtained by default in appearing to oppose it: see *Re Morris, ex. p. Streeter*, 19 Ch. D. 216; *Walker* v.

Budden, 5 Q. B. D. 267; *Allum* v. *Dickenson*, 30 W. R. 930. An appeal was permitted from a refusal to amend: *Laird* v. *Briggs*, 16 Ch. D. 663. Sec. 71.

As to appealing from a refusal to commit for contempt: see *Jarman* v. *Chatterton*, 20 Ch. D. 493; *Ashworth* v. *Outram*, 5 Ch. D. 943; *Debenham* v. *Wardroper*, 48 L. T. N. S. 235; *Krehl* v. *Burrell*, W. N. 1883, 177.

A party in contempt may appeal from the order putting him in contempt: *McGregor* v. *McDonald*, 7 C. L. T. 20.

Quære whether an appeal lies to the Court of Appeal from the decision upon the trial of an interpleader issue: see *Whiting* v. *Hovey*, 12 Ont. App. 119, where the Court was divided in opinion.

One of two or more plaintiffs, (*Beckett* v. *Attwood*, 18 Ch. D. 54), or counter-claiming defendants (*Hester* v. *Hester*, 71 L. T. Jour. 153), where the claim or counter-claim respectively is dismissed, may appeal, where the others refuse to join, they being made respondents.

As to whether a party not appealing can obtain relief on an appeal by another party: see *Black* v. *Black*, 9 Gr. 413; 2 E. & A. 419; *Sampson* v. *McArthur*, 8 Gr. 84; *Topping* v. *Joseph*, 1 E. & A. 305, 322; *Kent* v. *Freehold, etc.*, L. R. 3 Chy. 493; *Vaughan* v. *Halliday*, L. R. 9 Chy. 561; *Gilbert* v. *Jarvis*, 16 Gr. 275, 279; *Saffron Waldron Benefit Co.* v. *Rayner*, 14 Ch. D. 406, 419; *Dilke* v. *Douglas*, 5 Ont. App. 63; *Peterkin* v. *McFarlane*, 6 Ont. App. 254; *Re Gabouric*, 12 P. R. 252; *Esdaile* v. *Payne*, 59 L. T. N. S. 804; 40 Ch. D. 520.

Leave to appeal may be given to a person interested, but not a party: *Re Markham*, 16 Ch. D. 1; but only where his interest is such that he might have been made a party by service: *Crawcour* v. *Salter*, 30 W. R. 329; see also *Langtry* v. *Dumoulin*, 11 Ont. App. 544; *Wood* v. *Madras*, 23 Ch. D. 248; *Watson* v. *Cave*, 17 Ch. D. 19: *Re Claggett*, 30 W. R. 374; *ex. p. Tupper*, 12 Ch. D. 308; *Re Youngs, Doggett* v. *Revett*, 33 W. R. 880; 53 L. T. N. S. 682.

R. S. O. 1877, c. 38, s. 18 (3), which provided that there should be no appeal in cases where a new trial is granted or refused upon matter of discretion only, is now repealed by R. S. O. 1887, an appeal in such case will be governed by the general rule as to appeals from discretionary orders. See note to sec. 65. The above mentioned sub-sec. 18 (3) was held to apply only where an appeal was brought from a judgment, in which a discretion had been exercised: *Moore* v. *Connecticut Mutual*, 6 App. Cas. 644.

71. No appeal to the Court of Appeal shall be allowed unless notice thereof is given in writing to the opposite party and to the Registrar of the Division in which the proceedings are filed, within one month after the judgment complained of, or within such further time as the High Court, or a Judge thereof, may allow; nor unless within three months after the judgment complained of or within such further time as the Court or Judge aforesaid may allow, the appellant gives proper security to the extent of $400 to the satisfaction of the said Court or a Judge, that he will effectually prosecute his appeal, and pay such costs and damages as may be awarded in case the judgment appealed from is in whole or in part affirmed. 44 V. c. 5, s. 38. No appeal unless proper notice and security given.

This section places an additional limitation upon the right to appeal without interfering with the limit of a year imposed by ss. 73-75: see *Workman* v. *Robb*, 9 P. R. 160, where this enactment was held to be not retrospective.

Sec. 71. See further notes to *Rule* 803 *et seq.*

Notice of appeal.

Notice of Appeal.—Formerly notice was required to be given to the Registrar of the Court of Appeal. This is not now necessary. The notice to the Registrar of the Court appealed from must be filed.

When a judgment is affirmed by a Divisional Court *quære* whether the time for appealing runs from the date of the original judgment. As an appeal lies from either the Judge of first instance, or from a Divisional Court (see sec. 70), it would seem just and reasonable that, where an intermediate appeal to a Divisional Court is allowed, the time for appealing should run from its decision: see, however, *McFarlane* v. *Dickson*, 2 Ch. Ch. 38; *Bervier* v. *Morrington*, 6 Jur. N. S. 1123; *Tyler* v. *Webb*, 3 Ch. Ch. 33; *Duff* v. *Barrett*, *ib.* 318.

In a case where leave to appeal is necessary under secs. 65, 66 or 67, and the appellant is prompt in applying for leave, the month for delivering notice of appeal will be computed from the date the leave is granted: *McRae* v. *White*, 9 P. R. 288.

Vacation

Vacation was in *Wilby* v. *Standard*, 10 P. R. 34, assumed to be not excepted in the computation of the time for giving notice of appeal under this section. The then Order (57) of the Court of Appeal on the subject only provided that vacation should not be reckoned in the computation of time appointed by the *Orders* of the Court of Appeal. Nothing was provided in regard to time limited by a statute. The present *Rule* 484 seems also only to provide for cases where time is limited by the *Rules*.

Form.

The form of the notice which is prescribed by *Rule* 803 will be found in the App. as Form No. 41.

Service.

The retainer of a solicitor continues after judgment, so as to make service of notice of appeal on him good service on the client, until the client takes proper steps to inform his opponent that he has withdrawn his authority: *Lady de la Pole* v. *Dick*, 29 Ch. D. 351.

Notice must be formal notice.

The notice of appeal must be a formal notice; the mere communication, verbal or otherwise, by an unsuccessful party to his opponent of his intention to appeal is not sufficient notice of appeal: *In re Blythe* v. *Young*, 13 Ch. D. 416; *Re New Callao Co.*, 22 Ch. D. 484; see *Kettlewell* v. *Watson*, W. N. 1883, 102.

Co-defendants, when they need not be served.

Where some of several defendants appeal, notice of appeal need not be served on their co-defendants, even though relief over is claimed against them by the respondent: *Freed* v. *Orr*, 6 Ont. App. 690. It is sufficient for the respondent claiming relief, to serve the non-appealing defendants with the reasons against the appeal, a copy of the appeal book, and notice of the hearing of the appeal: *Ib.*; and see *Rule* 828.

The language of this section is very similar to that of Con. Stat. U. C. c. 13, s. 25, under which it was held that the mere statement of an unexplained oversight on the part of a solicitor was an insufficient ground for extending the time for giving notice of appeal, though it might be otherwise if an important question of law were involved, as to which there was a conflict between the Courts: *Gordon* v. *G. W. R.*, 6 P. R. 300.

Notice, when allowed to be served after time has elapsed.

Where the notice was served on the last day after office hours, the notice was allowed, but the Court doubted whether the section requiring notice applied in that particular case: *Rose* v. *Hickey*, 7 P. R. 390; and where notice had been served in due time on the respondent, but, through the negligence of a clerk of the appellant's solicitor, notice had not been served on the Registrar of the Court appealed from, notice was allowed to be served on payment of costs: *Re Laws*, *Laws* v. *Laws*, 9 P. R. 72; and see *Re Crosby*, *Munns* v. *Burn*, 34 Ch. D. 664; but where nothing was done within the time, and no sufficient special circumstances were shewn, leave was refused: *Miller* v. *Brown*, 9 P. R. 542. In England a delay of three days beyond the prescribed time in delivering notice to the officer has been held fatal to the right of appeal: *Ex parte Lamb*, 45 L. T. N. S. 639, and see *Ex parte Lyon*, *ib.* 768; *Re Blyth & Young*, 13 Ch. D. 416; and *Wright* v. *Leys*, 10 P. R. 354.

See also the cases *infra* relating to applications for leave to appeal. Sec. 71.

The service of notice as required by the Statute is not a condition precedent to the jurisdiction of the Court to hear the appeal, and may be waived by the respondent: see *Park Gate Iron Co.* v. *Coates*, L. R. 5, C. P. 634. Neither is the service of the notice an initiation of the appeal, and therefore when a notice was served, but was not followed up by giving security, a motion to dismiss the appeal was refused: *Smith* v. *Smith*, 11 P. R. 6. Notice of appeal not necessary to give Court jurisdiction.

Leave to Appeal.—In giving leave or extending time, there is a difference between applications before and after judgment. In the former case, leave is readily granted unless the opposite party is injured in some respect for which payment of costs cannot compensate him; but in the latter case after the action has been once tried and judgment given, the party in whose favour the judgment is, has a vested right in it of which he is not to be deprived except under special circumstances: see *Collins* v. *Vestry of Paddington*, 5 Q. B. D. 368; *Miller* v. *Brown*, 9 P. R. 542; *Shupe* v *Shupe*, 4 C. L. T. 129; *Craig* v. *Phillips*, 7 Ch. D. 249; *McAndrew* v. *Barker*, 7 Ch. D. 701: see *Re Ambrose Lake Tin and Copper Co., Taylor's case*, 8 Ch. D. 643: *Re Sceptre Licensed Victuallers Fire Insurance Co., ex parte How*, W. N., 1879, 6. Leave to appeal.

No precise rules can be laid down as to what constitute special circumstances sufficient to call for the exercise of the discretion of the Court: see *Carter* v. *Stubbs*, 6 Q. B. D. 116; *Re Manchester Economic B. S.*, 24 Ch. D. 488; *Wilby* v. *Standard, etc.*, 10 P. R. 34.

Generally speaking, an extension will be granted where justice requires it: *Re Gabourie, Casey* v. *Gabourie*, 12 P. R. 252; but two particular lines of cases have been noticed in which leave may be given, 1st, where there is unavoidable accident whereby a party is unable to bring on his appeal; and 2nd, where some equity is raised on behalf of the appellant from the conduct of the other side: *Langtry* v. *Dumoulin*, 4 C. L. T. 351; *Re Mansel, Rhodes* v. *Jenkins*, 7 Ch. D. 711; *Re Blyth & Young*, 13 Ch. D. 416. Mistake on the appellant's part may be a ground, and it is not essential to shew misconduct by the respondent, (though there are expressions in the cases to the contrary: see *Re Mansel, Rhodes* v. *Jenkins*; *McAndrew* v. *Barker*, 7 Ch. D. 701; *Curtis* v. *Sheffield*, 21 Ch. D. 5; *Rumohr* v. *Marx*, 19 C. L. J. 10; *Berdem* v. *Barringham*, 7 Ch. D. 24; but there must be an equity shewn in the applicant's favour either from conduct of the other party or from something else recognized as a ground of equity: *Re New Callao, etc.*, 22 Ch. D. 484; *Re Manchester Economic B. S.*, 24 Ch. D. 488: *Peckett* v. *Short*, 32 W. R. 123; *Wilby* v. *Standard, etc.*, 10 P. R. 34; *Lewis* v. *Talbot Road Co.*, 10 P. R. 15; *Sieveright* v. *Leys*, 9 P. R. 200; *Langdon* v. *Robertson*, 12 P. R. 139; *Re Gabourie*, 12 P. R. 252: and the onus of shewing such equity is on the applicant: *Shupe* v. *Shupe*, 4 C. L. T. 129.

Leave was granted where the applicants had been without their default in ignorance of the order appealed from, and applied as soon as they heard of it: *Re Padstow, Total Loss, etc., Ass.*, W. N. 1882, 1; 51 L. J. Chy. 344; where the delay was attributable to the Court: *McCrae* v. *White*, 9 Pr. R. 288, *supra*, p. 80; under peculiar special circumstances: *Re Lake Superior Native Copper Co.*, 11 P. R. 36; where some of the parties affected by the judgment lived at a great distance, and out of the jurisdiction: *Re Jacques*, 30 W. R. 394; but not where due diligence in communicating with them was not shewn: *Miller* v. *Brown*, 9 P. R. 542; and where the order appealed from, viz.: for the winding up of a company was founded upon a void resolution of which the appellant who obtained the order was not aware and therefore had not disclosed to the Court: *Re Manchester Economic B. S., supra*; where the case was important, and there were conflicting decisions below: *Powell* v. *Peck*, 12 P. R. 34; where leave was necessary and had not been applied for, but proceedings to appeal had been taken in proper time, and a fairly arguable point of law was presented: *Longdon* v. *Robertson*, 12 Pr. R. 139, approving of the rule expressed in *Sieveright* v. *Leys*, 9 P. R. 200; and see *Re Gabourie*, 12 P. R. 252, and *Foley* v. *Canada P. L. & S. Co.*, 18 C. L. J. 444. Leave granted.

Leave was refused where the delay was owing to the applicant's ignorance of the practice: *Wilby* v. *Standard, etc.*, 10 P. R. 34; or to the party having inex- Leave refused.

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Secs. 72-74.

cusably proceeded under the old and repealed practice: *Brown* v. *Dorse*, 34 W. R. 776; *Re Crosley*, 34 Ch. D. 664; or to the inadvertence of his solicitor: *Winnett* v. *Renwick*, 6 P. R. 233; or the misconstruction of a rule: *International Financial Society* v. *City of Moscow Gas Co.*, 7 Ch. D. 241. A contrary subsequent decision by a Court of Appeal does not form a special circumstance: *Craig* v. *Phillips*, 7 Ch. D. 249; *Allan* v. *McTavish*, 3 C. L. T. 196; see *contra Re Normantown*, 50 L. J. Chy. 223; and an offer of compromise made to the successful party, and pending when the time for appealing has elapsed raises no equity against the latter: *Shupe* v. *Shupe*, 4 C. L. T. 129.

In *Curtis* v. *Sheffield*, 21 Ch. D. 1 (see also 20 Ch. D. 398), leave to appeal from a decree 45 years old, which declared future rights, was asked by a person who applied promptly after the happening of the event which entitled him to a fund if the decree should be reversed. Leave was refused, the fact that future rights were declared being held to be no sufficient reason for giving leave in a case where all parties, who could in any event be interested, were before the Court when the declaration was made.

Security for Costs, etc.—See notes to *Rules*, 804, *et seq.*

Execution may be superseded, or payment of money levied be withheld.

72. If at the time of the receipt by the Sheriff of a *fiat* to stay execution, or of a copy thereof, the money has been made or received by him but not paid over to the party who issued the execution, the party appealing may demand back from the Sheriff the amount made or received under the execution, or so much thereof as is in his hands not paid over, and in default of payment by the Sheriff upon such demand, the appellant may recover the same from him in an action for money had and received. R. S. O. 1877, c. 38, s. 29.

LIMITATION OF TIME FOR APPEALING.

Time within which appeals from judgments or decretal orders must be brought to a hearing.

73. Subject to the provisions of this Act all appeals from a judgment, decision, rule or decretal order of the High Court, shall be brought to hearing within one year after the giving of the judgment, decision, rule or order, or within such further time as the Court of Appeal may allow. R. S. O. 1877, c. 38, ss. 45, 48; 44 V. c. 5, s. 39.

The year counts from the day on which the judgment or decision was delivered or was given, not from the time when it was drawn up or entered: see *Platt* v. *G. T. Ry. Co.* 12 P. R. 380.

Time within which appeals from interlocutory orders must be brought to a hearing.

74. If the appeal is from an interlocutory order, not being a decretal order, then the appellant shall bring the same to a hearing within six months from the pronouncing of the same, or within such further time as may be allowed for the purpose by the Court of Appeal, upon special grounds shewn to the satisfaction of the Court or Judge

granting the same. R. S. O. 1877, c. 38, s. 47; 44 V. c. 5, s. 39. Sec. 75.

As to what are interlocutory orders see notes to sec. 68.

75. The time limited for appealing from a judgment or order which, under any General Orders of the Court of Chancery still remaining in force, does not become absolute upon the same being pronounced, shall be computed from the time when the same does become absolute. R. S. O. 1877, c. 38, s. 47; 44 V. c. 5, s. 39. Time to be reckoned from the judgment or order becoming absolute.

This section has probably now no application. The General Orders referred to are probably Chy. O. 113-117 which have not been included in the Consolidated Rules and are therefore abrogated by *Rule* 3.

TRIAL AND PROCEDURE

In England the ordinary mode of trial in Chancery was always by a single Judge. That was the practice for many years in the Ontario Court also. The Chancery Act (R. S. O., 1877, c. 40, s. 99) shows the method of trial by jury in Chancery, where that course might be resorted to.

Sections 77 to 80 now govern the practice as to when a trial is to be with, or without, a jury.

In England the trial of an action with, or without a jury, depends upon Rules (Order 36 rr. 3-7 of the Rules of 1883) which have not been adopted in Ontario. An absolute right is given to either party in purely Common Law actions to require, by notice, the issues to be tried by a jury; whereas in cases which formerly would have been brought in Chancery only, and so could before the Act have been tried without a jury, there is, under Order 36 r. 4, a discretion vested in the Court to dispense with a jury against the will of the parties: see *Sugg* v. *Silber*, 1 Q. B. D. 362; *Clark* v. *Skipper*, 21 Ch. D. 134; *Re Martin, Hunt* v. *Chambers*, 20 Ch. D. 368; *Clarke* v. *Cookson*, 2 Ch. D. 746; *Bordier* v. *Burrell*, 5 Ch. D. 512; *Bank of B. N. A.* v. *Eddy*, 9 P. R. 468; *Cardinall* v. *Cardinall*, 25 Ch. D. 772; *The Old Mill Co.* v. *Dukinfield Local Board*, 50 L.T. N. S. 414; *Gardner* v. *Jay* 29 Ch. D. 50; *The Temple Bar*, 34 W. R. 68; *Timson* v. *Wilson*, 38 Ch. D. 72; *Fanshawe* v. *London, etc., Dairy*, 36 W. R. 418; *Lynch* v. *McDonald*, *ib.* 419; Snow & Winstanley, Prac. 329. When the discretion of the Court is exercised in favour of a jury trial, the cause may be transferred to another Division, to which it will thenceforward belong: *Jones* v. *Baxter*, 5 Ex. D. 275; and this is generally adopted as the more convenient course: *Re Martin*, *supra*; but an issue may be sent for trial at an Assize and the action still remain in the Chancery Division: *Jenkins* v. *Morris*, 14 Ch. D. 674. Practice in England.

In Ontario the practice as to having, or dispensing with, a jury is different. All actions which, under the practice existing at the time of passing of the A. J. Act, 1873, could have been brought in the Court of Chancery only, must be tried by a Judge without a jury (unless a jury can be had on special application): see sec. 77, and a notice of jury given in such a case is irregular and will be struck out on motion: see *Gowanlock* v. *Mann*, 9 P. R. 270, an action for rectification of a lease; *Thurlow* v. *Beck*, 9 P. R. 268, an action to set aside a conveyance: see also *Usil* v. *Whelpton*, 45 L. T. N. S. 39; 29 W. R. 799. Practice in Ontario.

In all other actions, viz., those which might have been brought in the Queen's Bench or Common Pleas, the provisions of sec. 78 will apply, *i.e.*, (except in the certain kinds of actions mentioned in s. 76) either party, upon giving notice, has a *prima facie* right to a trial by jury, subject to the discretion vested in a Judge in Chambers, or the Judge at the trial, to direct otherwise: see note to sec. 80 *infra*.

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Secs. 76, 77. Writs of summons are now issued out of the various Divisions in rotation without regard to the character of the action: *Rule* 226; and may be entered for trial at any sittings without regard to the Division to which the action is attached, except that actions to be tried by jury must be entered for a sittings at which a jury is summoned, viz., the Assizes: *Rule* 668. Prior to the passing of *Rule* 668 the practice was different: see *Vermilyea* v. *Guthrie*, 9 P. R. 267 and Mac. Jud. Act. 2nd ed. 60.

Certain actions for torts to be tried by a jury.

76. In actions of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment, all questions which might heretofore have been tried by a jury, shall be tried by a jury, unless the parties in person or by their solicitors or counsel, waive such trial. R. S. O. 1877, c. 50, s. 252.

In these cases the Court has no power to dispense with the jury: see *Adair* v. *Wade*, 9 Ont. 15.

Cases formerly within exclusive jurisdiction of Court of Chancery.

77. Subject to Rules of Court, all causes, matters and issues, over the subject of which prior to *The Administration of Justice Act* of 1873, the Court of Chancery had exclusive jurisdiction, shall be tried without a jury, unless otherwise ordered. R. S. O. 1877, c. 40, s. 99. *See* 44 V. c. 5, s. 45.

What actions *prima facie* to be tried without a jury.

A change in the practice is made by this section. The words "prior to the Administration of Justice Act of 1873" have, in the Revision of the Statutes, been substituted for the words "at the time of the passing of this (the J. A. 1881) Act" in sec. 45, of 44 V. c. 5. The effect of this alteration is to add to the cases which must now be tried without a jury those actions which by the A. J. Act, 1873, were made cognizable by a Court of Law as well as by the Court of Chancery, *e. g.*, actions for purely money demands though the right to recover was an equitable one (see R. S. O. 1877 c. 49 s. 4) and actions where an injunction, or similar equitable relief is required, though otherwise cognizable by a Court of Law: see *Toronto & Navigation Co.* v. *Silcox*, 12 P. R. 622, and R. S. O. 1877, c. 49, s. 8.

In determining whether an action is one over the subject of which the Court of Chancery had exclusive jurisdiction, the test is not whether the plaintiff's end might have been substantially obtained by some proceeding cognizable in a Court of Law, but whether or not the specific relief asked for in the statement of claim is of a kind which on the 29th March, 1873, could only have been obtained in the Court of Chancery: see *Pawson* v. *Merchants' Bank*, 11 P. R. 72; *Masse* v. *Masse*, 11 P. R. 81, reversing S. C. 10 P. R. 574; *Herring* v. *Brooks*, 11 P. R. 15. If the cause of action is an equitable one the circumstance that the issues or questions of fact to be tried are matters which juries are accustomed to consider, in actions differently framed, will not entitle a party to trial by jury: *Farran* v. *Hunter*, 12 P. R. 324.

Examples.

The following have been held to be cases which could have been only brought in Chancery: an action for the rectification of a lease: *Gowanlock* v. *Mann*, 9 P. R. 270; to set aside a conveyance: *Thurlow* v. *Beck*, 9 P. R. 268; to declare void the delivery of certain notes: *Pawson* v. *Merchants' Bank*, sup.; to establish a will: *Re Lewis, Jackson* v. *Scott*, 11 P. R. 107.

An action by rate payers against members of a municipal council for misconduct causing loss to the municipality is an action against trustees, and formerly within the exclusive jurisdiction of Chancery: *Morrow* v. *Connor*, 11 P. R. 423.

An action for specific performance of a covenant to repair or for damages was held to be a Common Law action, as specific performance of such a covenant

could not be decreed in Chancery: *Bingham* v. *Warner*, 10 P. R. 621; but generally where a party seeks equitable relief to which he is not entitled the opposite party should, unless in a very clear case, demur, instead of attacking the pleadings indirectly by asking to have a jury: *Ib.* Secs. 78, 79.

Even in cases formerly within the exclusive jurisdiction of the Court of Chancery a trial by jury may be had. *Prima facie* the trial is to be without a jury. It may, however be "otherwise ordered" on special application. The power to order a jury existed under the Chancery Act (R. S. O. 1877, c. 40, s. 99). Applications under that section could only be made to the Court; the Master in Chambers had no jurisdiction: *Thurlow* v. *Beck*, 9 P. R. 268. It is presumed that under the present section the application may be made in the same way as an application under section 80, that is, to the Court or a Judge thereof, and should not be made to the Master in Chambers or a local Judge, as the discretion to be exercised on the motion is similar to that vested in the Judge at the trial under section 80: see, however, *Bennett* v. *Tregent*, 25 C. P. 443. Jury obtained on special motion.

A jury was refused in *Re Lewis, Jackson* v. *Scott*, 11 P. R. 107, a suit to establish a will.

78.—(1) Subject to Rules of Court, all causes, matters and issues other than aforesaid, and the assessment or inquiry of damages therein may, and (subject to the provisions of section 80) in the absence of such notice as is in sub-section 2 of this section mentioned shall be heard, tried and assessed by a Judge without a jury. Other issues to be tried and damage assessed by Judge alone.

(2) If any of the parties desires the issues of fact to be tried or damages to be assessed or inquired of by a jury, he shall, at least eight days before the sittings at which the action is to be tried, or within such other time as may be ordered by the Court or a Judge, file and serve on the opposite party a notice in writing to the effect following, that is to say: Unless jury notice given or Court or Judge otherwise directs.

"The Plaintiff (*or one or more of them* or the Defendant, *or one or more of them, as the case may be*) requires that the issues in this cause be tried (or the damages assessed) by a jury,"

and a copy of the notice shall be attached to the record or certified copy of the pleadings prepared for the Judge. R. S. O. 1877, c. 50, s. 253; 44 V. c. 5, s. 45.

The provision that a jury notice is to be served at least 8 days before the sittings is new. Previously to the Rev. Stat. the jury notice had to be filed with the last pleading: see *Powell* v. *London Ass. Co.*, 10 P. R. 520; *Humphreys* v. *Hunter*, 20 C. P. 456, 466; *Leeson* v. *Lemon*, 17 C. L. J. 430, 1 C. L. T. 698.

79.—(1) Where any one of the parties has given such notice requiring a jury, the issues of fact therein shall (subject to the provisions of section 80) be tried and determined or the damages assessed by the unanimous verdict of twelve jurors duly sworn for the trial of such issues or for the assessment of such damages. Effect of notice requiring a jury.

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Sec. 80. Parties may waive notice.

(2) The parties present at the trial may consent that the said notice shall be waived, and the case tried and damages assessed by the Judge, and may indorse a memorandum of such consent upon the record, and thereupon the Judge may try the issues or assess the damages without a jury. R. S. O. 1877, c. 50, s. 254.

The memorandum if omitted to be made at the time may be made afterwards *nunc pro tunc* from the Judge's notes: *Wycott* v. *Campbell*, 31 U. C. Q. B. 584.

Judge may direct trial by jury, or without a jury.

80. Notwithstanding anything in the next preceding two sections contained, the Judge presiding at the trial may in his discretion direct that the action or issues shall be tried or the damages assessed by a jury; and upon application to the Court in which the action is pending, or to a Judge thereof, by an order made before the trial, or by the direction of the Judge presiding at the trial, the issues may be tried and damages assessed without a jury. R. S. O. 1877, c. 50, s. 255.

It has been said that as a rule the question whether a jury notice ought to be struck out can be better disposed of by the Judge at the trial, when the real questions to be tried have been ascertained, than by a Judge in Chambers on the pleadings and affidavits (per Osler, J.A., in *Conmee* v. *C. P. R.*, 12 Ont. App. 769), and the Judge at the trial is considered to have absolute control over the manner in which the case shall be tried, and his discretion will not be interfered with by a Divisional Court: *Brown* v. *Wood*, 12 P. R. 198.

In *Conmee* v. *C. P. R.* (*sup.*) though the Court of Appeal held that the plaintiff was entitled to a jury, at the trial a jury was dispensed with and the case referred to arbitrators. It has, therefore, sometimes been considered inexpedient to deal with the matter on motion before trial in view of the power of the Judge at the trial: see *Temperance Colonization Co.* v. *Evans*, 12 P. R. 48, 380; *McMahon* v. *Lavery*, *ib.* 62. Cases, however, have arisen in which the Court has acted on motion. In *Bennett* v. *Tregent*, 25 C. P. 443, Mr. Dalton, Q. C., Clerk of the C. & P. sitting in Chambers, directed the trial to be without a jury in an action for a breach of warranty, and his power to do so was affirmed by the Court. In *Pickup* v. *Kincaid*, 11 P. R. 445, an action to recover fees for medical attendance, where nothing was in dispute but the amount, it was held to be a proper case to strike out a jury notice with a view to having an account directed at once.

It has been held that this section places the matter in the discretion of the Judge in much the same way as under the English Order 36, rr. 3-7, that is, the Judge must be satisfied that sufficient reasons exist to deprive the party claiming a jury of his *prima facie* right. The *onus* of establishing this is on the other side, if an application is made before trial, and if the case can be equally well tried by either mode, then, if either party desires it, the case should go to a jury: *Bank of B. N. A.* v. *Eddy*, 9 P. R. 470; see also *Clark* v. *Skipper*, 21 Ch. D. 134; *Moses* v. *Simpson*, 20 C. L. J. 230.

Semble, mere complexity of facts would not, alone, be sufficient reason for dispensing with a jury, in a Common Law action: *Bank of B. N. A.* v. *Eddy*, 9 P. R. 468.

Under ordinary circumstances an action for infringement of a patent should not be tried by a jury: *Vermilyea* v. *Guthrie*, 9 P. R. 267.

Causes of action may in a proper case be severed, that some proper for a trial by jury may be so tried; see *Temperance Colonization Co.* v. *Evans*, and

McMahon v. *Lavery* (*sup.*); but such separate trial by jury should not be ordered where there is but one cause of action: *Farran* v. *Hunter*, 12 P. R. 324. Sec. 80.

Rules 677 and 678 provide the mode of trial where equitable issues or both legal and equitable issues are raised. See notes to those *Rules*.

Where a trial is commenced with a jury the Judge cannot during its progress dispense with and discharge the jury and try the case by himself: *Denmark* v. *McConaghy*, 29 C. P. 563; *Adair* v. *Wade*, 9 Ont. 15.

Where a case had been tried and the jury disagreed, a motion was made to dispense with a jury, as a jury would be likely to disagree again, but it was held that the case having been considered proper for a trial by jury, it should be so tried, subject to the directions of the Judge at the trial: *Bank of B. N. A.* v. *Eddy*, 3 C. L. T. 499; see 19 C. L. J. 158; but in *Adamson* v. *Adamson*, 12 P. R. 469, a second trial was directed to be without a jury, the case being one where there was no *prima facie* right to a jury.

In *McGunighal* v. *G. T R.*, 6 P. R. 209, where, after the jury disagreed, and a second trial had been had, but the verdict had been set aside as against evidence, an order was made for trial by a Judge.

PLEADINGS IN ACTIONS ON FOREIGN JUDGMENTS.

Foreign judgments are those given by Courts whose jurisdiction does not extend to Ontario: *Macfarlane* v. *Derbishire*, 8 U. C. Q. B. 12; a foreign judgment if not impeached or denied is *prima facie* evidence against the defendant: *Manning* v. *Thompson*, 17 C. P. 606. It constitutes a simple contract debt, so that the period of limitation in such case (6 years), for bringing an action upon it, applies: *North* v. *Fisher*, 6 Ont. 206.

The principle upon which a foreign judgment is enforced is that the judgment of a Court of competent jurisdiction over the defendant imposes an obligation upon the defendant to pay which the domestic Court is bound to enforce: *Fowler* v. *Vail*, 4 Ont. App. 270; *Castrique* v. *Imrie*, L. R. 4 E. & I. App. 414; *Godard* v. *Gray*, L. R. 6 Q. B. 139; *Re Trufort*, *Trafford* v. *Blane*, 57 L. T. N. S. 674.

A judgment for a penalty under a statute of a foreign State does not create a debt enforceable in this Province: *Huntingdon* v. *Attrill*, 17 Ont. 245.

A foreign judgment is *prima facie* evidence only that the foreign Court had jurisdiction over the subject matter or the person of the defendant, and that the judgment was regularly obtained. It may be shown by way of defence that the judgment was not binding in the foreign country, for want of jurisdiction. The Court has jurisdiction over the person of the defendant when he is the subject of the country even though not resident nor domiciled in it, and he is therefore bound by a judgment, though obtained in his absence, where recovered under the process of the country to which he owes allegiance as a subject, or temporary allegiance by being, when the suit was commenced, resident in the country, so as to have the benefit and protection of its laws. The absence of these circumstances will constitute a defence: see *Fowler* v. *Vail*; *Godard* v. *Gray* (*sup.*) *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155; *Maubourquet* v. *Wyse*, 1 Ir. C. L. 471; *McLean* v. *Shields*, 9 Ont. 699; *Beaty* v. *Cromwell*, 9 P. R. 547; 2 Smith L. C. 8th ed. 840.

If the foreign Court had jurisdiction as above (or if defendant submitted to its jurisdiction by appearing: *Voinet* v. *Barrett*, 34 W. R. 161; 1 Cab & E. 554), the judgment is conclusive so as to prevent him from pleading any defence which might have been pleaded in the foreign country: *Fowler* v. *Vail*, and other cases *supra*; *Paisley* v. *Broddy*, 11 P. R. 202.

Fraud in obtaining a foreign judgment is a defence: *Aboulaff* v. *Oppenheimer*, 10 Q. B. D. 295; or that it is contrary to natural justice as in *Buchanan* v. *Rucker*, 1 Camp. 63; 9 East. 192; or the fact that it was obtained against defendant without notice (he being an alien), notwithstanding the judgment is valid in the foreign country: *Rousillon* v. *Rousillon*, 14 Ch. D. 351.

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Secs. 81-84.

Suit upon judgment in Quebec, where the service was personal.

81. In any suit brought in Ontario on a judgment or decree obtained in the Province of Quebec in a suit in which the service of process on the defendant or party sued has been personal, no defence that might have been set up to the original suit shall be pleaded to that brought on the judgment or decree. R. S. O. 1877, c. 50, s. 145.

Suit upon judgment in Quebec, where service was not personal.

82. In any suit brought in Ontario on a judgment or decree obtained in the Province of Quebec in a suit in which personal service was not obtained and in which no defence was made, any defence that might have been set up to the original suit may be made to the suit on the judgment or decree. R. S. O. 1877, c. 50, s. 146.

Quære whether the personal service referred in these sections means personal service in the Province of Quebec: *Court* v. *Scott*, 32 U. C. C. P. 148. In that case the action was upon a prom. note made in Toronto payable in Montreal so that the contract was performable, and the breach occurred, in Quebec, bringing the defendant within 22 V. c. 5, s. 58., which, by the law of Quebec, gave the Quebec Court jurisdiction upon a personal service in Ontario.

As to the mode of proof of a Quebec judgment: see *Tilton* v. *McKay*, 24 U. C. C. P. 94.

VERDICT.

Court may direct jury to give a special verdict, except in actions for libel.

83. Upon a trial by a jury, where the Court or the presiding Judge otherwise directs, it shall not be lawful for the jury to give a general verdict, and it shall be the duty of the jury to give a special verdict if the Court or presiding Judge so directs; and unless the Court or the presiding Judge otherwise directs, the jury may give either a general or a special verdict; but this section shall not apply to actions of libel. R. S. O. 1877, c. 50, s. 268.

A "general verdict" is one whereby the jury find the issue in favour of one party or the other, generally *i. e.* plaintiff, or defendant, as the case may be; and where there are several issues, if some be found in favour of one side and some in favour of the other, this would still be a "general verdict:" Co. Lit. 226; *Davies* v. *Loundes*, 1 Sc. N. R. 328; Chitty's Arch. Pr. (14th ed.) 655. A "special verdict," on the other hand, is one whereby the jury simply find the facts, leaving it to the Court on applying the law to the facts so found, to determine for which of the parties a judgment should be given: Co. Lit. 227 b, 228. Chitty's Arch. Pr. (14th ed.) 655.

Formerly a jury might in all cases give a general verdict: *Mayor of Devizes* v. *Clark*, 3 A. & E. 506; but this and the following section have restricted this right.

In certain cases the jury may be directed to answer questions, and on the

84. Upon a trial by jury, in any case except an action for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution, and false imprisonment, the Judge, instead of directing the jury to give either a

general or a special verdict, may direct the jury to answer any questions of fact stated to them by the Judge for the purpose; and in such case the jury shall answer such questions, and shall not give any verdict; and on the finding of the jury upon the questions which they answer, the Judge shall direct judgment to be entered. R. S. O. 1877, c. 50, s. 264. Secs. 85-87. answers the Judge; shall enter verdict.

See *Canada Central* v. *McLaren*, 8 Ont. App. 564; *St. Denis* v. *Baxter*, 13 Ont. 41; *Gower* v. *Lusse*, 16 Ont. 88.

It is imperative upon the jury to answer the questions submitted to them and they may not give a general verdict instead, unless the Judge in his discretion receives it: *Furlong* v. *Carroll*, 7 Ont. App. 145.

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INTEREST.

85. Interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it. R. S. O. 1877, c. 50, s. 266. Interest may be allowed where it has been usual.

Interest is in practice more frequently allowed by our juries than English authority would seem to warrant: *Spence* v. *Hector*, 24 U. C. Q. B. 277; see also *Mennie* v. *Leitch*, 8 Ont. 397; *Snarr* v. *Badenach*, 10 Ont. 131; *Re Kirkpatrick*, 10 P. R. 4; *Michie* v. *Reynolds*, 24 U. C. Q. B. 303; *Montgomery* v. *Boucher*, 14 U. C. C. P. 45.

As to the allowance of interest on a claim in the Master's office: see *Re Ross*, 20 Gr. 385.

86.—(1) On the trial of any issue, or any assessment of damages, upon any debt or sum certain, payable by virtue of a written instrument at a certain time, interest may be allowed to the plaintiff from the time when the debt or sum became payable. When allowed on debts certain and overdue.

See *Towsley* v. *Wythes*, 16 U. C. Q. B. 139.

(2) If payable otherwise than by virtue of a written instrument at a certain time, interest may be allowed from the time when a demand of payment is made in writing, informing the debtor that interest will be claimed from the date of the demand. R. S. O. 1877, c. 50, s. 267.

Interest may be allowed on a solicitor's bill if a demand in writing is made for it: *Re McClive*, 9 P. R. 213.

87. In actions for conversion of goods or for trespass *de bonis asportatis*, the jury may give interest in the nature of damages over and above the value of the goods at the time of the conversion or seizure, and in actions on policies of insurance may give interest over and above the money recoverable thereon. R. S. O. 1877, c. 50, s. 268. When by way of damages in certain actions.

Secs. 88,89. Interest on judgments.

88. Unless it is otherwise ordered by the Court, a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be, notwithstanding that the entry of judgment upon the verdict, or upon the giving of the judgment, shall have been suspended by any proceedings in the action, whether in the Court in which the action is pending or in appeal. R. S. O. 1877, c. 38, s. 43; c. 50, s. 269; 47 V. c. 10, s. 4.

Interest does not run from the date of the verdict, where the judgment is expressly directed to be entered at a future day: *McLaren* v. *Canada Central Ry. Co.*, 10 P. R. 328; and where a verdict is entered, subject to an award, the amount of the award does not bear interest from the date of the verdict: *Hope* v. *Beatty*, 7 P. R. 39; and see *Woodruff* v. *Canada Guarantee Co.*, 8 P. R. 532.

SITTINGS.

Sittings for trial of causes.

89.—(1) Subject to Rules of Court, as often in every year as the due despatch of business and the public convenience may require, there shall be sittings of the High Court at every county town for the trial of causes, matters and issues, whether legal or equitable, in all Divisions of the High Court, which are to be heard and determined by a Judge without a jury, and also for the trial of causes, matters and issues in all Divisions of the High Court which are to be tried with a jury, and for the trial of criminal matters and proceedings; and in case such first mentioned sittings are appointed at any county town for the same time and before the same Judge as jury cases, separate lists shall be made of the jury and non-jury cases, and the jury cases shall first be disposed of, unless the Judge sees fit to direct otherwise. 44 V. c. 5, s. 46; 48 V. c. 13, s. 14.

(2) The Judges of the Supreme Court of Judicature, or a majority of them, shall appoint the days upon which such sittings shall be held. R. S. O. 1877, c. 40, s 24; c. 41, s. 2.

See also *Rule* 213.

Under this section the High Court holds Circuit Sittings similar to the former Sittings of Courts of Assize and Nisi Prius.

Commissions for holding Courts of Assize and Nisi Prius may still be issued. See R. S. O. 1887, c. 45.

Semble, that the Lieut.-Governor as well as the Governor-General has power to issue such commissions: *Reg.* v. *Amer*, 42 U. C. Q. B. 391.

See also *Reg.* v. *Bunting*, 7 Ont. 118.

Judges to appoint days for holding Courts of Assize.

90.—(1) Sittings of the High Court for the trial of causes, matters and issues shall be held at the county town of every county and union of counties in each year between the Hilary and Easter sittings of the High Court, and between the 1st day of September and the Michaelmas sittings. R. S. O. 1877, c. 41, s. 1.

(2) One such sittings shall ordinarily be held in each year at Sault Ste. Marie and at Port Arthur, respectively, on such days as may from time to time be appointed therefor by the Judges of the Supreme Court of Judicature, or a majority of them, but if the said Judges, on inquiry, ascertain on any occasion that any such sittings is not required for the administration of justice, it shall not be necessary to appoint a day for the holding thereof. 47 V. c. 14, s. 13.

(3) In addition to the said sittings so to be held at the county town of the County of York, there shall in every year be held at such county town a third such sittings between the said Michaelmas and Hilary sittings, and a fourth such sittings between the said Easter sittings and the 1st day of July. R. S. O. 1877, c. 41, s. 1.

(4) In addition to the sittings so to be held at the county towns of the Counties of Wentworth and Middlesex, there shall be held at each of such county towns a third such sittings for the trial of civil causes, matters and issues and criminal matters and proceedings, or of civil causes, matters and issues only, in each and every year between said Michaelmas and Hilary sittings. R. S. O. 1877, c. 41, s. 1; 48 V. c. 13, s. 14.

(5) In addition to the regular sittings to be held under sub-section 1 of this section, a third such sittings may be appointed if the Judges of the Supreme Court, or a majority of them, shall see fit for the trial of civil causes, matters and issues and criminal matters and proceedings, or of civil causes, matters and issues only, to be held at the county town of any county in the Province between said Michaelmas and Hilary sittings of the High Court. 48 V. c. 13, s. 14.

Judges may appoint sit-

91. The Judges of the Supreme Court may appoint sittings of the High Court in any county in the Province,

Secs. 92-95. tings in any County for issues to be tried without a jury.

as often and at such times as they see fit, for the trial of causes which are to be tried by a Judge without a jury. R. S. O. 1877, c. 41, s. 5.

Separate sittings for civil and criminal matters.

92. The sittings of the High Court for the trial of civil causes, matters and issues in any county may, in the discretion of the Judges appointing the days therefor, or of the Judge who has been appointed to preside or is presiding thereat, be held separate and apart from the sittings for the trial of criminal matters and proceedings, either on the same day or on a different day. R. S. O. 1877, c. 41, s. 3.

Place in County Town where Court to be hold

93. Such sittings may, at the discretion of the Court or of the Judge who is to hold the same, be held in the court house of the county town in which the same are appointed to be held, or in such other place in the county town as the Judge selects; and the Judge shall in all respects have the same authority as a Judge formerly had when sitting at Nisi Prius in regard to the use of the court house, gaol and other buildings or apartments set apart in the County for the administration of justice. R. S. O. 1877, c. 40, s. 26.

Who may preside.

94.—(1) Such sittings shall be presided over by one of the Judges of the Supreme Court; or in their absence by a retired Judge of the Supreme Court or by a Judge of any County Court in Ontario, or by one of Her Majesty's Counsel learned in the law appointed for Upper Canada, or for the Province of Ontario, upon such Judge or Counsel being requested by a Judge of the Supreme Court to attend for that purpose. R. S. O. 1877, c. 41, s. 6.

(2) Such Judge or Counsel while holding the sitting shall possess, exercise and enjoy all the powers and authorities of a Judge of the High Court, and in civil proceedings may reserve the giving of his decision on questions raised at the trial; and such decision shall have the like force and effect as the decision of a Judge of the High Court. R. S. O. 1877, c. 40, s. 27; c. 41, s. 8.

ABSENCE OF JUDGE AT THE OPENING OF ASSIZES.

Course to be pursued by the

95. Where the Judge whose duty it is to hold any [Court of Assize and Nisi Prius, or of Oyer and Terminer

or General Gaol delivery,] does not arrive in time, or is not able to open such Court on the day appointed for that purpose, the Sheriff of the County in which such Court should be holden, or, in his absence, his Deputy, may, after the hour of six of the clock in the afternoon of such day, adjourn by his proclamation, the Court which should have been opened on that day, to an hour on the following day to be by him named, and so from day to day until the Judge arrives to open such Court, or until such Sheriff receives other direction from the Judge in that behalf. R. S. O. 1877, c. 41, s. 11.

Sec. 96, (2, 3). Sheriff if the Judge of Assize does not arrive on the day appointed for opening Court.

By 52 V. c. 10, s. 3, the words in brackets have been struck out and the following inserted instead :—"Sittings of the High Court for the trial of civil cases, matters and issues, and for the trial of other matter and proceedings within the jurisdiction of the Provincial Legislature."

The adjournment of Courts of Assize and Nisi Prius is provided for in R. S. O. 1887, c. 45, s. 6.

TRIAL OF SUPERIOR COURT CASES IN COUNTY COURTS, AND COUNTY COURT CASES BEFORE HIGH COURT.

96.—(1) All issues of fact and assessments of damages in the High Court relating to debt, covenant and contract, where the amount is liquidated or ascertained by the signature of the defendant, may be tried and assessed in the County Court of the county where the trial is to take place, if the plaintiff desires it, unless a Judge of the High Court otherwise orders, and upon such terms as he deems meet.

Certain cases in High Court may be tried in the County Court of the County in which the venue is laid.

The amount must be ascertained by the signature of defendant or liquidated in the same way : *McPherson* v. *McPherson*, 5 P. R. 240. A note made in the U. S. and payable in American currency is not so liquidated or ascertained : *Cushman* v. *Reid*, 20 C. P. 147 ; 5 P. R. 121. By sub. sec. 3 *infra* the Court has a discretion to send an action for any debt for trial in a County Court, though the debt be not liquidated or ascertained by the signature of the defendant.

(2) In such case the action shall be entered for trial, notice of trial shall be given, and the trial take place in the same way as in ordinary cases in such County Court.

Certain cases in the High Court may be sent to be tried at the County Court of the County in which the action is brought.

(3) In any action in the High Court, in which the amount of the demand is ascertained by the signature of the defendant, and in any action for any debt in which a Judge of the said High Court is satisfied that the case may safely be tried in a County Court, any Judge of the High Court may order that such case shall be tried in the County Court of the county where such action was commenced, and such action shall be tried there accordingly,

Secs. 97-99. Proceedings in such case.

and the record shall be made up as in other cases; and the order directing the case to be tried in the County Court shall be left with the Clerk of the County Court on entering the action for trial, annexed to the certified copy of the pleading for the Judge; and the trial shall take place in the same way as in ordinary cases in such County Court. R. S. O. 1877, c. 49, s. 31.

In the cases mentioned in clause 1 the plaintiff is *prima facie* entitled to a trial in the County Court of the county in which the place named as the place of trial is, but if he takes steps for this purpose the defendant may move to have the trial in the High Court.

In the cases mentioned in clause 3 the plaintiff must first obtain an order for trial in a County Court, and the County Court must be that of the county in which the action is commenced, *i. e.*, the county in which the writ was issued.

By order County Court cases may be tried at High Court Sittings.

97.—(1) By the order of a Judge of the High Court, made upon such terms as the Judge may consider just, the issues of fact and assessment of damages in any action pending in a County Court may be tried and assessed at the sittings of the High Court at any county town.

This does not enable issues of fact to be tried in the High Court, leaving issues of law on the same record to be determined in the Co. Court: *Pattypiece* v. *Mayville*, 21 C. P. 316.

(2) In such cases the action shall be entered and the case tried as in ordinary cases. R. S. O. 1877, c. 49, s. 32.

The jurisdiction of the Co. Court is not enlarged by the trial of the case in the H. C. Where, therefore, the title to land came in question so that a Co. Court had no jurisdiction, a verdict was entered for defendant: *Wetherall* v. *Garlow*, 30 U. C. Q. B. 1.

Powers of County Court as to awards when Judge refers to arbitration, etc.

98. Where any such cause is referred by the presiding Judge at such sittings, the County Court in which the action is brought, and the Judge thereof, shall have the same power to enforce any award, report or certificate made on the reference, and to make rules and orders upon appeals therefrom and motions relating thereto, as if the order referring the case had been made by the County Judge. R. S. O. 1877, c. 49, s. 40.

Books for Judge's notes of trial, etc.

99. The Clerks of the several County Courts shall provide books in which the Judges presiding at the sittings of the High Court, where cases brought in any County Court are tried or assessed under this Act, may enter their notes

of such trials and assessments; and such books, immediately after the trials or assessments, shall be returned to the said Clerks and shall remain in their offices. R. S. O. 1877, c. 49, s. 41. Secs. 100, 101.

100. The jury fees and the fees and charges payable and pertaining to officers of the County Courts, upon all actions or proceedings brought in the County Courts, and tried or assessed in the High Court, shall be chargeable and paid as if the same were being tried or assessed in the County Courts; and no other fees shall be chargeable thereon, and the Clerk of a County Court shall be entitled to receive and take such part thereof as pertains to him, to his own use. R. S. O. 1877, c. 49, s. 44. Fee to officers.

OFFICIAL REFEREES AND ASSESSORS.

Equitable jurisdiction being given to all the Divisions of the High Court, the following sections are intended to give to all the Divisions, certain powers of reference similar to those formerly possessed by the Court of Chancery, and necessary in certain classes of cases in that Court.

Section 101 gives the power of referring, not the action, but any questions arising therein, to the proper officer, or to an official referee, or to any other person (if the parties so agree), for inquiry and report; and the report is treated by the Court as formerly a report of a Master was in Chancery.

The Common Law Courts had, previous to the Ont. J. A. 1881, power only under R. S. O. 1877, c. 49, s. 26, to refer matters in a cause for report. Sec. 101 gives a new tribunal, that is to say, instead of referring certain questions to a Master for report, the Court may refer questions to an Official Referee—an officer newly appointed with limited duties and also defined powers. See *Longman* v. *East*, 3 C. P. D. 142, 153.

Sec. 102 gives powers which neither the Court of Chancery nor the Common Law Courts possessed before. It gives authority to refer (without, as well as with, consent) to the proper officer any question or issue of fact, or any question of account, requiring a prolonged examination of documents or accounts, or a scientific or local investigation, which cannot conveniently be made before a jury, or conducted by the Court itself directly, not merely for report but for trial: *Longman* v. *East*, *sup.* 153.

A full explanation of these sections will be found in *Longman* v. *East*, *sup.*, quoted very fully, with approval, in *Cumming* v. *Low*, 2 Ont. 499.

The former power of the Court of Chancery to refer to a Master: *Longman* v. *East* and *Cumming* v. *Low*, *sup.*; *Slack* v. *Midland*, 16 Ch. D. 81; 29 W. R., 302, and the former practice as to arbitration were left unaffected by the Ont. J. A. 1881: *Cruikshank* v. *Floating Swimming Baths Co.*, 1 C. P. D. 260; *Longman* v. *East*, *sup.*; *Lloyd* v. *Lewis*, 2 Ex. D., 7; *Cumming* v. *Low*, 2 Ont. 499; and each Division of the High Court was given the jurisdiction formerly possessed by any of the Courts consolidated in the High Court; secs. 3 and 35.

Rule 550 now provides, however, that the Court will not refer to arbitration, so that all references of matters not disposed of by the Judge at the trial are referred either to a Master (see *Rules* 43-138) or an Official Referee.

See notes to *Rule* 550.

101.—(1) Subject to any Rules of Court and to such right as may exist to have particular cases submitted to References and assessors.

Sec. 101, (2, 3.)

the verdict of a jury (*a*) any question arising in any cause or matter before the High Court of Justice or before the Court of Appeal, may be referred by the Court or by any Divisional Court or Judge before whom such cause or matter may be pending, for inquiry and report to a Judge of a County Court, or to an official referee, or to any other person agreed on by the parties; and the report of such referee may be adopted wholly or partially by the Court, and may (if so adopted) be enforced as a judgment by the Court.

(2) The High Court, or any Divisional Court or Judge as aforesaid, or the Court of Appeal, may also, in any such cause or matter as aforesaid in which it may think it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors.

(3) The remuneration, if any, to be paid to such referees or assessors shall be determined by the Court. 44. V. c. 5, s. 47.

See Eng. J. A. 1873, s. 56.

By section 56 of the English Act the reference is to any official or special Referee, instead of being, as in the Ontario Act, to a Judge of the County Court or to an Official Referee, or to any other person agreed on by the parties. With respect to matters embraced in sub-sec. 2, the words "or any Divisional Court or Judge aforesaid," are not in the English Act.

As to who are Official Referees see section 124. See also *Rule* 551, which provides further for references to take accounts or make inquiries at any stage of proceedings.

(a) For such cases see secs. 76 and 78, and notes.

The Master in Chambers and local Judges have no jurisdiction to make an order under this section: *Union Loan Co.* v. *Boomer*, 10 P. R. 630; *Bank of Commerce* v. *Jennings*, 7 C. L. T. 170.

The jurisdiction of the Referee under this section is limited to "inquiry and report." Under the concluding clause of sub-sec. 1, it was formerly held that the Court may accept the report wholly or partially, or, if dissatisfied with the principle upon which the Referee has proceeded, may remit it to him for amendment: *Dunkirk Colliery Co.* v. *Lever*, 9 Ch. D. 20. It was there held also that though the Court might under this section adopt the report, wholly or partially, it could not alter or vary the report, any more than it could alter or vary the verdict of a jury as to the amount of the damages, and the L.JJ. differed as to whether the Court might disregard the report if wrong in principle and itself consider the evidence upon which it was founded. Subsequently the *Rule* corresponding to Ont. *Rule* 40 was passed, under which the Court may itself decide the question referred to a Referee, on the evidence taken before him or with additional evidence: see also *Re Brook*, 29 W. R. 821. It is submitted that now, under *Rule* 848, if the report becomes absolute the Court will adopt it, unless it is duly appealed against, and that the concluding clause of sub-sec. 1 must be regarded as repealed (see 51 V. c. 2 s. 4) or as having reference to what may be done where an appeal has been taken from the Referee. See also note to *Rule* 40.

Sec. 101.

What may be referred.

Under this section all that can be referred is a question or questions in the action, and must be a question or questions which must necessarily be decided in the action, not such as it may prove unnecessary to decide: *Weed* v. *Ward*, 40 Ch. D. 555. The whole action, facts and law, cannot be referred: *Longman* v. *East*, 3 C. P. D. 142: *Braginton* v. *Yates*, W. N. 1880, 150; *Luney* v. *Essery*, 10 P. R. 285; *Re Queen City Refining Co.*, 10 P. R. 415; nor the whole of the issues in an action: *Clarry* v. *B. N. Ass. Co.*, 12 P. R. 357. The Referee is not to dispose of the action, but to determine facts and report them; to find the materials upon which the Court is to act: *Longman* v. *East*, *sup.*; *Cummings* v. *Low*, 2 Ont. 501. A question of liability, upon which the right to an account depends, should be tried in the usual way: *Ward* v. *Hall*, W. N. 1880, 69 per Cotton, L.J.; *Clow* v. *Harper*, 3 Ex. D. 198; more especially if it be a proper question for a jury: *Young* v. *Prittie*, Globe, 19 April, 1882. Where a question is directly raised by the pleadings, and is distinctly presented to the Court for its decision, and evidence has been taken upon it, it should not be referred but should be disposed of by the Court: *International Bridge Co.* v. *Canada Southern Ry. Co.*, 7 Ont. App. 266; *Smith* v. *Armitage*, 24 Ch. D. 727.

This section contemplates an inquiry by examination of witnesses and not by the Referee's personal observation only: *Baroness Wenlock* v. *River Dee Co.*, 19 Q. B. D. 155.

Form of Order.

A form of order of reference under this section is given in the App. No. 139. It should express on its face that it is an order under this section for reference and report: *Cumming* v. *Low*, 2 Ont. 505. A difficulty has been felt about reserving further consideration, but if that cannot be done directly, the same object can, where necessary, be effected by making an interlocutory order of reference, and adjourning the further trial of the action till after the report shall be made: see *Re Brook*, W. N. 1880, 187; on fur. con. 29 W. R. 821; 45 L. T. 172, 17 C. L. J. 391; or though the judgment for the taking of accounts may be a final decree, a motion for judgment in the nature of a judgment on further directions may be made: *Walker* v. *Bunkell*, 22 Ch. D. 722.

Report.

The Referee under this section must make a report to the Court: *Cruikshanks* v. *Floating Swimming Bath Co.*, 1 C. P. D. 260. The report must contain the materials on which the Court is to act: *Longman* v. *East*, 3 C. P. D. 149, with such facts and particulars as may be necessary in each case, to shew on what the report is based, *e. g.*, where damages have been assessed, and the the principle upon which the assessment has been made: *Mayor of Birmingham* v. *Allen*, W. N. 1877, 190; where accounts have been taken, not merely the result of them, but also which items have been allowed, and which disallowed, should be made to appear by the report: *Burrard* v. *Calisher*, W. N. 1882, 11; 30 W. R. 321; 45 L. T. 793; 51 L. J. Chy. 223; 18 C. L. J. 180; 2 Ont. 165; *Luney* v. *Essery*, 10 P. R. 285. The evidence should not be stated: *Longman* v. *East*, *sup.*; see also *Sovereign* v. *Sovereign*, 15 Gr. 559; nor the reasons for any findings: *Dunkirk Colliery* v. *Lever*, 9 Ch. D. 20, though the Referee may doubtless be specially directed to do so where necessary: see *McCargar* v. *McKinnon*, 15 Gr. 361.

It is presumed that a Referee may, like a Master, report specially any circumstances which he deems necessary for the information of the Court, and that he should do so as to any matter affecting costs: see *Hayes* v. *Hayes*, 29 Gr. 90 and *Rule* 35.

When the conduct of an arbitrator would invalidate his report the like conduct on the part of a referee would be fatal to his report: see *Conmee* v. *Canadian Pacific Ry. Co.*, 16 Ont. 639.

Rules 34-40 provide for the mode of procedure by Referees. *Rule* 39 provides for the submission by the Referee, in his report, of questions for the decision of the Court.

As to the filing of the Referee's report, see *Rule* 84.

Procedure to enforce.

A report under this section formerly required to be adopted by the Court: see *Guardians of Mansfield* v. *Wright*, per Jessel, M.R., 9 Q. B. D., p. 686; *Miller* v. *Pilling*, 9 Q. B. D. 738; but now, under *Rule* 848, it becomes absolute at the expiration of 14 days from the filing unless duly appealed from.

Sec. 102. Judgment cannot be signed upon it, however, without a motion for judgment, which is similar to the former motion for decree on further directions. It is submitted also that notwithstanding the concluding clause of section 1 and *Miller* v. *Pilling*, 9 Q. B. D. 738, the Court is bound to adopt the report unless duly appealed from under *Rules* 848 and 849; (see note *supra*) and that the former decisions that the report may be taken to the Court for judgment at once without waiting for any lapse of time, and also without any motion to confirm it, and that any party dissatisfied with the report may move to set it aside or vary it at any time before or upon the return of any motion for judgment based upon it, no longer state the practice: see *Deacon* v. *Dolby*, W. N. 1882, 8; 30 W. R. 317; 18 C. L. J. 180; *Dunkirk Colliery* v. *Lever*, 9 Ch. D. 23; *Burrard* v. *Calisher*, W. N. 1882, 29; 30 W. R. 540; 46 L. T. 341; 18 C. L. J. 261; *Re Brook, Sykes* v. *Brook*, 29 W. R. 891; 45 L. T. 172; 17 C. L. J. 391; *Walker* v. *Bunkell*, 22 Ch. D. 722; *Luney* v. *Essery*, 10 P. R. 285. In *Hamilton* v. *Tweed*, 9 Pr. R. 448, the analogy of a Master's report was followed without objection in accordance with what is now, but was not then, the practice. Two clear days' notice of a motion for judgment was formerly, and is still, sufficient: *Re Brook*, *sup.* and *Rule* 479, but now 7 clear days' notice of an appeal is required by *Rule* 849. In England a motion raising objections to the report is generally begun by summons, but adjourned as a matter of course into Court to be heard with the further consideration of the case: see the cases *supra* and *Re Evans*, *Owen* v. *Evans*, W. N. 1882, 37. In Ontario the motion will be made before a single Judge in Court: see *Cumming* v. *Low*, 2 Ont. 505; *Douglas* v. *Hutchinson*, 6 Ont. 581.

No longer state the practice.

Procedure to vary report.

It has been held that an application to review the finding of a Referee must be supported by evidence, on affidavit or otherwise, of the proceedings before him. Counsel who appeared before him cannot move on his own statement: *Stubbs* v. *Boyle*, 2 Q. B. D. 124.

Power to direct trials before referees.

102.—(1) In any cause or matter before the said High Court, (1) in which all parties interested who are under no disability consent thereto, and (2) without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court or a Judge, conveniently be made before a jury, or conducted by the Court or Judge directly, the Court or a Judge may at any time, on such terms as may be thought proper, order any question or issue of fact, or any question of account arising in the cause or matter, to be tried either before a Judge of a County Court, or before an official referee, or (if the parties so agree) before a special referee.

(2) All such trials before referees shall be conducted in such manner as may be prescribed by Rules of Court, and subject thereto in such manner as the Court or Judge ordering the same shall direct. 44 V. c. 5, s. 48.

See Eng. J. A. 1873, s. 57.

Instead of the expression "the Court or Judge directly," the English section 57 has the words "the Court through its other ordinary officers" as by a recent change in the practice of the Court of Chancery in England references had ceased to be made to a Master, and were conducted by a Chief Clerk under the direction of the Judge. That change had not been followed in this Province.

The English Act does not provide for a reference to or trial before a County Court Judge. **Sec. 102.**

As to the scope of this section see prefatory note to sec. 101.

The Master in Chambers and Local Judges have no jurisdiction to order a reference under this section: *White* v. *Beemer*, 10 P. R. 531; *Union Loan* v. *Boomer*, 10 P. R. 630; *Bank of Commerce* v. *Jennings*, 7 C. L. T. 170.

A reference to a special Referee under the last clause of sub-section 1 is only ordered on consent: see *London & Lancashire F. Ins. Co.* v. *British American Ass. Co.*, 52 L. T. N. S. 385; 54 L. J. Q. B. 302, where the extra costs of a trial before an official Referee instead of a special Referee to whose appointment defendants refused to consent, were reserved.

Under this section, the Court, or a Judge at Nisi Prius, or a circuit sitting of the High Court: *Hoch* v. *Boor*, W. N. 1880, 93; 43 L. T. 425; 49 L. J. Q. B. 665; may send, where the parties have consented, not the whole action: *Longman* v. *East*, 3 C. P. D. 142; *Braginton* v. *Yates*, W. N. 1880, 150; *Clarry* v. *B. N. Ass. Co.*, 12 P. R. 357; but any question or issue of fact to an official Referee for trial. Where an order is made without consent, the Court can only send such questions as are brought within the terms of the section, that is any issue requiring prolonged examination of documents or accounts, etc., which in the judicial opinion of the Judge cannot conveniently be made before a jury or conducted by the Court or Judge directly: *Longman* v. *East*, *Hoch* v. *Boor*, *sup.* But if a case is once brought within the section by reason of a prolonged examination of documents, etc., being involved, the Court may refer not only the questions of account, but all issues of fact in the cause: *Ward* v. *Pilley*, 5 Q. B. D. 427, 431; *Miller* v. *Pilling*, 9 Q. B. D. 738; *Knight* v. *Coales*, 19 Q. B. D. 296; though the question in dispute does not consist entirely of matters of account: *Martin* v. *Fife*, 31 W. R. 840; 49 L. T. N. S. 107; *Goodwin* v. *Budden*, 42 L. T. N. S. 536; as where issues of fact were so mixed up with matters of account, that they could not practically be dissevered: *Longman* v. *East*, 3 C. P. D. 150; *Ward* v. *Hall*, W. N. 1880, 69. It is probable, however, that where there is a substantial question of liability upon which the taking of accounts depends, to be determined, it will first be determined in the ordinary way: *Clow* v. *Harper*, 3 Ex. D. 198; *Ward* v. *Hall*, W. N. 1880, 69; *Weed* v. *Ward*, 40 Ch. D. 555. What may be referred.

"Prolonged" means prolonged if had before a jury, not if had before a skilled accountant: *Ward* v. *Pilley*, 5 Q. B. D. 428; and the documents are such as it would be necessary to inquire into, in order to leave the question properly to the jury, not such as require examination to determine a question of legal right: *Ormerod* v. *Todmorden*, 8 Q. B. D. 664, 677. Reading a lot of letters is not a prolonged examination of documents: *Green's Trustee* v. *Barrett*, W. N. 1875, 204.

The expression, "question of account," will receive a large construction: *Re Leigh*, 3 Ch. D. 292; and any question of account which might have been compulsorily referred under the C. L. P. Act (see R. S. O. 1887, c. 50, ss. 189 and 195), may be compulsorily referred under this section: *Ward* v. *Pilley*, 5 Q. B. D. 427.

In a case involving a critical knowledge of pictures, the Court of Appeal refused to send the case for trial before a special Referee against defendant's will, as the fo[illegible]e and character of the defendant were involved, and he was entitled to have the matters of fraud charged tried in a public Court: *Leigh* v. *Brooks*, 5 Ch. D. 592. But even where there are questions of fraud there is no inherent right to a trial by jury, and in such a case if the issues involve a prolonged examination of documents or accounts they may be compulsorily referred: *Hoch* v. *Boor*, W. N. 1880, 93; 43 L. T. N. S. 425; *Sacker* v. *Ragozine & Co.*, 44 L. T. N. S. 308.

A question of damages consisting of various items in an action for injuries caused to a vessel by defendant's negligence: *Liverpool, etc. Co.* v. *London Navigation*, W. N. 1875, 203; issues of fact in a patent case requiring "scientific investigation": *Saxby* v. *Gloucester Waggon Co.*, W. N. 1880, 28; and damages

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Sec. 103. in an action for specific performance: *Stafford* v. *Coxon*, W. N. 1877, '38; were ordered to be assessed by a Referee.

An order made under this section by a Judge in his discretion is appealable: *Ormerod* v. *Todmorden, etc.*, 8 Q. B. D. 664; *Hoch* v. *Boor*, W. N. 1880, 93; 43 L. T. 425. But as a rule the Court of Appeal is disinclined to interfere with the exercise of a discretion: *Saxby* v. *Gloucester Waggon Co.*, W. N. 1880, 28.

Order. A form of order is given in the App. No. 140. It should, as intimated in *Longman* v. *East*, 3 C. P. D. 163, point out that it is an order under this section for issues to be tried, and should state whether all the issues are to be tried, or, if only certain issues, it should state by some sufficient description what those issues are: *Cumming* v. *Low*, 2 Ont. 505.

In *Cardinall* v. *Cardinall*, 25 Ch. D. 777, Pearson, J., said "it was not intended that Official Referees should decide the issue in an action; it was only intended that they should ascertain the facts so as to enable the Courts to decide the issue." This language seems applicable rather to a reference under section 101. The Referee under section 102 tries and decides, as a jury would, any issue referred to him, and his report is under section 103 equivalent to a verdict of a jury.

Rules 34, 37 regulate the procedure on a trial before a Referee.

As to the powers of Referees, see *Rule* 552.

Rule 39 provides for the submission of questions to the Court by the Referee before the conclusion of the trial before him, or by his report.

Report. The report of a Referee under this section should state his conclusions upon the issues referred, and he is not bound to give reasons for his findings: *Miller* v. *Pilling*, 9 Q. B. D. 736; see also *Longman* v. *East*, 3 C. P. D. 155; *Fawcett* v. *Winters*, 12 P. R. 232. Under *Rule* 39 the Court has power to obtain any explanation or reasons as to the principles upon which the Referee has rested his conclusions (*Ib*).

For an example of scientific or local investigation by a Referee, see *Broder* v. *Saillard*, 2 Ch. D. 692.

The report of a Referee under this section is by sec. 103 equivalent to the verdict of a jury. It would seem, however, to be subject to *Rule* 848 and notice of any motion against it must be given within 14 days from its filing.

Judgment. An Official Referee has, however, no power to order judgment to be entered: *Longman* v. *East*, 3 C. P. D. 142. The report must be brought before the Court on motion for judgment, when the Court will give judgment as formerly in Chancery upon the report of a Master: *Longman* v. *East*, *sup.*; *Deacon* v. *Dolby*, W. N. 1883, 25; *Miller* v. *Pilling*, 9 Q. B. D. 736; *Monro* v. *Rendall*, W. N. 1878, 41; *Walker* v. *Bunkell*, 22 Ch. D. 722. The motion is made to a single Judge sitting in Court: see *Cumming* v. *Low*, *sup.*

Such matters as that the report is imperfect or in excess of jurisdiction may be urged in opposing a motion for judgment: *Cooke* v. *Newcastle*, 10 Q. B. D. 336.

As to moving against the report see sec. 103.

Where a referee held that there was a want of reasonable and probable cause for the defendant's proceeding criminally against the plaintiff, and it was objected that this was a finding of law and not of fact, it was held to be equivalent to a verdict for plaintiff rendered by a jury under instructions from the Judge as to what would be reasonable and probable cause: *Fawcett* v. *Winters*, 12 P. R. 232.

Power of referees and effect of their findings.

103. In all cases of a reference to or trial by referees under this Act, the referees shall be deemed to be officers of the Court, and shall have such authority for the purpose of the reference or trial as shall be prescribed by Rules of Court, or (subject to such Rules) by the Court or Judge

ordering such reference or trial; and the report of any referee upon any question of fact on any such trial shall, unless set aside by the Court, be equivalent to the verdict of a jury. 44 V. c. 5, s. 49. Sec. 104.

Same as the Eng. J. A. 1873, s. 58.

The last clause of this section refers to reports made on a reference for trial under section 102.

The Referee reports his conclusion to the Court, and it has the same binding effect as the verdict of a jury. The judgment is, however, to be given by the Court: *Miller* v. *Pilling*, 9 Q. B. D., p. 738. The concluding words of the section merely deal with the binding effect of the Referee's findings, and do not make it necessary (notwithstanding *Sullivan* v. *Rivington*, 28 W. R. 372) to move against the report by the same mode of procedure, or within the same time, as in the case of a verdict of a jury. The proper course is to move upon notice under *Rule* 848 within 14 days from the date of the filing of the report, upon any ground upon which the verdict of a jury may be set aside: *Dyke* v. *Cannell*, 11 Q. B. D. 180; *Miller* v. *Pilling*, 9 Q. B. D. 739; *Cumming* v. *Low*, 2 Ont. 503; *Guardians of Mansfield* v. *Wright*, 9 Q. B. D. 686.

The former decisions as to the time of moving against a report: see *Dyke* v. *Cannell*, 11 Q. B. D. 183; *Bedborough* v. *Army and Navy Hotel*, 28 Sol. Jour. 325; 50 L. T. N. S. 173; 53 L. J., Chy. 658; *Luney* v. *Essery*, 10 P. R. 285, are overruled by *Rule* 848.

The motion to set aside a report must, in England, be made to the Divisional Court: *Cooke* v. *Newcastle, etc.*, 10 Q. B. D. 332; but in Ontario the motion will be before a single Judge in Court: *Hill* v. *N. Pacific Junc. Ry. Co.*, 11 P. R. 103; see *Rule* 219, and sec. 61, as in the case of a motion for judgment on the report: *Cumming* v. *Low*, *sup.* 505; *Guardians of Mansfield Union* v. *Wright*, 9 Q. B. D. 683; *Deacon* v. *Dolby*, W. N. 1883, 25.

104. With respect to all such proceedings before referees and to their reports, the Court or Judge shall have, in addition to any other powers, the like powers as by *The Act respecting Arbitrations and References* are given to the High Court with respect to references to arbitration and proceedings before arbitrators and their awards and appeals therefrom respectively. 44 V. c. 5, s. 50. Powers of Court with respect to proceedings before referees. Rev. Stat. c. 53.

It is not clear to what extent this section is now capable of application. *Rule* 550 provides that the Court will not refer to arbitration. The statute 51 V. c. 2, s. 4, confirmed the *Rules* and repealed any inconsistent enactments in the Rev. Statutes. *Rule* 550 would therefore seem to have effected a repeal of the power to refer to arbitrators conferred by R. S. O. 1887, c. 53. (See sec. 7 of that Act) Certain sections of c. 53, giving powers to the Court or Judge in respect to references to arbitration, and proceedings before arbitrators, and their awards, may possibly be applied under the above sec. 104. For example, the power to enforce reports after 6 days (sec. 34), the power to remit the matter (secs. 4 and 37), the issuing of subpœnas (sec. 46), and commissions (sec. 49). It is difficult, however, to see how some at least of these powers are not capable of being exercised under the *Rules* without the assistance of the sections just mentioned, all references being now merely proceedings in an action.

In case all the powers conferred in respect to appeals from arbitrators by R. S. O. c. 53, ss. 4 and 7 (2), are not as effectually given by the *Rules*, it may also be possible to invoke those secs. in order to amend or remit for reconsideration the report of a Referee.

The amendments to R. S. O. c. 53, made by 52 V. c. 13, apply only in cases of arbitrations by agreement and submission, not in an action.

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Sec. 105. RULES OF COURT.

The result of sections 105 to 108 in the present Act is, that since the Act went into operation the power of making rules is as follows:

(1) *Rules* may be made by the Supreme Court for governing its several Divisions (sec. 105).

(2) Subject to any such *Rules* of the Supreme Court, the Judges of the Court of Appeal may make *Rules* for that Court, and the Judges of the High Court may make *Rules* for the High Court (secs. 106 and 107). The English Acts do not give any such power to the Judges of the High Court. The Act of 1876, sec. 15, gives power to the President of the Court of Appeal, with the concurrence of the ordinary Judges of the Court of Appeal, or any three of them, to make *Rules* as to the Court of Appeal.

(3) The Lieutenant-Governor may authorize the three Chief Justices and the Chancellor to make *Rules*; and *Rules* so made are to have the same effect as if made by all the Judges of the Supreme Court: sec. 108.

Judges of Supreme Court may make Rules.

105.—(1) The Supreme Court may at any time, with the concurrence of a majority of the Judges thereof present at any meeting held for that purpose, alter and annul any Rules of Court for the time being in force, and may make any further or additional Rules of Court for carrying this Act into effect, and in particular for all or any of the following matters that is to say:—

(*a*) For regulating the sittings of the High Court of Justice and the Court of Appeal, and of any Divisional or other Courts thereof respectively, and of the Judges of the said High Court sitting in Chambers;

(*b*) For regulating the pleading, practice, and procedure in the High Court of Justice and Court of Appeal;

See Eng. J. A. 1875, s. 17.

The Court of Appeal and the High Court have each additional Rule-making powers. See ss. 106 and 107.

(*c*) For the hearing of appeals from County Courts, or a Judge of a County Court, from Provisional Judicial District Courts or a Judge of such Court, from Surrogate Courts, Stipendiary Magistrates, or Division Courts, by any two or more of the Judges of the Supreme Court, instead of the same being heard by the Court of Appeal, or a Judge thereof, (as the case may be); and for regulating the selection of the Judges of the Supreme Court, who shall

hear such appeals, and for regulating all matters relating to the practice on such appeals; 44 V. c. 5, s. 54 (1 *a-c.* 3). Sec. 105.

There is no clause similar to this in the Eng. Jud. Acts.

(*d*) For empowering the Master in Chambers, or any referee sitting for him, or the Judges of the County Courts, other than the Judge of the County of York, or the Local Masters in respect of actions brought in their counties to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same as by virtue of any statute or custom, or by the rules of practice of the High Court, are now or may be hereafter done, transacted or exercised by a Judge of the High Court sitting at Chambers, and as shall be specified in any such rule, except in respect of matters relating to— To empower Master in Chambers, etc., to make orders.

1. The liberty of the subject;
2. Appeals and applications in the nature of appeals;
3. Proceedings under *The Act respecting Lunatics*; Rev. Stat. c. 54.
4. Applications for advice under the *Trustee Acts*; Rev. Stat. c. 110.
5. Matters affecting the custody of children; and
6. Proceedings under section 32 of this Act. R. S. O. 1877, c. 39, ss. 29 and 32; c. 40, s. 28; 48 V. c. 13, ss. 13, 21.

See *Rules* 30-33 and notes.

(*e*) Generally, for regulating any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof, or of the said Supreme Court, or to the costs of proceedings therein (*a*); and every other matter deemed expedient for the better attaining the ends of justice, advancing the remedies of suitors, and carrying into effect

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the provisions of this Act and of all other Acts now or hereafter in force respecting the said Courts. 44 V. c. 5, s. 54 (1 *d*).

(*a*) What follows this is not taken from the English Acts but from R. S. O. 1877, c. 49, s. 45 (7).

(*f*) Subject to the approval of the Lieutenant-Governor in Council, to make rules from time to time regulating all fees payable in stamps. 44 V. c. 5, s. 54 (2).

See the Tariff, *post*.

Rule 6 requires that new *Rules* shall be published in the Ont. Gazette for 7 days before coming into force, unless the publication is expressly dispensed with.

(2) Where any provisions in respect of the practice or procedure of any Courts, the jurisdiction of which is vested by this Act in the High Court, are contained in any Statute, Rules of Court may be made for modifying such provisions to any extent that may be deemed necessary for adapting the same to the High Court, unless, in the case of any Act hereafter passed, this power shall be expressly excluded. 44 V. c. 5, s. 54 (6).

To the same effect is Eng. J. A. 1875, s. 24.

The operation of this section is probably now very limited, as nearly all the statutory enactments regulating practice and procedure in any of the Courts existing prior to Ont. J. A. 1881, whose jurisdiction is now vested in the High Court were, at the time of the Revision of the Statutes in 1887, intended to be embodied in the Consolidated *Rules*.

(3) Any provisions relating to the payment, transfer, or deposit into, or in, or out of any Court of any money or property, or to the dealing therewith, shall, for the purposes of this section, be deemed to be provisions relating to practice and procedure. 44 V. c. 5, 54 (7).

Taken from Eng. J. A. 1875, s. 24.

(4) All Rules of Court made in pursuance of this section shall from and after they come into operation, regulate all matters to which they extend, until annulled or altered in pursuance of this section. 44 V. c. 5, s. 54 (4).

Taken from Eng. J. A. 1878, s. 17.

Judges of Court of Appeal may make rules.

106. Subject to any Rules of Court which may be made under the provisions of the preceding section the Judges of the Court of Appeal or a majority of them, may from time to time make such General Rules and Orders, for fixing

the costs to be allowed in respect of proceedings in the said Court, and for regulating the different proceedings in appeal, and generally for the effectual execution of this Act and the intention and object thereof in regard to the practice in appeals as to them may seem expedient; and may also from time to time alter and amend any of the existing Rules, or any Rules made under the authority of this Act, and make other Rules instead thereof; and until such Rules are made, the present Rules and the existing practice and mode of proceeding in the Court shall continue in force. See R. S. O. 1877, c. 38, s. 56; 44 V. c. 5, s. 54 (5).

Judges of High Court may make rules.

107. The Judges of the High Court or any four of them of whom two of the Presidents of the Divisions of the High Court shall be two, shall as regards matters in the High Court have power to make General Rules from time to time for the regulation of the practice of the High Court. R. S. O. 1877, c. 49, s. 45; 44 V. c. 5, s. 54 (5).

Lieut.-Governor in Council may authorize certain Judges to make Rules.

108. The Lieutenant-Governor in Council may from time to time authorize the following persons, viz., the Chief Justice of Ontario, the Chief Justice of the Queen's Bench, the Chancellor, the Chief Justice of the Common Pleas, and any one or more of the other Justices of the Supreme Court, to make Rules of Court under this Act; every such appointment to continue for such time as shall be specified by Order in Council, and the Judges so appointed, or any three of them, may make such Rules, and the same shall have the same effect as if made by all the Judges of the Supreme Court, under section 105. 44 V. c. 5, s. 55.

Council of Judges to consider procedure and administration of Justice.

109. A Council of the Judges of the said Supreme Court, of which due notice shall be given to all the said Judges, shall assemble once at least in every year, on such day or days as shall be fixed by the Lieutenant-Governor, for the purpose of considering the operation of this Act and of the Rules of Court for the time being in force, and also the working of the several offices and the arrangements relative to the duties of the officers of the said Courts respectively, and of inquiring and examining into any defects which may appear to exist in the system of procedure or the administration of the law in the High Court of Justice or the Court of Appeal, or any other Court, or by any other

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Sec. 110. authority; and they shall report annually to the Lieutenant-Governor what (if any) amendments or alterations it would in their judgment be expedient to make in this Act, or otherwise relating to the administration of justice, and what other provision (if any) which cannot be carried into effect without legislative authority it would be expedient to make for the better administration of justice; an Extraordinary Council of the said Judges may also at any time be convened by the Lieutenant-Governor. 44 V. c. 5, s. 56.

This section corresponds with the Imp. enactment J. A. 1873, s. 75, except that, instead of the Lieutenant-Governor fixing the day for the annual assembling of the Council, that office is to be performed by the Lord Chancellor with the concurrence of the Lord Chief Justice of England; that, instead of the report being to the Lieutenant-Governor, the report is made to one of Her Majesty's principal Secretaries of State; and that, instead of an extraordinary Council being convened by the Lieutenant-Governor or the Chief Justice of Ontario, such Council is to be convened in England by the Lord Chancellor.

In the edition of the Judicature Acts by Sir W. T. Charley, M.P., p. 129, it is said of this section that, "it is calculated to produce the most beneficial effects, by breaking down the barrier of prejudice which still subsists, it is to be feared, between the sages of Equity and of the Common Law. Viewed in the light of this section the Supreme Court is a deliberative assembly." In another text-book it is said that "the Judges are constituted a standing commission on law and justice," (Lely & Foulkes, p. 57).

Provision for saving of existing procedure where not inconsistent with this Act or Rules of Court.

110. Save as by this Act or by any Rules of Court may be otherwise provided, all forms and methods (as nearly as may be) of procedure which, prior to the 22nd day of August, 1881, were in force in any of the Courts whose jurisdiction then became vested in the said High Court, under and by virtue of any law, general order, or rule whatsoever, and which are not inconsistent with this Act or with any Rules of Court—may continue to be used and practised in the said High Court of Justice, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable prior to the said date in the respective Courts of which the jurisdiction became so vested. 44 V. c. 5, s. 52.

This section is taken substantially from Imp. Act of 1875, s. 21, which uses the word "transferred" instead of "vested." That section was substituted for section 73 in Imp. Act of 1873, and it refers to the Court of Appeal as well as the High Court.

See also secs. 42, 53 (12) and 110.

This section must be taken to have been greatly modified by *Rule* 3, which provides that as to all matters not provided for in the *Rules*, the practice is to be regulated by analogy thereto instead of as above mentioned by the practice prior to the Jud. Act 1881. There were, however, prior to the passing of *Rule* 3, a number of decisions establishing the practice to be observed under the Jud. Act in certain matters in respect of which the *Rules* under the Jud. Act were silent, or

the practice of the pre-existing Courts was conflicting. These will still regulate the practice under the present *Rules* and are referred to below. Sec. 111.

See also notes to *Rule* 3.

As to how far the pre-existing procedure was to be considered to be in force, the following two canons or rules were laid down by Brett, L.J., in *Jackson* v. *Litchfield*, 8 Q. B. D. 477 :—The effect of the Judicature Act is that (1) in all cases which are not provided for by the Act the proceedings are to be as they were before the Act, and (2) in all cases within the Judicature Act, where no special steps in proceedings are provided, the proceedings are to be as nearly like as they can be to analagous proceedings before the Act : see also *National Funds Ass. Co.*, 4 Ch. D. 307 ; *Secar* v. *Lawson*, 29 W. R. 109 ; *Boddy* v. *Wall*, 7 Ch. D. 165 ; *Fowler* v. *Barstow*, 26 Sol. Jour. 96 ; *Bustros* v. *White*, 1 Q. B. D. 423. This is true as to rules of pleading as well as in matters of practice : *Evans* v. *Buck*, 4 Ch. D. 434. Two canons as to pre-existing procedure.

In cases within the first canon if the appropriate proceedings, and in cases within the second canon, if the special steps, were formerly similar in Chancery and at Common Law there is no difficulty ; but in cases where no rule of practice was laid down by the new *Rules*, and there was a variance in the old practice of the Chancery and Common Law Courts, it has been decided, under the corresponding section in England, that that practice is to prevail which is considered by the Court most convenient : *Newbiggin-by-the-Sea Gas Company* v. *Armstrong*, 13 Ch. D. 310 ; *Nurse* v. *Durnford*, *ib.*, 768 ; *LaGrange* v. *McAndrew*, 4 Q. B. D. 210 : *Thomas* v. *Palin*, 21 Ch. D. 367 ; *Bell* v. *Wilkinson*, W. N. 1878, 3 ; *Friendly* v. *Carter*, 9 Pr. R. 41 ; *Re Fitzgerald*, 10 P. R. 279 ; *Stewart* v. *Sullivan*, 11 P. R. 529 ; apparently overruling on this point some cases which applied sec. 53 (12) to matters of practice as well as of substantial law ; see *Grant* v. *Holland*, 3 C. P. D. 180, and notes to sec. 53 (12) ; see also *Davis* v. *Wickson*, 9 Pr. R. 219 ; *Bank of B. N. A.* v. *Eddy*, 9 Pr. R. 396 ; *Wilson* v. *Cowan*, 19 C. L. J. 140 ; 3 C. L. T. 216. First canon. Variances of old practice.

Though the appropriate and convenient proceedings are to be found in the practice of one only of the former systems of procedure, they may be applied in all the Divisions of the High Court : *Dobson* v. *Marshall*, 9 P. R. 1 ; *London & Canadian, etc.* v. *Merritt*, 32 C. P. 379 ; *Clarbrough* v. *Toothill*, W. N. 1881, 110 ; 50 L. J., Ch. 743 ; 18 C. L. J. 101 ; and see *Davis* v. *Wickson*, 9 Pr. R. 219.

Some proceedings under one of the former systems, and not referred to in the Jud. Act, have been held to be not now in force as being not convenient ; *e. g.*, a Term's notice is not now necessary where neither party has taken a step for a year : *Beaver* v. *Boardman*, 9 Pr. R. 239, and a side bar rule for costs of the day cannot be had where plaintiff gives notice of trial but does not enter the case : *Hopkins* v. *Smith*, 9 Pr. R. 285. Old practice abrogated.

The following are instances, under the second canon, of cases where, in the absence of provisions for special steps or practice under the Jud. Act, the proceedings prescribed by the Act may be supplemented from the former practice where appropriate and convenient :—The Chancery practice governing the time for applying for *interim* alimony : *Peck* v. *Peck*, 9 Pr. R. 299 ; relating to motions to dismiss for want of prosecution : *Bucke* v. *Murray*, 9 P. R. 195 ; the appointment of guardians *ad litem* to infant defendants out of the jurisdiction : *Rew* v. *Anthony*, 9 Pr. R. 545 ; substitutional service of process or documents other than writs of summons : *Dobson* v. *Marshall*, 9 Pr. R. 1 ; and the practice on appeal from a Master's report : *Walmsley* v. *Mundy*, 13 Q. B. D. 807. See also *Clarborough* v. *Toothill*, *Sup.* ; *Cooke* v. *Oceanic Steam Co.*, W. N. 1875, 220 ; *Laming* v. *Gee*, W. N. 1878, 240 ; *Regina* v. *O'Rourke*, 32 C. P. 388. Second canon. Supplementary procedure from old practice.

OFFICERS AND OFFICES.

111.—(1) The Lieutenant-Governor in Council may from time to time appoint a suitable person to be the Registrar of the Court of Appeal. Registrar may be appointed for the Court of Appeal.

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Secs. 112-114.

Fees of registrar to form part of Con. Rev. Fund.

Rev. Stat. c. 22.

(2) The said Registrar shall not take for his own use or benefit, directly or indirectly, any fee or emolument save the salary to which he is entitled by law; and all fees received by him on account of the said office shall form part of the Consolidated Revenue Fund, and shall be payable in stamps, subject to *The Act respecting Law Stamps*. R. S. O. 1877, c. 38, s. 11.

Appointment of Masters, etc

112.—(1) The Lieutenant-Governor may from time to time appoint a Master in Ordinary, a Master in Chambers, an Accountant of the Supreme Court and two or more Taxing Officers. R. S. O. 1877, c. 40, s. 8; 44 V. c. 5, Rule 438.

(2) Subject to Orders of the Lieutenant-Governor in Council, the said officers and the Local Masters shall be officers of the Supreme Court and attached thereto. 44 V. c. 5, s. 58 (2).

By order of the Lieutenant-Governor in Council of 22nd May, 1889, the Master in Ordinary and Local Masters were constituted officers of the High Court.

Appointment of Clerk of Process, etc.

Duties.

113. The Lieutenant-Governor may from time to time appoint one Clerk of the Process for the High Court, one Registrar for each of the Divisions of the High Court; and one Clerk of Records and Writs and one Assistant Registrar, to be attached to the Chancery Division; and also such other clerks and officers as the business of the Court may, from time to time, require; and such officers and clerks shall, in addition to any of the duties usually performed by the like officers and clerks, perform such duties as may by Rules of the Supreme Court or the High Court be provided, or as the Division of the High Court to which such officers are attached, may from time to time direct. R. S. O. 1877, c. 39, s. 36; c. 40, s. 8.

Officers to remain attached to their several divisions.

114.—(1) Subject to Orders of the Lieutenant-Governor in Council all officers attached to the various Divisions of the High Court shall remain and continue to be attached to the Divisions respectively to which they are now attached. 44 V. c. 5, s. 58 (1).

Compare Eng. Rules S. C. 1876, Order 60, r. 1.

(2) Where a doubt exists as to the position under this Act of any existing officer attached to any Court or Judge

affected by this Act, such doubt may be determined by Rule of Court. Secs. 115-117.

(3) The Lieutenant-Governor in Council shall have the power and (subject to any Order in Council) the Judges of the said Supreme Court shall have power to change the official names of offices and officers, and to change and regulate the duties of the officers. 44 V. c. 5, s. 58 (4).

See Eng. J. A., 1879, s. 24.

115. Subject to any Order in Council in that behalf, the business to be performed in the High Court and in the Court of Appeal respectively, or in any Divisional or other Court thereof, or in the chambers of any Judge thereof, other than that performed by the Judges, shall be distributed among the several officers attached to the said Courts by the preceding section in such manner as may be directed by Rules of Court; and such officers shall perform such duties in relation to such business as may be directed by Rules of Court; and, subject to such Order in Council and Rules of Court, all such officers respectively shall continue to perform the same duties, as nearly as may be, and in the same manner as if this Act had not passed. 44 V. c. 5, s. 59. Distribution of business among officers.

See Eng. J. A. 1873, s. 77.

116.—Orders made by the Master in Chambers, or other officer mentioned in sub-section (*d*) of section 105, shall be as valid and binding on all parties concerned as if made or given by a Judge in Chambers. R.S.O. 1877, c. 39, s. 31; c. 40, s. 29.

117.—(1) Every officer of the Court hereafter appointed before he enters upon his duties shall take and subscribe the following oath: Oath of officers.

"I, *A. B.* of———, do hereby solemnly swear that I will, according to the best of my skill, learning, ability and judgment, well and faithfully execute and fulfil the duties of the office of (*as the case may be*) without favour or affection, prejudice or partiality, to any person or persons whomsoever. So help me God."

(2) When not convenient to a person appointed to any office to attend at Toronto to take the oath of office, the oath may be taken before the Judge of the County Court of the County in which the officer resides, or before

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Secs. 118-122.

a Commissioner authorized to administer affidavits in such County, and the oath shall be certified by the Judge or Commissioner and filed amongst the records of the Court at Toronto. In all other cases the oath shall be administered to the officer by the Judge in open Court. 44 V. c. 5, s. 61.

Officers to give security.

118. The Clerk of the Process, the Registrars of the Queen's Bench and Common Pleas Divisions, and the Deputy Clerks of the Crown and Pleas, shall, within one month next after their appointment, give security to Her Majesty, in such sum, and with so many sureties, and in such form as the Lieutenant-Governor in Council directs, conditioned respectively, for the due performance of th duties of their office. R.S.O. 1877, c. 39, s. 38.

Consequences of neglecting to do so.

119. The neglect by any such Registrar or Deputy Clerk to give such security shall render his appointment void; but the forfeiture of office shall not affect any act done by him during the time he actually continues to hold his appointment. R. S. O. 1877, c. 39, s. 39.

Who to approve of the sureties.

120. The Lieutenant-Governor shall in his discretion approve of the security and sureties so given by each Registrar, and the Judge of the County Court having first certified his approval in writing, of the security and sureties given by the Deputy Clerk of the Crown for his County, the Lieutenant-Governor shall in his discretion approve of the security and sureties so given by such Deputy Clerk; and such securities, when executed and approved, shall be duly recorded in the manner provided by *The Act respecting Public Officers*, and shall then be deposited in the office of the Provincial Treasurer. R. S. O. 1877, c. 39, s. 40.

To be recorded and deposited as provided by Rev. Stat. c. 15.

Officers to be at Osgoode Hall.

121. The Registrars and the Clerk of the Process respectively shall keep their offices in Osgoode Hall, in the City of Toronto. R. S. O. 1877, c. 39, s. 42.

To supply officers with blank writs.

122. The Clerk of the Process shall keep the officers whose duty it is to issue writs and process, supplied with blank writs and process of all descriptions, to be filled up and issued by them; and he shall have a reasonable allowance for printing, procuring and transmitting blank forms of writs and process, and for necessary books and stationery. R. S. O. 1877, c. 39, s. 44.

Secs. 123-125. The Clerk of Process to make quarterly returns.

123. The Clerk of the Process shall make to the Treasurer of the Province quarterly returns, verified by his affidavit, of all writs and process issued by him in actions brought at Toronto, or supplied by him to the Registrars and Deputy Clerks of the Crown to be issued by them. R. S. O. 1877, c. 39, s. 46.

Official referees.

124.—(1) Subject as aforesaid, the Judges of the County Courts, the Master in Ordinary, the Master in Chambers, the Registrars of the several Divisions of the High Court and the Local Masters shall be official referees for the trial of such questions as shall be directed to be tried by such referees.

(2) In case the business is found to require other or additional official referees, and the Presidents of the said Divisions so certify, the Lieutenant-Governor from time to time may appoint other and additional official referees accordingly.

It has hitherto only been found necessary to appoint one additional Referee.

(3) In the case of officers who are paid by salary, the fees on any reference or trial shall be paid in stamps; other referees shall be paid by fees. 44 V. c. 5, s. 63.

This section does not correspond with the provisions of the English Act as to official referees. The English Act appears to have contemplated an immediate appointment of a new set of officers as "official referees, which has not been thought necessary for the present here, the authority of official referees being given to the County Court Judges, Masters in Chancery, Local Masters and other officers specially named in section 124 of the present Act, and the appointment of others being deferred until the Presidents of the Division certify that others are necessary.

Local Masters, Deputy Registrars, and Deputy Clerks of the Crown.

125.—(1) There shall be a Local Master in every County or union of Counties other than the County of York, and every Local Master hereafter appointed shall reside in the County for which he is appointed.

See sub-section (13), authorizing the High Court, with the concurrence of the Lieutenant-Governor in Council, to relieve present officers from the operation of this provision. No part of the 125th section is taken from the English Acts.

Local Masters.

(2) When a vacancy occurs in the office of Local Master, the Judge of the County Court for the County shall be the Local Master until and unless another person is appointed Local Master. In such case if there are two County Judges, a Senior and Junior Judge, both Judges shall be

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Sec. 125, (3-9).

Local Masters until and unless one of them or some other person is appointed sole Local Master. 44 V. c. 5, s. 64 (1, 2).

Deputy Clerks of the Crown.

(3) Except in the County of York, the several Clerks of the County Courts shall be *ex officio* Deputy Clerks of the Crown and Pleas of the High Court for their County. R. S. O. 1877, c. 39, s. 37.

Deputy Registrars.

(4) Where a County Court Judge is the Local Master, the County Court Clerk shall be Deputy Registrar. 44 V. c. 5, s. 64 (3).

Local Registrars.

(5) The offices of Deputy Clerk of the Crown and Deputy Registrar (not Local Master) shall be consolidated as vacancies occur in either; unless where the Presidents of the Divisions of the High Court or a majority recommend otherwise, when the said offices are held by the same person, he shall be styled Local Registrar of the High Court. 44 V. c. 5, s. 64 (4); 44 V. c. 5, Rule 417.

Fees of Deputy Clerks of the Crown.

(6) Where a reference is made to a Deputy Clerk of the Crown, or an examination is taken by him, he shall be entitled to take and receive to his own use the fees on such reference or examination. 44 V. c. 5. s. 64 (5).

Commutation of fees of Local Masters.

(7) The Lieutenant-Governor in Council may commute the fees of a Local Master, or of a Local Master and Deputy Registrar, including his fees as an official referee, for a fixed annual sum, such sum not to exceed the average income derived from fees for the preceding five years. 44 V. c. 5, s. 64 (6).

Commutation of fees of Deputy Clerks of the Crown.

(8) The Lieutenant-Governor in Council may commute the fees payable to a Deputy Clerk of the Crown on references and examinations and other matters for a fixed annual sum, such sum not to exceed the average income derived from such fees during the preceding five years. 44 V. c. 5, s. 64 (7).

Amount of commutation may be changed.

(9) Any annual sum fixed as provided in the preceding two sub-sections shall continue until varied by Order in Council, but any order for payment of any such annual sum as aforesaid may be rescinded, and the amount may by Order in Council be increased or diminished, provided

that in no case shall any Order in Council name a sum exceeding the average income or fees aforesaid (as the case may be) during the preceding five years. 44 V. c. 5, s. 64 (8). Sec. 125, (10-13.)

(10) The Local Masters, Local Registrars, and Deputy Clerks of the Crown, Deputy Registrars and other officers mentioned in this Act shall be appointed by the Lieutenant-Governor, and every such officer heretofore appointed shall hold office during the pleasure of the Lieutenant-Governor. 44 V. c. 5, ss. 58 (3), 64 (9); 47 V. c. 10, s. 7. Appointments of officers.

(11) Where a Local Master, or Deputy-Registrar, or Deputy Clerk of the Crown, or other officer, is paid by a salary, he shall not, save as hereinbefore expressly provided, take for his own benefit, directly or indirectly, any fee or emolument, save the salary to which he may be entitled; but the like sums and fees heretofore payable on proceedings in his office shall continue to be payable; and all such fees shall form part of the Consolidated Revenue Fund of this Province, and shall be payable in stamps, subject to the provisions of *The Act respecting Law Stamps*. 44 V. c. 5, s. 64 (10). Fees of salaried officers to form part of the Consolidated Revenue. Rev. Stat. c. 22.

(12) No Local Master whose gross income from his office of Local Master or of Deputy Registrar and Local Master, is $2,000 or upwards shall, during the continuance of his appointment, directly or indirectly, practise in the profession of the law as Counsel, or Solicitor, or as a Notary Public, or Conveyancer, or do any manner of conveyancing, or prepare any papers or documents to be used in any Court of this Province, under the penalty of forfeiture of office, and the further penalty of $400, to be recovered by any person who sues for the same by action in the High Court, and one-half of such pecuniary penalty shall belong to the party suing, and the other half to Her Majesty for the use of the Province; but nothing in this section shall prevent the Lieutenant-Governor in Council, or the High Court, from requiring a Local Master whose income does not amount to $2,000, to abstain from practising under the like penalties. 44 V. c. 5, s. 64. (11). Local Masters not to practise in certain cases.

(13) the High Court may, with the concurrence of the Lieutenant-Governor, relieve any person now holding the High Court may except officers

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Secs. 126, 127. from subss. 1 and 12.

office of Local Master and Deputy Registrar, or any other officer from the operation of the preceding sub-sections 1 and 12, or either of them. 44 V. c. 5, s. 64 (12).

Returns of fees.

(14) Every officer paid by fees, whether commuted or not, shall on or before the 15th day of January in every year, transmit to the Inspector of Legal Offices appointed under section 141 of this Act a just, true and faithful account, verified upon oath, of the amount of fees paid or payable to him in cash or in stamps in respect of his office during the preceding year, and also such particulars with reference to the business of his office as the Inspector of Legal Offices may require. 44 V. c. 5, s. 64 (14); 47 V. c. 10, s. 16; *as amended by* 52 V. c. 10, s. 4.

Form of returns.

(15) The Lieutenant-Governor or the member of the Government having charge of the matter may require the return to state any particulars, or to be made in any form that may be thought proper, and such return shall be made accordingly. 44 V. c. 5, s. 64 (15).

Seals of Deputy Registrars and Deputy Clerks of the Crown.

126. In the office of every Deputy Registrar and Deputy Clerk of the Crown such seal shall be used as the Lieutenant-Governor shall from time to time direct, which seal shall be impressed on every writ and other document issued out of or filed in such office; and all such writs and documents, and all exemplifications and copies thereof, purporting to be sealed with the seal of any such Deputy Registrar or Deputy Clerk of the Crown, shall in all parts of this Province be received in evidence without further proof thereof. 44 V. c. 5, s. 51.

See Eng. J. A. 1873, c. 61.

The English section referred to provides for the seals of the District Registries, enacts that such seals shall be used in every such registry as the Lord Chancellor may direct, and contains the same provisions as above with reference to the use of it and to its effect in evidence.

Owing to doubts as to whether the effect of this section was to make an additional fee of 50 cents, payable under R. S. O. c. 39, s. 53 (now sec. 155), upon all filings, *Rule* 1225 was passed to make such fee not payable except where the former practice required a seal to be impressed.

Marshal and Clerk of Assize for County of York.

127. The Lieutenant-Governor in Council may from time to time appoint a suitable person to be the Marshal and Clerk of Assize for the County of York, who shall hold office during pleasure. R. S. O. 1877, c. 41, s. 16 (1).

Secs. 128-131. Remuneration of Deputy Clerks of the Crown when they act as marshals.

128. Every Marshal and Clerk of Assize, being a Deputy Clerk of the Crown or Local Registrar, or authorized to act as such shall be entitled to be paid out of the Consolidated Revenue Fund the sum of $4 for each day's attendance as such Marshal or Clerk of Assize. R. S. O. 1877, c. 41, s. 18.

Not to receive fees in criminal cases.

129. No charge whatever shall be made by any of the said Marshals or Clerks of Assize upon any criminal trial or proceeding in any Court at which they act as Marshals and Clerks of Assize respectively. R. S. O. 1877, c. 41, s. 19.

Where Deputy Clerk's office to be kept.

130.—(1) Each Deputy Clerk of the Crown and Pleas shall, if proper accommodation is afforded him, keep his office in the Court House of his County, and until he can obtain such accommodation he shall keep his office in some convenient place in the County Town. R. S. O. 1877, c. 39, s. 47.

(2) Provided, however, that the Deputy Clerk of the Crown and Pleas at Sandwich, may keep an office in some convenient place in the Town of Windsor, in the County of Essex, subject to such arrangements as the County Council of the County of Essex may assent to, and subject also to the approval thereof by the Lieutenant-Governor in Council. 49 V. c. 12, s. 1.

Official Guardian *ad litem*.

131.—(1) There shall be an Official Guardian *ad litem* of infants, who shall be appointed by the Lieutenant-Governor, and shall be a Barrister-at-Law and Solicitor of this Province, of not less than seven years' standing, and shall hold office during pleasure.

Duties of Guardian.

(2) The Official Guardian, besides acting as a Guardian *ad litem* of infants under Rules of Court and other orders, shall perform such other duties as a Divisional Court or Judge may from time to time direct.

Costs of Guardian.

(3) The same costs as hitherto shall be paid to the Guardian by any party; and the same costs as hitherto shall be payable to the Guardian out of funds in Court; but all costs so paid to the Guardian by any party shall be by such Guardian paid forthwith into Court with the privity of the Accountant of the Supreme Court, and shall

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Sec. 131, (4-8).

be placed to the credit of an account to be intituled "Account of Official Guardian *ad litem;*" and all costs payable to the Guardian out of any funds in Court, shall be transferred to the credit of the same account.

Costs where estate is small.

(4) Where the estate is small, and, in view of the amount at the credit of the said account, the amount or part of the amount payable out of the estate for the Guardian's costs does not appear to be required to pay the salary and disbursements of the Official Guardian, the Court may withhold payment out of such estate of the sum or any part of the sum due for the Guardian's costs in respect of such estate; and may distribute the estate as if such costs were not payable by or out of the same.

Salary of Guardian.

(5) There shall be paid to the said Guardian in respect of all business done a fixed salary of such sum per annum as, in view of the amount of business done or to be done by the Guardian, and the sum at the credit of the account, the said Judges think reasonable and the Lieutenant-Governor in Council approve; which salary shall be over and above all necessary disbursements; and the salary and disbursements shall be paid monthly or otherwise as shall be determined by Rule of Court, out of the fund at the credit of the said account of the Official Guardian *ad litem*, and not otherwise.

Transfer of surplus of Guardian's account.

(6) The surplus appearing from time to time at the credit of the said account beyond what may be required to pay the charges on the said account, shall be transferred to the "Suitors' Fee Fund Account."

As to this account see note to sec. 140.

Costs of solicitor employed by official Guardian.

(7) Where the Official Guardian has occasion to employ a solicitor in another County for the purpose of any proceeding in an action, such solicitor shall be entitled to receive from the Official Guardian in respect of the proceeding the same costs as if the solicitor so employed were solicitor and Guardian of the infant.

Return of costs.

(8) The Official Guardian *ad litem* shall once every six months file in the Accountant's office an affidavit, shewing all costs recovered by him as Official Guardian *ad litem*, during the six months preceding the making of the affidavit, giving therein the several amounts received by him,

and the name or names of the actions and matters in which the same were respectively received by him, together with the date of receipt. Secs. 132-133.

(9) When a new Official Guardian *ad litem* is appointed, he shall *ipso facto* become, and be by virtue of such appointment, Guardian *ad litem* to all infants, in the place and stead of his predecessor, with the same duties and powers; and the latter (his executors and administrators, as the case may be) shall forthwith deliver over to the new Official Guardian all letters, papers, documents and books in his possession or power as Official or other Guardian *ad litem* of infants; and the new Guardian shall forthwith communicate his appointment to whom it may concern. Transfer on appointment of new Guardian.

(10) The Lieutenant-Governor in Council, or the High Court, may order that the Official Guardian is not to practise as a Barrister or Solicitor, and in such case he shall not, during the continuance of his appointment and of such order, directly or indirectly practise the profession of the law as Counsel or Solicitor, or as a Notary Public, or Conveyancer, or do any manner of conveyancing, or prepare any papers or documents to be used in any Court of this Province, except in the discharge of his duties as Official Guardian, or of any other duties which may be assigned to him by the said High Court or any Division or Judge thereof as the case may be; and the said Official Guardian in case of his offending in the matter aforesaid shall be subject to a penalty of forfeiture of office, and the further penalty of $400 to be recovered by any person who sues for the same by action in the High Court; and one-half of such pecuniary penalty shall belong to the party suing, and the other half to Her Majesty for the use of the Province. 44 V. c. 5, s. 66; 48 V. c. 18, s. 18. Guardian not to practise if Lieutenant-Governor in Council or Court so orders.

132. The Accountant shall yearly and on or before the 15th day of January in every year transmit to the Lieutenant-Governor in Council a just, true and faithful statement, shewing the state of the "Account of the Official Guardian *ad litem*" upon the 31st day of the preceding December. 44 V. c. 5, s. 67. Return of official Guardian's accounts.

133.—(1) Subject to any Rules of Court which may be made under the provisions of sections 105 to 108 of this Accountant of

Secs. 134, 135. Supreme Court.

Act the present Accountant and his successors appointed under section 112 of this Act, shall be the Accountant of the Supreme Court of Judicature for Ontario, and shall be so designated.

(2) For the purposes of holding the mortgages, stocks, funds, securities, and all estate therein, and any interest in real and personal estate, effects or property, and of all moneys and effects mentioned and described in section 134 of this Act, or in any Rule or Order of Court, the said Accountant shall be a corporation sole by the name of "The Accountant of the Supreme Court of Judicature for Ontario," and the said Accountant as such corporation sole shall have perpetual succession, and may sue and be sued, may plead and be impleaded in any of Her Majesty's Courts in this Province. 48 V. c. 13, s. 17.

Securities vested in Accountant.

134. All mortgages, stocks, funds, annuities and securities whatsoever, at the time of the commencement of *The Ontario Judicature Act, 1881*, standing in the name of the Accountant of the Court of Chancery, or of the Referee in Chambers, or any other officer named by the Court for the purpose under the authority of the 31st section of the Chancery Act, or in his custody or power as such Accountant, Referee in Chambers or other officer aforesaid, together with all the interest and estate of the said Accountant, Referee in Chambers or other officer, in the lands and premises embraced in such mortgages or other securities, and by the said *The Ontario Judicature Act, 1881*, vested in the Accountant of the High Court for the time being, as such Accountant, and all other mortgages, stocks, funds, securities and all estate therein, and any interest in real and personal estate, effects or property, and all moneys and effects, bonds and guarantees, on the 30th day of March, 1885, vested in and held by the Accountant of the High Court in his own name, or in his name of office, as such Accountant, subject to the same trusts as they may then respectively have been subject to, are hereby declared to be and to have been from and after the 30th day of March, 1885, vested in the said corporation sole under the name aforesaid. *See* R. S. O. 1877, c. 40, ss. 30-33; 44 V. c. 5, s. 68 (3); 48 V. c. 13 ss. 17-19.

Securities held by Registrar

135. All mortgages, stocks, funds, securities, and all estate therein, and all moneys and effects prior to the 30th

day of March, 1885, standing in the name of the Registrar of the Court of Appeal as such Registrar in any cause, matter, or proceeding then or at any time theretofore pending in the said Court of Appeal, are hereby declared to be and from and after the said day to have been transferred to and vested in the Accountant of the Supreme Court of Judicature for Ontario as such Accountant, subject to the trusts which respectively attached thereto; and the said Registrar and one of the Judges of the said Court of Appeal are to execute all cheques or documents necessary to effect a formal transfer thereof, if any are required; and the Registrar is forthwith to deliver to the said Accountant all books of account and documents in his possession or control relating to the moneys and property hereby declared to be and to have been transferred to the said Accountant. 48 V. c. 13, s. 19.

Secs. 136-138. Of Court of Appeal to be transferred to Accountant of Supreme Court.

136. In case of there being at any time no Accountant of the Supreme Court, all mortgages, stocks, funds, annuities and securities whatsoever theretofore standing in the name of any Accountant, or in his custody or power in respect of his office, together with all the interest and estate of the said Accountant in the lands and premises embraced in such mortgages or other securities, shall become and be, by force of this Act, vested in such other officer as the Supreme Court, by general rule, may, from time to time, direct, subject to the same trusts as they may then respectively be subject to. 44 V. c. 5. s. 68 (2).

When there is no Accountant securities to be vested in officer appointed by Court.

137. All moneys that become subject to the control and distribution of the High Court or Court of Appeal, shall be paid in the name of the Accountant of the Supreme Court, (or if there is no Accountant in the name of such other officer as the Court by general rule may from time to time direct) into the hands of such person or body corporate, or shall be invested in the name of the Accountant (or, if there is no Accountant, in the name of such other officer) in the public funds of the Dominion of Canada or of this Province, or in such other securities as the Court may from time to time direct. R. S. O. 1877, c. 40, s. 33; 48 V. c. 13, s. 20.

Money in Court how to be disposed of.

138. The expenses of the Accountant's Office including all salaries, shall be the first charge on the income arising from the funds in Court. 44 V. c. 5, s. 69.

Expenses of Accountant's office.

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Secs. 139-141.

Amounts to be paid to Suitors' Fee Fund.

139. The surplus income arising from the funds in the High Court after payment of the expenses of the Accountant's office, and of such interest on the moneys of suitors as from time to time by Rules of Court or otherwise is directed to be paid, shall be transferred to the "Suitors' Fee Fund Account." 47 V. c. 10, s. 5.

Suitors' Fee Fund.

140. "The Suitors' Fee Fund Account" shall continue to be kept and managed as may from time to time be directed by the Court, and any Divisional Court or any Judge of the Supreme Court of Judicature for Ontario may apply the same as may be necessary for the protection of infants and other persons not *sui juris* or *non compotes mentis*, on whose behalf proceedings may be had in the Court, or may, by the Court, be ordered to be had in other Courts, and may also, from time to time, order to be paid, out of the money at the credit of the said account, any sum required to make good a default arising in respect of suitors' money or securities from any mistake, act, or omission of any official of the Court. Such payment is to be without prejudice to any personal liability of the official or his sureties in respect of the mistake, act or omission. R. S. O. 1877, c. 40, s. 104; 41 V. c. 8, s. 5; 47 V. 10, s. 6.

Certain losses may be charged Suitors' Fee Fund.

The "Suitors' Fee Fund Account," which is an account formerly kept by the Court of Chancery, was first created by 20 Vict. c. 56, s. 20 (Con. Stat. U.C. c. 12, s. 73; R. S. O. 1877 c. 40, s. 104). It was constituted by a small fee of ten cents on every bill, answer, and demurrer; and it was provided, that the account should "be kept and managed as may from time to time be directed by the Court; and the sums at the credit of such account shall be applied by the Court as may be necessary for the protection of infants and other persons not *sui juris*, on whose behalf proceedings may be had in the Court, or may by the Court be ordered to be had in other Courts." This section of the Revised Statute was repealed by 41 Vict. c. 8, s. 5, "so far as it directed payment of any fee to the account." There was then, and is still, a considerable sum at the credit of the account; and this sum, with the additions that may be made to it under sections 131 (6), 139, will continue to be applicable to the same purposes and the others mentioned in this section.

Inspector of Sheriffs and other officers.

141. The Lieutenant-Governor may from time to time appoint one of the officers of the High Court, or some other competent person, to inspect the offices of the Sheriffs, Local Masters, Deputy Registrars, Deputy Clerks of the Crown, Local Registrars of the High Court, Registrars of Surrogate Court, Clerks of the Peace, and County Crown Attorneys, and Clerks of the County Court, in the respective Counties of the Province, and such other officers connected with the administration of justice as the Lieutenant-

Governor in Council may from time to time direct. 44 V. c. 5, s. 70; 49 V. c. 16, s. 40.

142. The duty of the Inspector shall be:— Duties of Inspector.

1. To make a personal inspection of the said offices and of the books and Court papers belonging thereto respectively;

2. To see that proper books are provided, that they are in good order and condition, that the proper entries and records are made therein in a proper manner, at proper times, and in a proper form and order, and that the Court papers and documents are properly classified and preserved;

3. To ascertain that the duties of the officers are duly and efficiently performed;

4. To see that proper costs and charges only are allowed or exacted;

5. To ascertain that proper security has been given by any officer required by law to give security;

6. To ascertain whether uniformity of practice prevails in the several offices of the High Court and in the County and Surrogate Courts;

7. To report upon all such matters as expeditiously as may be, to the Lieutenant-Governor. 44 V. c. 5, s. 70.

143. When the said Inspector has occasion to institute an inquiry into the conduct of any officer in relation to his or their official duties or acts, it shall be lawful for the said Inspector to require such officer, or any other person or persons, to give evidence on oath; and for this purpose the said Inspector shall have the same power to summon such officers and other persons to attend as witnesses, to enforce their attendance, and to compel them to produce books and documents and give evidence, as any Court has in civil cases. 44 V. c. 5, s. 71. Inquiries by Inspector.

144. The said several officers shall, as often as required by the said Inspector, produce for examination and inspection all books and documents which are required to be kept by them, or which may hereafter be required to be kept by them; and shall report to the Inspector all such matters Books, etc., to be produced for inspection.

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relating to any cause or proceeding as the Inspector shall require. 44 V. c. 5, s. 72.

Affixing stamps to papers unstamped or insufficiently stamped.

145.—(1) Where the Inspector of Legal Offices, appointed under section 141 of this Act, or any other officer inspecting legal offices under the authority of an order of the Lieutenant-Governor in Council, finds any paper or proceeding which should have had affixed to it law stamps, to be unstamped, or to be insufficiently stamped, he may require the officer to whom belonged the duty of seeing that such paper was properly stamped, to affix to every such paper or proceeding a stamp or stamps of a sufficient amount to make up the deficiency.

(2) The Inspector or other officer directing stamps to be affixed as aforesaid shall cancel the stamps so affixed in such manner as shall be directed by the Lieutenant-Governor in Council, and the affixing of such stamps by direction of the Inspector, shall have the same effect as if the paper or proceeding had been duly stamped in the first instance. 48 V. c. 13, s. 31.

Stenographic writers.

146.—(1) The stenographic writers heretofore appointed, or who shall hereafter be appointed by the Lieutenant-Governor to report trials at sittings of the High Court, or of a County Court, shall be officers of the Court to which they are appointed, and shall hold office during the pleasure of the Lieutenant-Governor, and shall perform such other duties as may be assigned to them by Rule of Court, or order of the Lieutenant-Governor in Council.

Reporter's oath.

(2) Every such reporter shall take the following oath before one of the Judges of the Court to which he is appointed, and the same shall be filed:

I (*A. B.*) do solemnly and sincerely promise and swear that I will faithfully report the evidence and proceedings at the trial in each case in which it may be my duty to act as shorthand reporter. So help me God. 49 V. c. 16, s. 41.

Appointment of special examiners.

147. The Supreme Court may, from time to time, under the seal of the Court, appoint and at discretion remove special examiners for the purpose of taking evidence of parties and witnesses, and the examiners so appointed shall have all the powers formerly possessed by Masters Extraordinary and Examiners. R. S. O. 1877, c. 40, s. 11.

Secs. 148-152. Administration of oaths.

148. Any officer of the Supreme Court or the High Court shall, for the purposes of any proceedings directed by the Court to be taken before him, have full power to administer oaths, to take affidavits, to receive affirmations, and to examine parties and witnesses, as the Court may direct. R. S. O. 1877, c. 40, s. 10.

Sheriffs, gaolers, etc., to be officers of the Court.

149. Sheriffs, deputy sheriffs, gaolers, constables and other peace officers, shall aid, assist and obey the Court and the Judges thereof respectively in the exercise of the jurisdiction conferred by this Act, and otherwise, whenever by any General or other Order of the Court or of a Judge thereof, required so to do. R. S. O. 1877, c. 40, s. 17.

Gaols to be prisons of the Court.

150. All gaols in Ontario shall be prisons of the High Court. R. S. O. 1877, c. 40, s. 18.

Salaries, etc.

151.—(1) There shall be paid out of the Consolidated Revenue Fund of this Province such sums as the Legislature may from time to time appropriate for such purpose as and for the salaries of officers of the said Courts, who are not paid by fees or otherwise. R. S. O. 1877, c. 39, s. 49; c. 40, s. 15.

(2) The salaries of all officers of the Court which are payable out of the Consolidated Revenue Fund shall be paid monthly, but the payment to be made in each case on the first day of payment which happens after the right thereto accrues, shall be a ratable proportion of a month's salary, according to the time then elapsed since the accrual of the right; and in case of a vacancy, the person who vacates the office, his executors or administrators, shall be entitled to a proportional part of his salary according to the time elapsed between the vacancy and the last payment. R. S. O. 1877, c. 40, s. 15; c. 39, s. 51.

No fees allowed.

How fees to be payable.

152.—(1) Unless specially authorized, neither the Master in Ordinary, the Registrars, nor any of their deputies, nor the Process Clerk, nor the Clerk in Chambers, nor the Accountant, nor any Clerk appointed as aforesaid, shall take for his own benefit, directly or indirectly, any fee or emolument, save the salary to which he may be entitled by law; but the like sums and fees heretofore payable on proceedings in the offices of the said officers shall continue to

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be payable; and all such fees shall form part of the Consolidated Revenue Fund of the Province, and shall be payable in stamps, subject to the provisions of *The Act respecting Law Stamps*.

Rev. Stat. c. 22.

Local officers may take fees.

(2) The Local Masters and Deputy Registrars not paid by salary and the Commissioners may retain to their own use all the fees of office which they respectively receive not payable to the Crown or belonging to any fee fund, and need not account to the Crown for any portion of such fees. R. S. O. 1877, c. 40, s. 16; c. 39, s. 52.

Salaries of Deputy Clerks of the Crown.

153.—(1) The Lieutenant-Governor in Council may appoint that sums not in any case exceeding $600 nor less than $100 yearly shall be paid out of moneys to be hereafter voted by the Legislature for the purpose, as and for the salaries of the Deputy Clerks of the Crown respectively. R. S. O. 1877, c. 39, s. 50.

(2) The preceding provision fixing the maximum at $600 shall not apply to any case where the Deputy Clerk does not hold the office of Registrar of the Surrogate Court. 45 V. c. 11, s. 5.

Fees on writs and process.

154. The fees payable on all writs and process issued by the Clerk of the Process shall form part of the Consolidated Revenue Fund of the Province, and shall be payable in stamps subject to the provisions of *The Act respecting Law Stamps*. R. S. O. 1877, c. 39, s. 45.

Rev. Stat. c. 22.

Fees.

155. In addition to all fees, otherwise authorized to be levied on proceedings in the High Court, the following fees shall form part of the Consolidated Revenue Fund of the Province, and shall be payable to the Crown in stamps, subject to the provisions of *The Act respecting Law Stamps*.

Rev. Stat. c. 22.

	$ cts.
On every writ of summons, capias or subpœna, and on every other writ or other document of what nature or description soever, having the seal of the Court affixed thereto	0 50
On every judgment entered	0 60
On every certificate of action instituted, judgment or decretal order made	0 50
On setting down on the paper for argument of every demurrer, special case, points reserved, special verdict or appeal case	0 30
On entering every action for trial or assessment	2 00
On every rule or order of Court issued	0 20
On taxation of every bill of costs	0 20

R. S. O. 1877, c. 39, s. 53; c. 40, s. 105; 44 V. c. 5, Rule 432.

The fees payable under this section have been included in the Tariff prescribed by *Rule* 1218.

156. In addition to all fees otherwise authorized to be levied on proceedings in cases brought to the Court of Appeal from the High Court, the following fees shall be payable to the Crown in stamps, subject to the provisions of *The Act respecting Law Stamps*: Sec. 156, 157. Fees. Rev. Stat. c. 22.

	$ cts.
On every appeal entered	4 00
On every judgment, decree, or order of the Court passed and entered	2 00

R. S. O. 1877, c. 38, s. 55.

The fees payable under this section have also been included in the Tariff prescribed by *Rule* 1218.

COUNTY COURTS AND JUDGES.

157. The Judges of the several County Courts shall be Judges of the High Court for the purposes of their jurisdiction in actions in the High Court; and in the exercise of such jurisdiction may be styled "Local Judges of the High Court," and shall, in all causes and actions in the High Court, have, subject to Rules of Court, power and authority to do and perform all such acts, and transact all such business in respect to matters and causes in and before the High Court as they are by Statute or Rules of Court in that behalf from time to time empowered to do and perform. 44 V. c. 5, s. 76. Local Judges of High Court.

Compare Eng. Rules S. C. 1875, Order 35, s. 4.

Rules 41 and 42 define the powers which the County Court Judges are to have in actions in the High Court.

(2) A Local Judge of the High Court may in cases of emergency grant an interlocutory injunction under subsection 8 of section 53 of this Act in any action in the High Court brought in his County on proof to the satisfaction of the Judge that the delay required for an application to the High Court is likely to involve a failure of justice; such injunction to remain in force for a period not exceeding eight days, as such Local Judge may direct, unless continued by the High Court. Such injunction shall be by order, to be signed, sealed and issued by the Deputy-Registrar or Deputy-Clerk of the Crown of such County, upon the direction or fiat of such Local Judge, and such injunction shall have the same force and effect and may

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Sec. 158. be continued, varied, dissolved, and otherwise dealt with by the High Court as if it had been originally granted by judgment or order of the High Court. 52 V. c. 11, s. 1.

TRANSFERRING CAUSES FROM COUNTY OR DIVISION COURTS TO HIGH COURT.

Transfer to High Court from County and Division Courts.

158. In cases before any County or Division Court where the defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, the High Court or any Division or Judge thereof, may on the application of any party to the proceeding, order that the whole proceeding be transferred from such Court to the High Court, or to any Division thereof; and in such case the Record in such proceeding shall be transmitted by the Clerk or other proper officer, of the County or Division Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein. 44 V. c. 5, s. 78. (*See* cap. 47, s. 22, and cap. 51, s. 74.)

Adopted from Eng. J. A. 1873, s. 90.

In the Ont. J. A. 1881 this section was preceded by a clause which is now in the Revised Statutes transferred to the County and Division Court Acts as c. 47, ss. 21 and 22, and c. 51, ss. 73 and 74.

Powers of County and Division Courts.

Sec. 21 of the County Courts Act (R. S. O. c. 47) and sec. 73 of the Division Courts Act (R. S. O. c. 53) provide that "[every County and Division Court] shall as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such Court such relief, redress, or remedy, or combination of remedies, either absolute or conditional [including the power to relieve against penalties, forfeitures and agreements for liquidated damages] and shall in every such proceeding give such and the like effect to every ground of defence or counter claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court."

The Eng. J. A. 1873, s. 39, has, instead of the words first in brackets, the following:—"Every Inferior Court which now has, or which may after the passing of this Act, have jurisdiction in Equity or at Law, and in Equity and in Admiralty respectively." The words secondly in brackets were introduced into the Ont. section by 49 V. c. 16, s. 38. The two sections are the same otherwise. In England the County Courts had equitable jurisdiction under 28 & 29 Vict., c. 99, and other Acts.

Where a transfer is made under s. 158 the proceedings must thenceforward be regulated by the practice of the High Court: *Davies* v. *Williams*, 13 Ch. D. 550.

The relief or remedy, power to grant which is by this sec. given, only refers to the relief and remedies to be administered in the action and as the result of the action: *Speers* v. *Daggers*, 1 Ch. & E. 503.

Under the corresponding section of the English Act, it was held that a County Court in actions within its jurisdiction has power to grant an injunction against a nuisance, and to enforce obedience by committal: *Martin* v.

Bannister, 4 Q. B. D. 212, 491, and though the order is only interlocutory: *Richards* v. *Cullerne*, 7 Q. B. D. 623; 18 C. L. J. 364. Sec. 158.

In *Pryor* v. *City Offices Co.*, 10 Q. B. D. 504, the extent to which those decisions seemed to go was restricted, and it was held that the above words "in any proceeding" do not mean "in a motion in any action" but rather "in any action," and that the Inferior Court is given the same authority as the High Court, to grant the relief, as the result of the action, but that relief must be given, if at all, by the existing machinery of the Inferior Court; and all the powers given by the Rules of the Jud. Act to Judges of the High Court in order to arrive at the granting of such relief, are not conferred upon the Judges of the Inferior Courts.

In County Courts the machinery of the High Court is by *Rule* 1257, to apply and extend to actions in the County Courts. See further that *Rule*. Amongst other provisions *Rule* 739 (as to moving for final judgment of appearance) and *Rule* 373 (as to counter-claims) have frequently been made use of. County Courts.

As regards the Division Courts there is some conflict of authority, but it may perhaps be fairly said that the weight of authority is in favour of the view that this section only enables Division Courts to exercise the complete legal and equitable jurisdiction conferred upon the High Court (see also sec. 54 and R.S.O. c. 47, s. 53) and does not purport to deal with details of practice, or apply to the Division Courts the Rules of Procedure contained in the Jud. Act. See *Building & Loan Co.* v. *Heimrod*, 19 C. L. J. 254; 3 C. L. T. 361, and *Bank of Ottawa* v. *McLaughlin*, 8 Ont. App. 543, where *Rule* 797, as to the effect of a nonsuit, and *Fletcher* v. *Noble*, 9 P. R. 258, where the right to security for costs were held not to fall within the purview of the present section. See also *Pryor* v. *City Offices Co.*, *supra*. On the other hand in *Conners* v. *Birmingham*, 20 C. L. J. 10, *Rule* 80 (now 739) was, by virtue of the present section, applied. In *Awberry* v. *McLean*, 19 C. L. J. 335, the right to counter-claim, which seems implied by the terms of the above sec. 158, was held to exist. Division Courts under this section.

The provisions of the Judicature Act relating to garnishee process do not apply in Division Courts, the proceedings in such cases being specially provided for by the Division Court Act: *Re Clark* v. *McDonald*, 4 Ont. 310.

The practice under *Rule* 795 as to moving to set aside a verdict or judgment obtained by default of appearance by a party at the trial is not applicable in Div. Courts, being inconsistent with sec. 145 of the Div. Courts Act: *Re Foley* v. *Moran*, 11 P. R. 316. Division Courts under R. S. O. c. 51.

There has also been some difference of opinion as to how far the practice of the High Court may or should be introduced into Division Courts under sec. 304 of the Division Courts Act, (R. S. O. c. 51.)

That section is as follows:—

"304. In any case not expressly provided for by this Act, or by existing rules, or by rules made under this Act, the County Judges may, in their discretion, adopt and apply the general principles of practice in the High Court, to actions and proceedings in the Division Courts; provided that nothing herein contained shall be held to authorize the taxation or allowance of costs to any officer of the Court other than those to be found in the tariff of fees as authorized and allowed by the board of County Judges under the provisions of this or any other Act.

Under this section the right to security for costs has been held to be a principle of practice which may be applied by the Division Court Judges: *Fletcher* v. *Noble*, 9 P. R. 255, with all its consequences: *ib.* 3 C. L. T. 360.

The power of adding defendants (see *Rule* 324) is not a principle of practice within the section: *Barber* v. *Bingham*, 20 C. L. J. 65; nor is service out of the jurisdiction a principle of practice, but a branch of a system of practice or a means of relief which the procedure in Division Courts does not admit of being applied: *Re Guy* v. *G. T. Ry. Co.*, 10 P. R. 372.

Quære whether the third party *Rules* (328 *et seq.*) are applicable: *Re Merchants Bank* v. *VanAllen*, 10 P. R. 348.

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Sec. 159.

The power to apply the High Court practice of examining parties before trials has been affirmed: *MacNee* v. *Ont. Bank*, as reported, 19 C. L. J. 252; 3 C. L. T. 360; and denied: *Re Willing* v. *Elliott*, 37 U. C. Q. B. 320; *Fletcher* v. *Noble*, 9 P. R. 258.

MacNee v. *Ont. Bank*, (*supra*), as reported, is also in favour of the power to apply the *Rules* of the Jud. Act generally. See also *Murray* v. *Gillett*, 18 C. L. J. 78. The decision in *Building & Loan Co.* v. *Heimrod* is the other way, and in that case the discretion, if it existed, to apply to *Rule* 797, was not exercised.

In *Burk* v. *Brittain*, 19 C. L. J. 74, the former *Rule* 80 (now 739) was acted upon as introducing a principle of practice, which the County Judge of Northumberland and Durham felt bound, in the exercise of a judicial discretion, to apply; and this decision was approved by the Junior Judge of the County of Ontario, in *Smith* v. *Lawlor*, 19 C. L. J. 258; see also *Connors* v. *Birmingham*, 20 C. L. J. 11. In a similar case the County Judge of Victoria thought it would be unwise to apply the same *Rule* 80: *Cowan* v. *McQuade*, 19 C. L. J. 108; and this view was shared by the then Junior Judge of the County of York: *Building & Loan, etc.* v. *Heimrod*, *supra*; see further comments on this subject, 3 C. L. T. 374 and 19 C. L. J. 238, where the view entertained by the majority of the County Judges at their annual conference in July, 1883, is said to have been in accordance with *Cowan* v. *McQuade*, and *Building & Loan, etc.* v. *Heimrod*; see also *Bell* v. *G. T. Ry. Co.*, 20 C. L. J. 346.

The provisions of the former *Rule* 80 (now 739) have now been made applicable to Division Courts by the Legislature, and will be found in R. S. O. 1887, c. 51, s. 111.

Counter-claims in County or Division Courts.

Sec. 22 of the County Courts Act and sec. 74 of the Division Courts Act enact that "where in any proceeding before a [County or Division] Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counter-claims."

This was adopted from Eng. J. A. 1873, s. 90.

It has been held under that section that an Inferior Court has jurisdiction to entertain a claim set up by way of counter-claim, although it is in respect of matters which arose beyond its local jurisdiction, but the power to grant relief in respect of such counter-claim is limited to the same amount as the plaintiff has claimed in the action: *Davis* v. *The Flagstaff Mining Co.*, 3 C. P. D. 228. The relief which a defendant can obtain against a third party brought in under *Rule* 328 is similarly limited to protection against the plaintiff's demand: *Neald* v. *Corkindale*, 4 Ont. 317.

A defendant who has obtained a verdict or judgment for an amount beyond the jurisdiction of the County Court is not estopped from bringing an action in the High Court on the same cause of action to recover what the County Court would not give him. The defendant in the High Court is estopped by the judgment in the County Court from denying the cause of action of the plaintiff in the High Court. The only question in the High Court is the amount of damages: *Webster* v. *Armstrong*, 54 L. J. Q. B. 236; 1 Cab. & E. 471.

MISCELLANEOUS.

Order in Council as to allowances and salaries subject to ratification by Legis-

159.—(1) Every Order in Council determining the commutation allowance or the salary of any Judge, Official Guardian or other officer, under the authority of this Act, shall be laid before the House of Assembly forthwith, if the Legislature is in session at the date of the Order, and if

the Legislature is not then in session, the Order shall be laid before the said House within the first seven days of the session next after the Order in Council is made. Sec. 160. lative Assembly.

(2) In case the Assembly at the said session, (or, if the session does not continue for three weeks after the said Order is laid before the House, then at the ensuing session of the Legislature,) disapprove by resolution of such Order in Council either wholly, or so far as relates to any of the persons therein named, the Order in Council, so far as so disapproved of, shall have no effect from the time of such resolution being passed. 44 V. c. 5, s. 81.

160. This Act shall not affect, the issue of any Commissions of Assize, Nisi Prius, Oyer and Terminer, Gaol Delivery, or other commission for the discharge of civil or criminal business on circuit or otherwise; or the authority of a Judge or a retired Judge of any of the Superior Courts, or a Judge of a County Court, or one of Her Majesty's Counsel learned in the law, to preside without any commission at any Court of Assize, Oyer and Terminer, and General Gaol Delivery, or at a Court held under this Act in the exercise of the jurisdiction now belonging to the Courts of Assize, Oyer and Terminer, and General Gaol Delivery, or the authority of any such Judge or retired Judge of a Superior or County Court, or Counsel learned in the law, to hold any sitting for the hearing of causes; and any such Judge or Counsel shall after the commencement of this Act have the same authority to preside as aforesaid, or to hold any sitting of the High Court for the hearing of causes in the High Court respectively, which such Judge or Counsel now has to preside at Courts of Assize, Oyer and Terminer, and General Gaol Delivery, or to hold a sitting of the Court of Chancery for the hearing of causes; and any such Judge or Counsel when presiding as aforesaid with or without a commission, or when holding any sitting as aforesaid, shall be deemed to constitute a Court. 44 V. c. 5, s. 85. Savings as to circuits, etc.

See Eng. J. A. 1873, s. 93.

R. S. O. 1887, c. 45, relates to the holding of Courts of Assize and Nisi Prius, Oyer and Terminer, and General Gaol Delivery.

The principal English statutes relating to assizes are 13 Edw. 1 (Stat. West 2), c. 30; 25 Edw. 1 (Mag. Char.), c. 12; 31 Car 2, c. 2, s. 17; 1 Geo. 4, c. 55; 3 Geo. 4, c. 10; 11 Geo. 4 and 1 Will. 4, c. 70; 2 & 3 Will. 4, c. 47; 3 & 4 Will. 4, c. 71; 2 & 3 Vict., c. 72; 12 & 13 Vict., c. 6; 17 & 18 Vict., c. 37; 22 & 23 Vict., c. 32; 26 & 27 Vict., c. 122; 39 & 40 Vict., c. 57; 40 & 41 Vict., c. 46; 42 & 43 Vict., c. 1.

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Secs. 161-163.

All books in which writs, judgments, etc., are entered to be open to inspection.

161. Every person shall hereafter have access to and be entitled to inspect the several books of the High Court and of the County Courts, containing records or entries of the writs issued, judgments entered, and chattel mortgages and bills of sale filed; and no person desiring such access or inspection shall be required, as a condition to his right thereto, to furnish the names of the parties or the style of the causes or matters in respect of which such access or inspection is sought; and the Registrars and Deputy-Registrars of the High Court and all clerks of the County Courts of the Province respectively, shall, upon demand or request, produce for inspection any writ of summons or copy thereof, and any judgment roll, or chattel mortgage, or bill of sale so issued, entered or filed in their respective offices, or of which records or entries are, by law, required to be kept in such several books of the High Court and County Courts respectively. 50 V. c. 18, s. 1.

Fees.

162. The fees payable in respect of such inspection of books shall be twenty-five cents as for a general search, and ten cents for each writ of summons, judgment roll, chattel mortgage or bill of sale so inspected, and ten cents per folio shall also be payable for all extracts, whether made by the person who makes the search or by the officer. 50 V. c. 18, s. 2.

This Act not to apply to criminal and other matters.

163. Nothing in this Act shall affect the practice or procedure in criminal matters, or matters connected with Dominion Controverted Elections, or proceedings on the Crown or Revenue side of the Queen's Bench or Common Pleas Divisions. 44 V. c. 5, s. 87.

See Eng. J. A. 1875, ss. 19, 21; Rules S. C. 1875, O. 62.

The High Court is a continuation of the existing Courts, and the High Court, Q. B. Div., has under a new name the same jurisdiction in Dominion Controverted Election matters as the former Court of Q. B. had under the Dom. Controverted Elections Act of 1874: *Mitchell* v. *Cameron*, *West Huron Election*, 8 S. C. R. 126, reversing S. C. 1 Ont. 433. See also *Re N. York case*, 32 C. P. 458, and *Russell case*, 1 Ont. 439, and note to sec. 3 (4).

THE

CONSOLIDATED RULES OF PRACTICE

OF THE

SUPREME COURT OF JUDICATURE FOR ONTARIO.

CHAPTER I.

INTERPRETATION.

Criminal matters not affected.

1. Nothing in these Rules shall be construed as intended to affect the practice or procedure in criminal proceedings, or proceedings on the Crown or Revenue side of the Queen's Bench or Common Pleas Divisions. J. A. Rule 484.

See Eng. R. 1875, O. 62; R. S. O. c. 39, s. 4.

The English Rule contains like exceptions and others not needed in this Province.

"Judge" meaning of.

2. A "Judge" in these Rules means a Judge of the Supreme Court, or a Judge having the authority for the time being of a Judge of the High Court unless there is something in the context indicating a different meaning. J. A. Rule 491.

The interpretation clause in the Act, viz. sec. 2, applies to the *Rules*. See *Rule* 4.

For the reason for employing the expression "Court or a Judge" throughout the English Rules, see *Freason* v. *Loe*, 26 W. R. 138.

This definition of "Judge" was considered to give jurisdiction to the Master in Chambers or County Judge under *Rule* 422 of the original Act, (subject to the express limitation of their authority), to entertain applications which under these *Rules* are to be made to "the Court or a Judge" but not those which were required to be made to a "Judge of the High Court." This interpretation is confirmed by the language of the present *Rules* 30 and 41.

2a) The words County Court where they appear in the Consolidated Rules of 1888 include

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Rules 3-6.

Former practice superseded.

3. All Rules and Orders heretofore passed by any of the Superior Courts of Law or Equity in Ontario or Upper Canada and not included in these Rules are rescinded, save and except those mentioned in the schedule, and these Rules shall take effect on and after the 1st day of March, 1888. All practice inconsistent therewith is superseded. As to all matters not provided for in these Rules, the practice is, as far as may be, to be regulated by analogy thereto.

By special *Rule* the date of coming into effect of the *Rules* was extended till 1st Sept., 1888, when the Consolidation came into force, except *Rules* 210, 211, 537.

See *Wolff* v. *Ogilvy*, 13 P. R. 645.

(*a*) Rules 210, 211 and 537, are not to come into force until on and after the 1st September, 1888, and in the meantime the existing practice as to the weekly sittings of the Court shall be continued.

The coming into force of the *Rules* mentioned was, however, postponed until further order, and no *Rule* bringing them into operation has yet been passed. Other *Rules*, *e. g.*, *Rules* 17 and 23 (17) may depend upon those here expressly mentioned, and may be not yet in force.

Interpretation.

4. The interpretation clauses of the Judicature Act shall apply to these Rules unless there is anything in the subject or context repugnant thereto.

The interpretation clauses referred to are contained in sec. 2 of the Act.

Division of Rules.

5. The division of these Rules into chapters, titles and headings is for convenience only, and is not to affect their construction.

Promulgation of Rules.

6. Every Rule hereafter made shall be construed as intended to come into force on the seventh day after the day of its publication in the *Ontario Gazette*, unless such prior publication is expressly dispensed with in or by the Rule.

CHAPTER II.

OFFICERS AND OFFICES.

1. Office Hours, etc., 7-11.
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1. Office Hours, Etc.

Office hours to be observed in offices of the Court.

7. Except during Vacations, and excepting Sundays, Christmas Day, Good Friday, Easter Monday, New Year's Day, the birthday of the Sovereign, and any day appointed for the celebration of the birthday of the Sovereign, Dominion Day, and any day appointed by proclamation of the Governor-General, or Lieutenant-Governor, as a public holiday, or for a General Fast, or Thanksgiving, the offices of the Supreme Court, Court of Appeal, and of the High Court of Justice for Ontario and its Divisions, shall be kept open from 10 a.m. to 4 p.m. during the sittings of the respective Divisional Courts, and at other times from 10 a.m. until 8 p.m. J. A. Rules 537 and 545.

Office hours of officers of High Court during vacation.

8. The offices of the High Court of Justice, and of the Divisions thereof, and of the Court of Appeal, shall be kept open during the Long Vacation, and the Christmas Vacation, from 10 of the clock in the forenoon until 12 o'clock noon. J. A. Rule 535.

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Rules 9-13.

No business to be transacted except upon attendance of party, or his solicitor, or the clerk or agent of solicitor.

9. No business shall be transacted in any of the offices of the Courts, either in procuring or suing out of process, or in entering judgments or taking any proceeding whatever in a cause, unless upon the personal attendance of the party on whose behalf such business is required to be transacted, or of the counsel or solicitor of such party, or the clerk or agent of the solicitor, or the clerk of the agent. Rules T. T. 1856, 145.

Putting paper under door of office, or handing same to officer in street, irregular.

Putting an appearance under the door of the office of a Deputy Clerk of the Crown during office hours, or handing it to him in the street, was held not to be a due entry of the appearance: *Grey* v. *Stacey*, 10 U. C. L. J. 245; and see *Fralick* v. *Huffman*, 1 C. L. Ch. 80; *Campbell* v. *Madden*, Dra. 2.

But the Court refused to set aside a *fi. fa.* issued at the officer's house before office hours: *Rolker* v. *Fuller*, 10 U. C. Q. B. 477; and see *Hall* v. *Hunter*, 5 O. S. 705.

Defendant's solicitor, when entitled to precedence.

Where a defendant's solicitor is present at the opening of the office to enter an appearance, or file a statement of defence, and the plaintiff's solicitor is present to sign judgment for default, the defendant's solicitor is entitled to precedence: see *Fralick* v. *Huffman*, 1 C. L. Ch. 80.

Offices of Court not to be opened when appointed to be closed.

The offices of the Court should not be opened for business, on days on which they are appointed by statute, or *Rule* of Court, to be closed, and proceedings taken therein on such days are irregular: *Trust and Loan Co.* v. *Dickson*, 2 C. L. J. 166; *Mumford* v. *Hitchcock*, 9 Jur. N. S. 1200.

Officers to be auxiliary to one another.

10. All officers shall be auxiliary to one another for promoting the correct, convenient, and speedy administration of business. J. A. Rule 415.

Not in the English Rules.

2. Clerk of the Process.

Clerk of process to issue writs for commencement of actions.

11. The Clerk of the Process shall, on receiving a certified copy of the writ to be filed by him, issue any writ of summons required for the commencement of an action. Rule T. T. 1856, 150.

The copy is to be certified by the plaintiff's solicitor.

Sealing writs.

12. The Clerk of the Process shall have a seal for sealing writs, to be approved by the Judges of the Supreme Court of Judicature, and he shall seal therewith and sign all writs and process issued by him. *See* R. S. O. 1877, c. 39, s. 43.

Issue of writs.

13. All other writs required to be issued by the Clerk of the Process to the parties or their solicitors, shall be issued

according to the established practice. Rule T. T. 1856, 152. Rules 14-18.

14. The Clerk of the Process shall attend in his office at all times when the Registrars are required to attend in their respective offices, and shall permit all necessary searches respecting writs so issued by him. Rules T. T. 1856, 153. Attendance at office.

The office hours are now regulated by *Rules* 7 & 8 *ante*.

15. The Clerk of the Process shall, on the opening of the respective offices each morning, or as soon thereafter as may be, deliver to the Registrars of the Queen's Bench and Common Pleas Divisions and to the Clerk of Records and Writs for the Chancery Division, the copies of writs of summons issued in such Divisions respectively on the preceding day, that the same may be filed with the papers in the respective actions to which such writs belong. Rules of 19 Feb. 1859. *See* J. A. Rule 547. Copies of writs to be sent to Registrars.

16. The Clerk of the Process shall deliver to each of the Registrars of the respective Divisions on the first day of January, the first day of April, the first day of July, and the first day of October, if not a Sunday or legal holiday, and if so then on the first day thereafter not being a Sunday or legal holiday, in each and every year, quarterly returns of all writs issued by him during the preceding quarter to the respective Divisions, naming each description of writ, and the dates on which the same were issued, to each of the Registrars requiring the same. Rule of 19 Feb., 1859. Quarterly returns of writs.

3. Registrars, Local Registrars, etc.

17. The Registrars or Assistant-Registrars or such other officers as the Judges of the Supreme Court shall approve of, shall attend the Weekly Sittings of the High Court in rotation. *New*. Attending court.

See note to *Rule* 3.

18. Local and Deputy Registrars are to perform the duties of their offices in the same manner, and under the same regulations, as the like duties are performed by the Clerk of Records and Writs; and all Orders, Rules, and Rules and regulations relating to Clerk of R. & W., to apply to

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Rule 18. Local and Dep. Registrars.

regulations in force respecting the Clerk of Records and Writs, and respecting the regulation of his office, are to be in force and applicable to the Local and Deputy Registrars in relation to such duties as they are hereby required to perform; and the like sums and fees payable to the Clerk of Records and Writs, are to be payable to the Local and Deputy Registrars, in relation to similar matters. Chy. O. 34.

For *Rules* relating to the duties of the Clerk of Records and Writs: see *Rules* 23-25.

This *Rule* appears to be defective in not including Deputy Clerks of the Crown in its provisions, inasmuch as they have to discharge similar duties in actions in the Queen's Bench and Common Pleas Divisions to those herein provided for by Local and Deputy Registrars: see *post Rule* 20. Perhaps in view of *Rule* 20 the present *Rule* is unnecessary.

Whether Local Masters may practise—*quære.*

Local Masters, and Deputy Registrars, under the former practice in Chancery, were not at liberty to practise themselves in Chancery, nor were they even at liberty to practise in partnership with solicitors practising in Chancery, although they might not actually share in the emoluments arising from such business: *McLean* v. *Cross*, 3 Chy. Ch. 432. After the merging of the three Superior Courts into one, it was doubtful whether a Master could practise at all, even though he confined his practice to the Queen's Bench and Common Pleas Divisions of the High Court; as under the new system he is just as much an officer of those Divisions as he is of the Chancery Division; but see *Rule* 138 *post*, from which it may be inferred, that it is not the intention of *The Judicature Act* to deprive them of the right of practising; and see also sect. 125, s-s. 12 *ante*.

Fees.

The fees now payable to Deputy Registrars, Deputy Clerks of the Crown, and Local Registrars, are regulated by the tariff *post*.

Officers paid by fees are entitled to receive all fees payable under the tariff, in cash, but those fees payable under any statute not expressly requiring them to be paid in stamps.

Deputy Clerks of the Crown and Deputy Registrars.

19. Where the offices of Deputy Clerk of the Crown and Deputy Registrar in any county are not held by the same person, the Deputy Clerk of the Crown shall in actions in the Queen's Bench and Common Pleas Divisions have the powers and duties of a Deputy Registrar (not Local Master), in addition to the powers and duties heretofore belonging to a Deputy Clerk of the Crown; and the Deputy Registrar shall in actions in the Chancery Division have the powers and duties of a Deputy Clerk of the Crown, in addition to the powers and duties heretofore belonging to a Deputy Registrar. In counties where there is a Local Registrar, every reference in these Rules to the said two offices, or either of them, shall be deemed to apply to the Local Registrar. Rules 417, 545. *See* J. A. s. 125 (5).

This *Rule* in effect continues all the powers of the Deputy Clerks of the Crown and Deputy Registrars at the time when the Ont. J. A. 1881 was passed, and gives to each of these officers the powers of the other as well as his own.

20. Subject to the foregoing Rules, where an action is commenced in the office of a Deputy Registrar or Deputy Clerk of the Crown or Local Registrar, those officers respectively shall have all such powers and authorities in relation to the action as the Clerk of Records and Writs has in the case of an action where appearance is to be entered in his office, all such orders in the action as require to be entered (except orders made by the Local Judge or the Local Master of the county under the authority and jurisdiction vested in them under these Rules) shall be entered in the office of such Deputy Registrar or Deputy Clerk or Local Registrar. Rules 418, 509; Chy. O. 35. Rules 20-22. Entry of orders.

See Eng. R. 1875, o. 35 r. 2.

The English Rule makes provision with reference to the entry of judgments in the District Registries established by the Judicature Act of 1873. The authority to make orders where actions proceed in the District Registry is given to the District Registrar, not to the County Court Judge or any other officer.

21. Every Deputy Clerk of the Crown, Deputy Registrar, and Local Registrar, shall once in every three months transmit to the Registrar of each Division at Toronto, a list, in the form No. 216 in the Appendix, of all judgments which have been entered by him in such Division during such period; and from the said lists the Registrars of the several Divisions shall prepare and from time to time keep up, a general index or list of judgments, which shall be open to inspection by all persons interested, upon payment of the usual fee. See J. A. Rule 517. List of judgments entered in outer offices to be forwarded to head office of Division in Toronto.

4. Judgment Clerks.

22. Two of the officers of the High Court shall, in addition to their other duties, be Judgment Clerks of the High Court, for the purpose of settling the form and terms of special judgments and orders. *See* J. A. Rule 416. Judgment clerks.

Not in the English Rules.

Judgments are now drawn up by the Registrar, Deputy, or Local Registrar, or Deputy Clerk, at the office where the writ and pleadings are filed. In cases such as were formerly dealt with by the Court of Chancery, where minutes require to be settled, the parties attend in country cases before the Local officer; but if they cannot agree before him as to the proper form of the judgment, a direction was formerly required to be obtained, on motion to a Judge, to refer the minutes for settlement to one of the Judgment Clerks: *Breckenridge v. Ontario Loan & Deposit Co.*, 10 C. L. J. 140; 3 C. L. T. 212; but now the minutes may be varied by application to a Judge or a Judgment Clerk on notice to the other parties interested: see *Rule* 761. Settling minutes.

Entry of judgment in the Local office does not prevent an application to a Judge to vary the minutes. The Court will, for a time at least, encourage the

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Rule 23. settling of judgments by the Judgment Clerks, in order to preserve uniformity in the language of judgments: *Holden* v. *Smith*, 20 C. L. J. 370; 4 C. L. T. 541; 10 P. R. 369; see also 4 C. L. T. 568. See further as to duties of Judgment Clerks, *Rules* 759-63.

A judgment, though by consent, is a solemn judgment of the Court, and cannot be altered by consent of the parties without the sanction of the Court: The *Bellcairn*, 34 W. R. 55.

Clerk of Records and Writs.

Clerk of Records and Writs, duties of.

23. The Clerk of Records and Writs is to perform in the Chancery Division, the same duties as heretofore in relation to the several matters hereinafter mentioned, that is to say:

1. Receiving, filing, and custody of, pleadings, petitions, reports, depositions, affidavits, bonds, and other papers and proceedings, and making entries thereof in the proper books.

2. Amending pleadings.

3. Entering consents, and notes of default in pleading and giving certificates thereof.

4. Certifying proceedings.

5. Examining and authenticating office copies of pleadings and other proceedings.

6. Preparing and issuing writs, other than those required to be issued by the Clerk of the Process, commissions and orders of course.

7. Preparing and signing certificates for registration, and issuing the same.

8. Attending on the opening of commissions.

10. The care and custody of all documents ordered to be deposited for safe keeping, or produced under any order of Court.

11. The care and custody of the books kept under the Act for Quieting Titles, and making the necessary entries therein.

12. Preparing and signing certificates of the filing of petitions, under said Act, and issuing the same.

13. Transmitting such petitions to the proper Referee.

14. Entering and issuing certificates of title and conveyances, granted under the said Act. Chy. O. 23.

15. Attending with records and exhibits on the Judges of the Court or elsewhere. Rule 24.

16. Setting down actions for trial and motions for the Divisional Court.

17. Setting down all motions, appeals, demurrers and special cases in all Divisions of the High Court for the weekly sittings, and all appeals in Chambers.

Orders of course, referred to in clause 6, are those orders which, according to the practice of the Court of Chancery, could be obtained on præcipe without an actual motion therefor; or which, at Common Law, were called "side bar rules," and which were issued on the filing of a motion paper signed by Counsel: see *Rule* 25. The most common orders of this kind were: Orders of course.

1. Orders for security for costs, where the writ or other proceeding by which an action is commenced discloses on its face, that the plaintiff or person asking relief, (see J. A. s. 2) is resident out of the jurisdiction: *Rule* 1242.

2. Orders to produce, under *Rule* 508.

3. Orders for appointment of guardians of infants when necessary: see Chy. Ord. 610, but the power to issue orders of this kind seems now to be abrogated, owing to the omission of Chy. O. 610 from the present consolidated *Rules*.

4. Orders to continue proceedings where the death or marriage of parties, or the transmission of interest *pendente lite*, renders it necessary for other persons to be made parties to the action: *Rule* 622.

5. Orders for sheriffs to return writs, or to bring in the body.

6. Orders for leave to plaintiff, or defendant, to change his solicitor, or solicitor and agent,—or to prosecute, or defend, in person, instead of by a solicitor,—or to enable one of several plaintiffs to appoint a solicitor for the purpose of making an application separate from his co-plaintiff,—or to enable a solicitor of a plaintiff, or defendant, to change his agent.

7. Orders for delivery and taxation of solicitors' bills of costs, on the application of a client: or for the taxation alone of such bills on the application of the client within a month from the delivery thereof, or on the application of the solicitor at any time after such month: see *Rule* 1228. Formerly orders of course for delivery and taxation were issuable by the Clerk of Records and Writs under original *Rule* 444, in the Chancery Division, and orders of course for taxation alone, were issued by the Registrar of that Division; but now all orders of course in the Chancery Division at Toronto are to be issued by the Clerk of Records and Writs.

For other orders issuable as of course, see Daniel's Pr., 5th ed., 2002—2012.

All orders of course are to be drawn up on præcipe: see *Rule* 25 *post*.

Certificates of officers as to proceedings in their offices are conclusive; and affidavits cannot be read to contradict them: *Beavan* v. *Burgess*, 10 Jur. 63; *Foley* v. *Griffith*, 2 Moll 318.

24. The Clerk of Records and Writs shall make out and transmit to the proper Registrar a list of all actions and matters set down for trial or argument as soon as the time for setting the same down has elapsed. *See* Chy. O. 26.

The list of causes here referred to is posted up at Osgoode Hall, outside the Court Room, and the cases are taken by the Court in the order in which they appear upon the list, unless otherwise ordered by the Court.

Papers for weekly Court to be filed with Clerk of Records & Writs Rule 24

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Rules 25-28.

Rules which by English practice, were granted, of course, to be granted by Registrars and Clerk of Records and Writs, in same manner.

25. All orders of course, or which by the English practice, prior to the first day of Trinity Term, 1856, might be had as a matter of course upon signature of counsel at side bar, or were given by the Master, Clerk of the Papers, or Clerk of the Rules, in England, whether in Term time or in Vacations are to be issued on præcipe at any time, by the Registrars of the Queen's Bench and Common Pleas Divisions, Clerk of Records and Writs, or the Deputy Clerk of the Crown, Deputy or Local Registrar as the case may require. *See* Rules T. T. 1856, 120; Chy. O. 25, 595.

5. Marshals and Clerks of Assize.

Who to officiate as Clerks of Assize.

26. The Deputy Clerks of the Crown and Local Registrars in the several Counties and Unions of Counties, except the County in which the City of Toronto is situated, shall *ex officio* be and act as Marshals and Clerks of Assize at the Circuit Sittings of the High Court for the trial of causes, matters and issues, and of criminal matters or proceedings, and at any Courts of Assize and Nisi Prius, Oyer and Terminer, and General Gaol Delivery, appointed to be holden by commission in their respective Counties or Unions of Counties, and shall have all the powers and perform all the functions incident to the same as such Marshals and Clerks of Assize. R. S. O. 1877, c. 41 s. 13.

To make return of proceedings and transmit indictments, etc., to the Registrar of Queen's Bench Division.

27. The said Deputy Clerks of the Crown and Local Registrars respectively shall, immediately after each sitting of such Courts, forward by post to the Registrar of the Queen's Bench Division at Toronto, every recognizance, indictment, paper or proceeding in any criminal matter, in their custody as such officers respectively, and also the usual and proper returns as such Marshals and Clerks of Assize. R. S. O. 1877, c. 41, s. 14.

And to pay the postage thereon, etc.

(*a*) The Deputy Clerks of the Crown and the Local Registrars shall pay the postage on the transmission to Toronto of the indictments and other proceedings in criminal cases, and the same is to be repaid out of the Consolidated Revenue Fund. R. S. O. 1877, c. 41, s. 15.

Marshal and Clerk of Assize for County of York.

28. The Marshal and Clerk of Assize for the County of York, shall perform the duties of Marshal and Clerk of Assize at the Sittings of the High Court for the trial of

causes and issues and of criminal matters or proceedings, and at any Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery holden for the County of York, and shall be subject to all the provisions of this Act, in reference to records, exhibits and other documents; and he shall also perform such other duties as he may from time to time be directed, by Rules of the Judges of the Supreme Court, or High Court under section 105 of the *Judicature Act* to perform; and subject to such duties and Rules, he shall be a Clerk in the office of the Registrar of the Queen's Bench Division. Rule 28. Duties.

(*b*) The person so appointed shall take and receive the same fees only as other Marshals and Clerks of Assize; and such fees shall be by him accounted for, paid over and applied in the manner provided by law; and he shall not take for his own use or benefit, directly or indirectly, any fee or emolument save the salary to which he may be entitled by law. Fees.

(*c*) When the Circuit Sittings of the High Court at the County Town of the County of York for the trial of civil and criminal proceedings are held separately, or when any Court of Assize and Nisi Prius by commission in the County of York is held separate and apart from any Court of Oyer and Terminer and General Gaol Delivery held by commission in the said County, and at the same time, the Registrars of the Queen's Bench and Common Pleas Divisions of the High Court shall alternately, personally or by Deputy, act as Clerks of the Sittings for criminal proceedings or of such Courts of Oyer and Terminer and General Gaol Delivery, only as long as such separate Sittings or such Courts are being held at the same time, and shall, while so acting, have all the powers and exercise all the functions that are by law had and exercised by Marshals and Clerks of Assize. R. S. O. 1877, c. 41, s. 16. Clerk of Courts for criminal trials when held in County of York at same time as Courts for civil trials.

(*d*) The Marshal and Clerk of Assize for the County of York, shall forthwith, after the close of each Assize, or earlier if required, return to the Clerk of Records and Writs, and the Registrars of the Queen's Bench and Common Pleas Divisions, all records in their respective Divisions, together with all exhibits and other documents appertaining thereto. Rule of 16th May, 1876. To return records and exhibits to Registrars of different divisions.

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Rules 29, 30.

Absence of Clerk of Assize provided for.

29. In the event of any Marshal or Clerk of Assize or Registrar being absent, or being prevented by illness or other cause from performing his duties as such Marshal or Clerk or Registrar, the presiding Judge at such Sitting or Courts may authorize some person to act as Marshal or Clerk of Assize, and the person so authorized to act shall receive the remuneration payable for the performance of the duties. R. S. O. 1877, c. 41, s. 17.

6. Master in Chambers.

Master in Chambers.

30. The Master in Chambers, in regard to all actions and matters in the High Court, including proceedings in the nature of *quo warranto* under *The Municipal Act*, shall be and hereby is empowered and required to do all such things, transact all such business, and exercise all such authority and jurisdiction in respect to the same as by virtue of any statute ~~or custom,~~ or by the rules of practice of the Superior Courts, or any of them, respectively, were at the time of the passing of the Acts 33 Vict. (O.) cap. 11, 37 Vict. (O.) c. 7 and *The Ontario Judicature Act, 1881*— or are now done, transacted, or exercised by any Judge of the said Courts sitting at Chambers, save and except in respect to the matters following;

Criminal matters, etc.

1. All matters relating to criminal proceedings, or the liberty of the subject;

Appeals.

2. Appeals and applications in the nature of Appeals;

Lunacy.

3. Proceedings as to Lunatics under the Revised Statutes of Ontario, chapter 54, sections 5, 6, 7, 8, 9, 17 and 18, and chapter 44, section 140;

Arrest.

4. Applications to arrest;

Petitions by trustees for advice.

5. Petitions for advice under the Revised Statutes, chapter 110, section 34.

Custody of infants.

6. Applications as to the custody of infants under the Revised Statutes, chapter 137, section 1;

Leases and sales of settled estates.

Settlements by infants, etc.

7. Applications as to leases and sales of settled estates; to enable minors, with the approbation of the Court, to make binding settlements of their real and personal estate on marriage; and in regard to questions submitted for the

opinion of the Court in the form of special cases on the part of such persons as may by themselves, their committees, or guardians, or otherwise, concur therein; Rule 30. Special cases.

8. Opposed applications for Administration Orders; Administration, or respecting infants or their estates

9. Opposed applications respecting the Guardianship of the person and property of Infants;

10. Applications for Prohibition, Mandamus or Injunction. Mandamus and injunction.

11. Proceedings as to Partition and sale of Real Estate, under the Revised Statutes, chapter 104. Partition.

12. Applications for leave to appeal after the time limited for that purpose has elapsed. Application to appeal.

13. Appeals from Judges of County Courts or Local Masters, or in respect of any other matter which by these Rules is expressly required to be done by a Judge of the High Court. Appeals.

14. The payment of money out of Court, or dispensing with payment of money into Court, in administration and partition matters, Payment out of court.

and except (unless by consent of the parties) in respect of the following proceedings and matters, that is to say:—

The removal of causes from Inferior Courts, other than the removal of judgments for the purpose of having execution. In certain matters jurisdiction by consent.

The referring of causes.

Reviewing taxation of costs, except as provided in Rule 854.

Staying proceedings after verdict or judgment.

J. A. Rules 420, 548; Chy. O. 560; C. L. Rules of 9th Feb., 1870.

This *Rule* contains a consolidation of the Chy. Orders and C. L. Rules, defining the jurisdiction of the Referee in Chambers and the Clerk of the Crown and Pleas in Chambers before the Ont. Jud. Act, 1881, together with the extension of such jurisdiction rendered necessary by new provisions under the Jud. Act. The Master in Chambers became under that Act possessed of the powers in Chambers which both the former officers had, but subject to the restrictions placed upon the powers of either of them: see original *Rule* 420 and *Keefe* v. *Ward*, 18 C. L. J. 166. Scope of Rule.

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Rule 30.

Under the Jud. Act, jurisdiction of quite a new kind was conferred by various *Rules* upon a Judge in Chambers. The former Referee by Chy. Order 560, and the Clerk of the C. & P. by Rules of Feb., 1870, (see 29 U. C. Q. B. 623) were limited to the powers at the date of those Orders and Rules respectively possessed by a Judge in Chambers: see *Queen* v. *Smith*, 7 P. R. 429; *Collver* v. *Swayzie*, 8 P. R. 42. To settle doubts as to the jurisdiction of the Master in Chambers, more especially under original *Rule* 80 (now 739) J. A. *Rule* 548, consolidated above, was passed.

This *Rule* appears to be intended to confer on the Master in Chambers all the jurisdiction of a Judge in Chambers at the time of these *Rules* coming into force, *i. e.*, 1st Sept., 1883, except as to the matters above excepted. The word "now" in the latter part of this *Rule* can hardly refer to any other period of time, as no date is affixed to the *Rules*; but it is to be noted that the wording of the *Rule* has been changed in an important particular by the substitution of the word "of" for "or" in the seventh line: so far as this change is concerned, however, it may be observed that the *Rule* follows the statute under which it is authorized to be made: see sec. 105, s-s. 1 (*d*). The Master in Chambers has, therefore, now power to entertain applications to set aside fraudulent conveyances, &c. by judgment debtors, under *Rules* 1007-1011, which the Referee in Chancery Chambers did not formerly possess: see *Queen* v. *Smith*, 7 P. R. 429; and *Wark* v. *Moulton*, 7 P. R. 144; but it was exercised by the Clerk of the Crown and Pleas in Chambers: see *Watts* v. *Hobson*, 7 P. R. 334. He may also have power to make orders dispensing with a wife joining in a conveyance by her husband, under R. S. O. c. 133 ss. 9, 10, a jurisdiction he did not formerly possess: *Re Nolan*, 6 P. R. 115. Upon a strict construction of the language of *Rule* 989 by that of the present *Rule* it might be said that he has also power to grant judgments for partition on summary applications in Chambers, which was formerly excluded from his jurisdiction: *Re Arnott, Chatterton* v. *Chatterton*, 8 P. R. 39; unless it can be said that the necessity for directing a reference to another officer, excludes such motions from his jurisdiction. But in *Hendricks* v. *Hendricks*, 13 P. R. 79, it was held that the mere consolidation of the *Rules* could not work a construction which was not in accordance with the policy upon which *Rule* 1187 (originally promulgated along with *Rule* 989) was framed. Local officers generally would not appear to have jurisdiction under *Rule* 989, but only Local Masters. It would therefore seem to be still contrary to *Rule* 989, that the words "Judge in Chambers" therein should by the aid of *Rule* 30 be made to extend to the Master in Chambers and by force of *Rule* 41 to Local Judges also.

Setting aside fraudulent conveyances.

Dispensing with wife executing deed.

Applications for partition.

References to Masters.

The right of the former Referee in Chambers to direct a reference to a Master was denied: *Brown* v. *Dollard*, 6 P. R. 113; (this case was affirmed on rehearing, however, on another ground, viz: that the relief should have been sought under Chy. Ord. 398 *et seq.*); see also *Queen* v. *Smith*, 7 P. R. 429; and since the *Judicature Act* the right of the Master in Chambers to direct such a reference under the Dominion Winding-up Act has also been denied: *Re Queen City Refining Co.*, 10 P. R. 415; *Re Joseph Hall Manufacturing Co.*, 10 P. R. 485.

Quo warranto.

The jurisdiction of the Master in Chambers in *quo warranto* proceedings under the Municipal Act affirmed in *Reg. ex. rel. Felitz* v. *Howland*, 11 P. R. 264, and denied in *Reg. ex. rel. Wilson* v. *Duncan*, *ib.* 379, has been settled by this *Rule*. He has also power to direct a reference to a County Judge to take evidence in such a matter under sec. 212 of R. S. O. c. 184, *Reg.* v. *McClay*, 13 P. R. 96. See also notes to *Rule* 41.

The jurisdiction to entertain a motion to change the venue in a County Court action was doubted: *Brigham* v. *McKenzie*, 10 P. R. 406; but is now settled by *Rule* 1260.

Where a statute passed after 1871 merely enlarged the power of a Judge in Chambers, in a case in which the Referee in Chambers had previously exercised jurisdiction, it was held that the Referee could exercise the additional powers conferred by the statute upon a Judge in Chambers: *Collver* v. *Swayzie*, 8 P. R. 42.

Rule 30.

There is jurisdiction under the Mechanics Lien Act to hear a motion to annul registration of a mechanic's lien, where the amount in question is under $200: *Re Cornish*, 6 Ont. 250; *Re Moorehouse* v. *Leak*, 13 Ont. 290.

Local Judges and Masters.

By *Rules* 41 and 138 the jurisdiction conferred on the Master in Chambers is extended to Local Judges and Local Masters who do not practise: except in proceedings in the nature of a *quo warranto* under the Municipal Act, for payment of money out of Court, or dispensing with payment into Court, appeals from the taxing officers at Toronto pending taxations, or making orders for the sale of infants' estates.

Matters excluded from jurisdiction.

Applications to the summary jurisdiction of the Court against solicitors, were held to be excluded from the jurisdiction of the Referee: *Re L. & M.*, 6 P. R. 21; but see *Re Carroll* 2 Chy. Ch. 323; *Re Walker*, *ib.* 324; *Re Toms*, *ib.* 381; *Re Attorney*, 7 P. R. 174; also applications by parties claiming adversely to a receiver, or sequestrator: see *Brown* v. *Dollard*, 6 P. R. 113, also an application by a person claiming adversely to the heirs or next of kin in an administration suit to be made a party in the Master's office and for leave to establish his claim there: *Re Tobin*, *Tobin* v. *Tobin*, 7 P. R. 67; and an application for payment into Court by an executor or administrator of money admitted by him to be in his hands: *Re Curry*, 8 P. R. 340; but see now *Rule* 756.

The Master in Chambers has no jurisdiction on conflicting evidence to strike out pleas, raising questions of liability preliminary to an account and order an account to be taken: *Ryan* v. *Fish*, 20 C. L. J. 114; nor to set aside a judgment of a creditor against an absconding debtor to enable another creditor to defend: *Wills* v. *Carroll*, 10 P. R. 142.

Where no jurisdiction, adjournment before a judge refused.

Where an application was made to the Referee, which he had no power to entertain, he refused to adjourn it before a Judge: *Lapp* v. *Lapp*, 3 Chy. Ch. 234, or to hear it even by consent: *Thompson* v. *Freeman*, 4 Chy. Ch. 1. Such cases have, however, sometimes been adjourned before a Judge.

Leave to Appeal.

Leave to appeal—The restriction of clause 12 did not extend to applications for leave to appeal from a Master's report: *Russel* v. *Brucken*, 3 Chy. Ch. 488, but only to applications for leave to appeal to the Court of Appeal: *Langtry* v. *Dumoulin*, before Dalton, M.C. 25 June, 1884; and see *Re Gabourie*, 12 P. R. 252.

Liberty of the subject.

Liberty of the Subject.—Formerly the Referee in Chambers could entertain motions to commit for disobedience of an order to produce, but the Clerk of the C. & P. Q. B. had no jurisdiction in matters relating to the liberty of the subject. The latter restriction is continued under this *Rule*, and is held to prevent the Master in Chambers from entertaining motions to compel obedience to an order for production by committal: *Keefe* v. *Ward*, 18 C. L. J. 106. He has also no jurisdiction to order the discharge of a defendant held in custody under a *ca. sa.*: *Cochrane* v. *Lamon*, 11 P. R. 351.

Appeals, etc.

Appeals.—An application impeaching the propriety of a filing, is not an appeal or in the nature of an appeal from the officer who filed the document, so as to exclude the jurisdiction of the Master in Chambers: *Waterous* v. *Farran*, 6 P. R. 31.

Referring causes.

The referring of Causes.—The original expression "The referring of causes under the C. L. P. Act" was held not to be restricted to causes begun by writ of summons: *Bank of Hamilton* v. *Baine*, 12 P. R. 418. The expression now substituted seems to be without any restriction.

References to Referees under secs. 101 and 102 of the Act cannot be made by the Master in Chambers: see notes to those sections.

Staying proceedings.

Staying proceedings after Verdict or Judgment.—The words "or judgment" have been added in the Consolidation of the *Rules*, probably meaning judgment at the trial, as the result of the trial is now not usually a verdict merely but a judgment in the action, as formerly in Chancery and at Common Law where the trial was by a Judge without a jury.

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Rules 31-34.

Probably the alteration will not affect the power of the Master in Chambers to stay proceedings upon a reference or execution under a judgment pending an appeal, and which under the English Rules has been held exercisable by a Master; *Oppert* v. *Beaumont*, 35 W. R. 266; 56 L. J. Q. B. 216; see also *Rules* 2 and 805, and *Butler* v. *Standard Ins. Co.*, 8 P. R. 41; *Powell* v. *Peel*, *ib.* 85.

Official Referees may sit in Chambers for M. in C.

31. Any official Referee, upon request of the Master in Chambers, or of a Judge of the High Court, may sit with or for such Master; and while sitting for him shall have all the authority and power of such Master, but shall not be entitled to any fees. J. A. Rule 421.

See *Rule* 88 (*b*) making similar provision where an official Referee sits for the Master in Ordinary.

M. C. may refer to Judge.

32. The Master in Chambers, or Referee sitting for him, may refer any matter pending before him to a Judge of the High Court for decision, and the Judge may dispose of the same in whole or in part, or refer back the whole or a part. See J. A. Rule 426.

See note to *Rule* 42.

M. C. to sign orders.

33. The Master in Chambers, or other officer holding chambers, shall sign all orders made by him, and shall cause such as require entry to be entered in a book to be kept for that purpose. See Chy. O. 565.

As to Orders required to be entered: see *Rules* 546, 774.

7. Referees.

Trial before referee.

34. Where any cause or matter, or any question in any cause or matter, is referred to a Referee, he may, subject to the order of the Court or a Judge, hold the trial or reference at, or adjourn it to, any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors if any, which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the Court or a Judge, proceed with the trial *de die in diem* in a similar manner as in actions tried by a jury. J. A. Rule 276.

Identical with Eng. R. 1875, O. 36, r. 30 (1883, R. 472).

The provision as to a referee sitting *de die in diem* is directory only; and non-compliance with it is not a ground for setting aside his finding: *Robinson* v. *Robinson*, 35 L. T. N. S. 337; 24 W. R. 675.

Rules 35-40. Procedure before Referee.

35. Where matters of the nature of those commonly referred to the Master are referred to a Referee, the practice and procedure, including the procuring of the attendance of witnesses, shall be the same as nearly as may be as the practice and procedure in the Master's office. *New.*

This *Rule* would seem to govern the practice on references under sec. 101 of the Act.

Procedure before Referee.

36. When matters in the nature of the trial of an issue are referred to a Referee, the practice and procedure, including the procuring of the attendance of witnesses, shall be as nearly as may be, the same as the practice and procedure at a trial, but not so as to make the tribunal of the Referee a public Court of Justice. See J. A. Rule 277.

See Eng. Rule 1875, O. 36, r. 31 (1883, R. 473).

This *Rule* would seem to apply where the reference is to an official or specia Referee under sec. 102 of the Act; see *Rooney* v. *Whiteley*, W. N. 1883, 225.

Authority of Referee.

37. Subject to any order to be made by the Court or Judge the Referee shall have the same authority in the conduct of any reference or trial as a Judge of the High Court when presiding at any trial. J. A. Rule 278.

Identical with Eng. R. 1875, O. 36, r. 32 (1883, R. 474).

The Referee, whether the reference is for report (sec. 101), or trial (sec. 102), has power, subject to the control of the Court, to fix a peremptory appointment for the hearing, and, on default of either party, to proceed in his absence: *Wenlock* v. *River Dee Co.*, 32 W. R. 220, 49 L. T. N. S. 617.

Not to commit to prison.

38. Nothing in these Rules contained shall authorize a Referee to commit any person to prison or to enforce an order by attachment or otherwise. J. A. Rule 279.

Identical with Eng. R. 1875, O. 36, r. 33 (1883, R. 475).

Referee may submit questions to the Court.

39. The Referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any facts specially with power to the Court to draw inferences therefrom, and in any such case the order to be made on the submission or statement shall be entered as the Court may direct. J. A. Rule 280.

Identical with the first part of Eng. R. 1875, O. 36, r. 34, as amended by Eng. R., March, 1879, r. 5 (1883, R. 476). See R. S. O. 1877, c. 50, s. 211.

Court may remit case, or decide

40. The Court shall have power to require any explanations or reasons from the Referee, and to remit the cause

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Rules 41, 42. on evidence taken.

or matter, or any part thereof, for re-trial or further consideration, to the same or any other Referee; or the Court may decide the question referred to a Referee on the evidence taken before him, either with or without additional evidence, as the Court may direct. J. A. Rule 281.

Corresponds with the effect of the English Rule referred to under *Rule* 39.

The powers given by these Rules are more extensive than those conferred by the C. L. P. Act, sec. 211, which simply enabled an arbitrator to state his award as to the whole or any part thereof, in the form of a special case for the opinion of the Court; and the Court could only deal with the case as stated. Under this *Rule* the Court may require of the Referee explanations or reasons, or send the matter back for re-trial or reconsideration, and to another Referee if it thinks fit; or may itself decide the question on the same evidence, or with additional evidence.

The latter part of this *Rule* does not seem to be quite in keeping with the presumable intent of *Rules* 848 *et seq.* that the report of the Referee shall be absolute if not appealed against.

See notes to secs. 101 and 102 of the Act, pp. 64-69.

Report of Referee may be filed ...

8. Local Judges.

Jurisdiction in Chambers of Local Judges.

41. The Judge of every County Court other than the County Court of York, shall in all actions brought in their County have concurrent jurisdiction with and the same power and authority as the Master in Chambers in all proceedings now determined in Chambers at Toronto, except that the authority of such Judge shall not extend to ~~proceedings in the nature of a *quo warranto* under *The Municipal Act*, or to~~ the payment of money out of Court, or dispensing with payment of money into Court, in any action or matter, or to appeals from the Taxing Officers in Toronto pending taxation, or to making an order for the sale of infants' estates. 48 V. c. 13, s. 21. J. A. Rule 584.

Local Judges have also recently had a limited jurisdiction conferred upon them in respect to granting injunctions, as to which see sec. 157 (2) of the Act.

A County Judge has now under 52 Vict., c. 36, s. 46 (O), original jurisdiction to determine the right of a municipality to a reeve, deputy reeve, etc., or the validity of an election.

Power to refer to Judge of High Court.

42. Every Local Judge may refer any matter pending before him in Chambers to a Judge of the High Court for decision, and the Judge may dispose of the same in whole or in part, or refer back the whole or a part. See J. A. Rule 426.

The English Order 35, Rule 6 (1875), makes this provision with reference to matters which come before the District Registrar, and Order 54, R. 3 (1875), contains a like provision with reference to the Master. Rule of Hilary Term, 1870, contains a like provision with reference to matters before the Clerk of the Crown: see 29 U. C. Q. B. p. 623. **Rule 42.**

A case may be brought before a Judge under this Rule upon a certificate of the officer that in his opinion the case is a proper one to be heard by a Judge; otherwise applications within the jurisdiction of any officer must be disposed of by him: *Hughes* v. *Rees*, 9 P. R. 86.

10. Master's Office.

The Master in Ordinary, and Local Masters, are all officers of the Supreme Court, J. A. s. 112, ss. 2, and as such, actions may be referred to them, from any Division of the High Court. They are also by Order in Council of May 22nd, 1889, made Masters of the High Court and Court of Appeal. **Masters are officers of Supreme Court.**

The Local Masters who do not practise as barristers or solicitors, and who have not taken out certificates to practise, in addition to their duties as Masters, have also jurisdiction in certain cases in Chamber applications, in actions brought in the County in which they hold office: *Rule* 138. **Powers of Local Masters in Chambers.**

Formerly a Master in Chancery was debarred from practising as a solicitor in Chancery, or in partnership with any other person practising as a solicitor in Chancery, even though he received no part of the emoluments: *McLean* v. *Cross*, 3 Chy. Ch. 432. They might however practise as attorneys in the other Courts. Now, however, that the Masters have jurisdiction in all the Divisions of the High Court, it seems doubtful if they can practise at all as solicitors. There is however no express provision either in *The Judicature Act*, or *Rules* debarring Masters from practising; and see *Rule* 138, from which it may be inferred that it was not the intention of *The Judicature Act* to deprive them of the right of practising: and see J. A. s. 125, (12). **As to whether Masters may practise as solicitors; *quære*.**

Under the former practice in Chancery the plaintiff was *prima facie* entitled to have a reference, when necessary, directed to the Master at the place where his bill was filed: *Macara* v. *Gwynne*, 3 Gr. 310; *Watson* v. *Henderson*, 2 Chy. Ch. 370; and the defendant might for good cause apply to change the reference: *McNab* v. *McInnis*, 4 Chy. Ch. 53; but now in administration actions, it has been held that the reference should be *prima facie* to the Master in the County where the deceased resided: *Thompson* v. *Fairbairn*, 10 P. R. 523. **Place of reference.**

Subject to this exception the old rule it is presumed will still be followed, and a plaintiff will have the right *prima facie* to have the reference, if any, directed to the Master in the county where the writ issued. Formerly when it was sought to change the reference on the score of expense, the difference of expense must have been considerable; and if on the ground of convenience, a clearly preponderating convenience for the proposed change must have been established; and the fact that a defendant was a man in extensive business, or a trustee, was not a sufficient ground for changing the reference: *McNab* v. *McInnis*, *supra*; *Jackson* v. *Harriman*, 9 C. L. J. 29. ***Prima facie*, plaintiff entitled to have reference where writ issued.**

Since *The Judicature Act* it has been held that the policy of that Act is to decentralise business, and to send local matters to the Local Masters, and the fact that a partnership business had been carried on in the county to which it was proposed to change the reference to take the partnership accounts, and that a delay of two months would be incurred by retaining the reference at the place directed by the judgment, was held sufficient ground to warrant the change: *Aitken* v. *Wilson*, 9 P. R. 75. **Reference may be changed; on what grounds.**

When the Master has been professionally concerned for any of the litigants, in reference to the same or any other matter, that is a sufficient ground for changing the reference: *Bigelow* v. *Bigelow*, 6 P. R. 124; *Boyd* v. *Simpson*, before Spragge, C., 19th June, 1878. (See Reg. Lib.) **When Master has been professionally concerned.**

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Rules 43-45.

But when the reference was directed to a Master, who had, prior to the appointment, been counsel for one of the litigants, neither party objecting, and the Master certifying that he acted in the reference at the pressing request of both parties, the Court held that the party against whom the Master reported could not raise that objection on appeal from the report, having taken the chance of the Master's finding in his favour: *Cotter* v. *Cotter*, 21 Gr. 159.

Where necessary to add Master as a party.

Where in the course of a suit it becomes necessary to add as a party the Master to whom the cause is referred, the reference will be changed on an *ex parte* application by the plaintiff: *Weldon* v. *Templeton*, 1 Chy. Ch. 360.

Application to be made on notice.

Usually however the party having the conduct of the reference is entitled to notice of any appplication to change it, and an order made in his absence is irregular and will be set aside: *McConnell* v. *McConnell*, 3 Chy. Ch. 122.

The following *Rules* 43-137, which regulate the practice in the Master's offices, apply to actions in all the Divisions, which are referred to a Master, or to a Referee.

(i) *General Rules.*

Interpretation.

43. In the following rules from 44 to 137 inclusive, the word "Master" shall include Local Master and Official or other Referee, as well as the Master in ordinary of the Supreme Court.

The powers conferred by the *Rules* on Masters may be also exercised by a Judge sitting in Chambers: *Rule* 549.

Court may dispose of matters without reference.

44. In all cases where a reference might be directed, the Court may dispose of all matters itself without a reference, and may direct the proceedings to be taken in Court, or in Chambers, as it finds expedient. Chy. O. 540.

This *Rule* is usually acted upon only in simple cases, to save the expense of a reference to a Master. The most usual instance of its application being, where the account necessary to be taken involves a mere computation. In such a case the Judge usually directs the Registrar to ascertain the amount, and it is then inserted in the judgment, or order, as the finding of the Court.

Occasionally, however, the accounts in an administration suit have been taken under this *Rule*.

Order to be carried into M. O. within 14 days.

45. Every order of reference is to be brought into the proper office for prosecution within 14 days after the order is drawn up, or after the same should have been drawn up, by the party having the carriage of the same; otherwise any other party to the cause, or any party having an interest in the reference, may assume the carriage of the order. Chy. O. 211.

The "proper office for prosecution" is that of the Master, or Referee, to whom the reference is directed. Usually the original, or a copy, of the judgment or order of reference, is required to be left with the Master.

Time for issuing order of

Formerly an order, or judgment, directing a reference, was required to be bespoken, and the necessary papers left for preparing the same within 7 days after the order, or judgment, was pronounced or finally disposed of by the

Court: see Chy. Ord. 10,—and Chy. Ord. 7, as to meaning of word "order,"— and otherwise it was not to be drawn up without leave being obtained in Chambers: see Chy. Ord. 11; *Steers* v. *Cayley*, 1 Ch. Ch. 165. In practice, the solicitor having the carriage of the order, or judgment, usually prepared the minutes and within the time limited by Chy. Ord. 10, procured them to be settled by the Registrar, or obtained an appointment from him to settle them: see Chy. Ord. 596. Under these *Rules*, however, no time appears to be prescribed within which an order, or judgment, directing a reference, is to be drawn up and entered. **Rule 46. reference and carrying into M. O.**

According to the former practice, it would appear that the party having the conduct of an order, or a judgment, directing a reference, was entitled to at least 21 days from the time the order, or judgment, was pronounced, or finally disposed of, by the Court, within which to issue the order, or judgment, and carry it into the Master's office; but whether he is entitled to the same time, or any longer, or shorter period, under the present practice is not clear.

The rule which regulates the question, as to who shall have the carriage of an order, or judgment directing a reference to a Master, is a technical one, and in the majority of cases, the solicitors alone are interested. The solicitor of the party having the conduct of the judgment is entitled to prosecute all those proceedings which relate to the general inquiries, and the other parties only prosecute those which relate exclusively to themselves, or such as it would be inconsistent for the party having the carriage of the order, or judgment to do. Thus, if the plaintiff have the conduct, his solicitor bespeaks and procures to be inserted all advertisements, whether for creditors, or for next of kin, or for the sale of property, he prepares the abstract, and answers the requisitions; and if the purchaser requires a reference title, he attends upon it. He furnishes, where directed, for the purpose of answering the general inquiries and taking the general account, copies, abstracts, or extracts of, or from accounts, deeds or other documents, and pedigrees, etc., relating to proceedings of a general character, and not belonging to particular parties to prosecute. Smith's Pr., 7th ed., 729. See also notes to *Rule* 321. **Conduct of reference, who entitled to.** **Duty of solicitor having conduct.**

Where the party having the carriage of a judgment, or order, directing a reference, is guilty of delay in carrying it into the Master's office within the meaning of this *Rule*, any other party to the action, or any party having an interest in the reference, may assume the carriage of the judgment, or order, which, where necessary, would include the right to draw up the minutes and procure them to be settled, and to have the order or judgment passed and entered. No order seems necessary to entitle him to do this: but see *Re Shaw*, 14 Gr. 524, where a special application was made. Where the judgment, or order, has been drawn up and entered, but has not been carried into the Master's office within the prescribed time, an office-copy of the judgment, or order, may be obtained and carried into the Master's office by any other party interested. Persons who are not parties to the action, but who are interested in the reference, *e. g.*, creditors, next of kin, heirs, etc., are entitled under this *Rule* to assume the carriage of the order, or judgment, where the prescribed time has elapsed: see *Re Shaw*, 14 Gr. 524. **May be changed for delay.** **Party interested may assume carriage, when.**

Where a judgment or order has been carried into the Master's office, in the event of delay arising on the part of the party having the carriage of it, the Master may transfer the conduct of the reference to any other person interested: see *post Rule* 50.

46. When in proceedings before the Master, it appears to him that some persons not already parties ought to be made parties, and ought to attend, or be enabled to attend the proceedings before him, he may direct an office-copy of the judgment or order to be served upon such parties; and upon due service thereof, such parties are to be treated and **Master may add parties in his office.**

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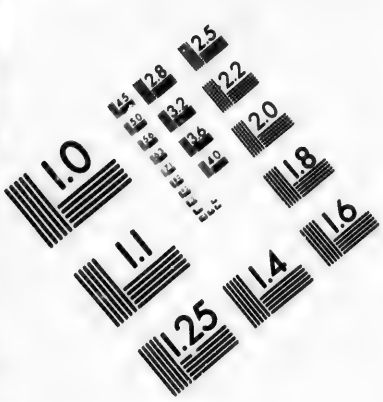
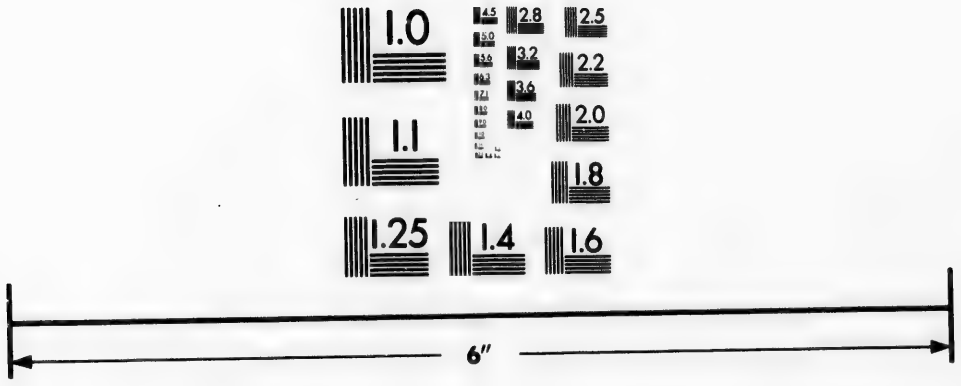
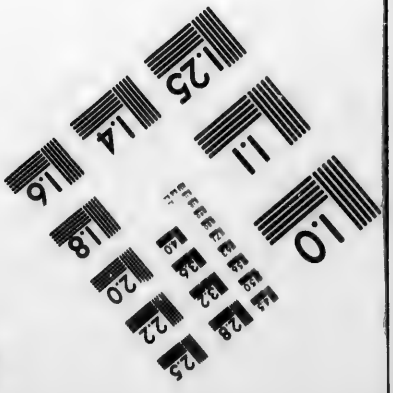




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Rule 46. named as parties to the action, and are to be bound by the judgment or order in the same manner as if they had been originally made parties. Ch. O. 244.

Master may dispense with service of judgment.

The Master has power to dispense with the service of the judgment on parties required to be served therewith under *Rule* 322; but he would seem to have no power to dispense with service on parties who ought to be added as parties under the provisions of this *Rule*.

Persons served with a copy of a judgment under *Rule* 322, are not thereby made parties to the action: see notes to that *Rule;* but persons required to be served under *Rule* 46, are made parties to the action.

Adding parties.

When persons are required to be added as parties, the Master usually issues an order adding them parties, and directing them to be served with the judgment, or order, of reference, indorsed as required by *Rule* 47.

Persons acquiring interest *pendente lite* need not be added.

Persons who acquire equitable interests in the subject matter of litigation *pendente lite* need not be added as parties, but are nevertheless bound, and concluded, by the proceedings: thus, a person recovering a judgment, and execution, against a mortgagor: *Wallbridge* v. *Martin*, 2 Chy. Ch. 275; or obtaining a mortgage, or other incumbrance from him: *Robson* v. *Argue*, 25 Gr. 407; pending an action for foreclosure, or sale, by a prior mortgagee, need not be made a party. But where a person acquires the legal estate *pendente lite* it may

Except assignee of legal estate.

sometimes be necessary to make him a party for the purpose of obtaining a conveyance: *sed vide* 1 Ric. 2 c. 9; this statute has been repealed in England but not in Ontario. A purchaser *pendente lite* may be added as a defendant in the Master's office under this *Rule*: *Lindsay* v. *Bank of Montreal*, 13 Gr. 66; but see *Abell* v. *Parr*, 9 P. R. 564. But where after registration of a certificate of *lis pendens* a statement of claim was amended by claiming further and other relief than that originally sought; it was held that persons acquiring interests before such amendment, though after the registration of the *lis* were not bound by notice of such further relief: *Price* v. *Price*, 35 Ch. D. 297: but see C. L. T. Sept., 1887, and Bennett on *Lis pendens*, c. 1. The doctrine of *lis pendens* does not affect third persons acquiring title *pendente lite* under tax sales: *ib.* c. 5, s. 80; nor *bona fide* assignees of negotiable paper: *Ib.* ss. 86, 87; nor persons acquiring title under Acts authorizing expropriation: *Ib.* s. 89.

Persons with paramount title not to be added in M. O. Absentee when action commenced, may be added in M. O. on his return.

Persons having a paramount title to the plaintiff, cannot be made parties in the Master's office, if they object: *Montgomery* v. *Shortis*, 3 Chy. Ch. 69. Thus, in a suit by an execution creditor, to set aside a fraudulent conveyance of the equity of redemption by the execution debtor, an order adding a prior mortgagee for the purpose of redeeming him, was discharged. When that is required he should be made an original party to the action: *Crawford* v. *Meldrum*, 19 Gr. 165. But when a decree had been made to take partnership accounts, in the absence of one of the partners alleged to be insolvent and out of the jurisdiction, it was held that he was properly made a party in the Master's office on his returning to the jurisdiction pending the reference: *Paterson* v. *Holland*, 7 Gr. 563; and as to parties interested in the equity of redemption: see *Rule* 306.

Action, commencement of, as against parties added.

The action is only deemed to be commenced as against parties added in the Master's office from the date of the order adding them: *Juson* v. *Gardiner*, 11 Gr. 23; and see *Dumble* v. *Larush*, 27 Gr. 187; *Sterling* v. *Campbell*, 1 Chy. Ch. 147. Where it is made to appear to the Master that all liability on the part of a party added, is barred by the Statute of Limitations, he may discharge the order adding him as a party: *Kline* v. *Kline*, 3 Chy. Ch. 161.

No relief can be had against parties added.

No direct relief can be had against parties added in the Master's office, and they cannot be required to account: *Hooper* v. *Harrison*, 28 Gr. 22; *Rolph* v. *Upper Canada Building Society*, 11 Gr. 275, 278; *Walker Seligmann*, 12 Eq. 152. And it would seem they cannot themselves get any relief against co-defendants beyond what is claimed by the plaintiff: see *Whitney* v. *Smith*, 4 Chy. 513; they are simply bound by the proceedings.

Rules 47-49.

A party filling two capacities, if made a party to a suit distinctly in one capacity only, may not be bound to his rights in the other capacity; *e. g.*, a person added as a defendant in his character of a judgment creditor, was held not to be bound in his character as a mortgagee: *Crooks* v. *Watkins*, 8 Gr. 340.

Party filling two capacities, how far bound.

47. The office-copy of a judgment or order directed to be served under Rule 46 is to be indorsed with a notice to the effect set forth in Form No. 33 in the Appendix, with such variations as circumstances require. Chy. O. 245.

Judgment, how served on parties in M. O.

48. A party served with an office-copy of a judgment or order under Rule 46, may apply to the Court, at any time within 14 days from the date of such service, to discharge the judgment or order, or to add to, vary, or set aside the same. Chy. O. 245.

Parties added in M. O. may move against judgment.

Formerly the application was required to be brought on to be heard within the fourteen days: see Holmested's Rules and Orders, 245. But the application might, in the discretion of the Court, be entertained after that time: *Stewart* v. *Hunter*, 2 Chy. Ch. 265.

Application to be heard.

The long vacation is excluded from the fourteen days: *Rule* 484 s. 4; but it would seem that the Christmas vacation is not excluded.

Where a party is added who claims by title paramount to the plaintiff, he should move to discharge the order: *Montgomery* v. *Shortis*, 3 Chy. Ch. 69; *Crawford* v. *Meldrum*, 19 Gr. 165; *McVean* v. *Tiffin*, 13 Ont. App. 1. But an incumbrancer claiming priority to the plaintiff, but whom the Master finds to be subsequent, may also appeal from the report on the question of priority: *McDonald* v. *Rodger*, 9 Gr. 75.

Party added claiming priority to plaintiff.

The Master may himself discharge the order adding a party who subsequently appears to be an unnecessary party: *Kline* v. *Kline*, 3 Chy. Ch. 161.

Master may discharge order when.

49. Where, at any time during the prosecution of a reference, it appears to the Master, with respect to the whole or any portion of the proceedings, that the interests of the parties can be classified, he may require the parties constituting each or any class, to be represented by the same solicitor; and where the parties, constituting such class, cannot agree upon the solicitor to represent them, the Master may nominate such solicitor for the purpose of the proceedings before him. Chy. O. 218, *first part*.

Master may classify, and appoint solicitors to represent different classes.

When the Master appoints a solicitor to act for a class, all the individuals composing that class are bound by the acts of the solicitor so appointed, and cannot repudiate them, unless they appoint a separate solicitor: *Re McConnell*, 3 Chy. Ch. 423.

Solicitor appointed by Master to represent a class, binds all of the class.

A solicitor so appointed is entitled to act for the class, not only in the Master's office, but also in proceedings arising out of, or connected with, the proceedings in the Master's office: *Ib.* But where a solicitor was *ex parte* appointed to represent creditors it was held that he could not recover his costs against creditors who had not proved their claims and who had had no notice of his appointment: *Monteith* v. *Merchants Bank*, 12 P. R. 288; 23 C. L. J. 415.

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Rule 50.

After the appointment of a solicitor to act for a class, the separate costs of any member of that class subsequently incurred will not ordinarily be allowed against the estate under administration: *Re Ætna Insurance Company*, 17 Gr. 160.

Solicitor not to be appointed to represent a class already represented.

The Master should not appoint a separate solicitor for parties who are sufficiently represented by the plaintiff; and where *prima facie* the plaintiff represents the class (see *Rule* 320 *post*), if the Master appoint a separate solicitor, he should state the reason for so doing in his report: *Gorham* v. *Gorham*, 17 Gr. 386.

As to the liability for costs of any member of a class refusing to be represented by the solicitor nominated by the Master, and insisting on being represented by a different solicitor: see *post Rule* 1188.

Master may change conduct of reference.

50. Where a party prosecuting a reference, does not proceed with due diligence, the Master is to be at liberty, upon the application of any other party interested, either as a party to the suit, or as one who has come in and established his claim under the judgment or order, to commit to him the prosecution of the reference; and from thenceforth neither the party making default nor his solicitor is to be at liberty to attend the Master as the prosecutor of the judgment or order. Chy. O. 212.

The Master in his discretion may entertain an application to change the conduct of the reference *ex parte*: *Stephenson* v. *Nicolls*, 14 Gr. 144; but ordinarily the application should be made on notice: 1 Sm. Pr. 2nd ed., 312, and see *Sims* v. *Ridge*, 3 Mer. 458; *Edwards* v. *Acland*, 5 Mad. 31.

Master's order subject to appeal.

An appeal lies from the order of the Master changing the reference: *Stephenson* v. *Nicholls*, 14 Gr. at pp. 147, 149, and in *Wyatt* v. *Sadler*, 5 Sim. 450; the Court on a substantive motion changed the reference, after the Master had refused an application for that purpose. But the application must in the first instance be made to the Master: *Miller* v. *McNaughten*, 1 Chy. Ch. 206.

Creditor may apply.

Where there has been great delay in prosecuting a judgment in a creditor's suit, a creditor may apply to have the conduct of the cause, though it has become defective by the death of a defendant: *Cook* v. *Bolton*, 5 Russ. 282; and see *Re Shaw*, 14 Gr. 524; *Patterson* v. *Scott*, 4 Gr. 145.

Party conducting reference entitled to inspect papers.

A party to whom the conduct of the reference is committed is entitled to inspect and take copies of briefs and documents in the possession of the party, or his solicitor, from whom the carriage of the reference has been taken: *Bennett* v. *Baxter*, 10 Sim. 417; and see *Heslop* v. *Metcalf*, 8 Sim. 622.

Plaintiff may apply to amend order of reference, though conduct taken him.

An order taking the conduct of the reference from the plaintiff, does not preclude him from applying to amend a clerical error in the judgment, or order, under *Rule* 780: *Whitehead* v. *North*, Cr. & Ph. 78. *Rule* 50 only enables the Master to transfer the conduct of proceedings in his office.

Where there is undue delay in prosecuting a reference the Master may close the reference as provided by *Rule* 51.

Where there is undue delay in prosecuting a reference, Master may close it.

51. Where there is undue delay in prosecuting a reference in the office of a Master, he may issue his warrant to the solicitors or parties interested, which may be transmitted by post, calling upon them to show cause why the reference should not be duly proceeded with. In default

of sufficient cause being shewn to excuse the delay, or upon default being made in attending upon the return of the warrant, the Master is to certify to the Court the circumstances of the case; and thereupon the reference in his office is to be deemed closed, and is not to be resumed until further order. Ch. O. 584. Rules 52-54.

In England a somewhat similar practice prevails; there the Chief Clerks from time to time go through all matters pending before them, and in those cases which have been left unattended to by the solicitors having the conduct of the cause or matter, they address a formal notification to such solicitors, pointing out the excessive delay, the present position of the matter, and informing them unless the matter is attended to, it will be handed over to the official solicitor of the Chancery Division: see 66 L. T. Jour. 133. English practice where delay occurs in prosecution of suits.

This *Rule*, however, only provides for closing the reference. After it has been closed under this *Rule*, an application must be made to the Court before it can be resumed. The object of the *Rule* is to protect the Court and its officers from any responsibility for undue delays in the prosecution of references, and its provisions should, therefore, be strictly observed by the Masters.

When a reference is closed in pursuance of this *Rule*, it provides that the Master is to certify to the Court the circumstances of the case; under the former Chy. Ord. 584, from which this *Rule* is taken, it was the practice for the Master to forward to the Registrar the certificate of the circumstances of the case,—such certificates should now be forwarded to the Registrar of the Division in which t' e action is pending.

52. Unless the Master in his discretion thinks fit to postpone the same, every reference is to be called on and proceeded with at the day and time fixed; and so *de die in diem*, without interruption, and without a fresh warrant, unless he is of opinion that an adjournment other than *de die in diem* would be proper, and conducive to the ends of justice; and when an adjournment is ordered, the Master is to note in his book the time and reason thereof. Chy. O. 213, 214. References to be proceeded with on day fixed and *de die in diem*.

The Master cannot proceed with a reference in vacation, except by consent of all parties: *Anderson* v. *Thorpe*, 12 Gr. 542. A report made in vacation, without the consent of all parties, is null and void, as against a party having no notice of the proceedings on which it is founded, and it is not necessary to appeal from it: *Fuller* v. *McLean*, 8. P. R. 549. Master cannot proceed in vacation.

"It is the bounden duty of the Masters to observe these *Orders* to the letter, wherever it is not absolutely impracticable to follow them literally," *per* Spragge, C.; *Falls* v. *Powell*, 20 Gr., at p. 468.

53. In no case is any matter to be discontinued or adjourned for the mere purpose of proceeding with any other matter, unless that course becomes necessary. Chy. O. 215. References not to be adjourned to take up other cases.

54. Upon the bringing in of a judgment or order, the solicitor bringing in the same is to take out a warrant Warrant to consider to be taken

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Rule 54. (unless the Master dispenses therewith) appointing a time, which is to be settled by the Master, for the purpose of taking into consideration the matters referred by the judgment or order, and is to serve the same upon the parties, or their solicitors, unless the Master dispenses therewith. Chy. O. 216.

unless dispensed with by Master.

This *Rule* is adapted from the English Chy. Ord. 51, of 3rd April, 1828. See Kennedy's Ord., p. 17.

Where judgment erroneous, Master may refuse to proceed on it.

Where a judgment is manifestly erroneous, the Master may properly refuse to proceed upon it until it has been corrected: *Swainson* v. *Bartley*, 18 C. L. J. 15; and see *Commercial Bank* v. *Graham*, 4 Gr. 419; *Mitchell* v. *Strathy*, 28 Gr. 80; *Adamson* v. *Adamson*, *Ib.*, at p. 224; but the mistake must be very obvious to warrant the Master in refusing to proceed.

Warrant to consider.

A warrant to consider a judgment, or order, only requires one day's service; see *Sutherland* v. *Rogers*, 2 Chy. Ch. at p. 192; other warrants require two clear days' service; *Ib.*; except warrants to settle report which require four days' service: see *post Rule* 77 note.

The warrant must be underwritten so as to explain clearly what proceedings are to be taken under it: *Denison* v. *Denison*, 3 Chy. Ch. 349.

Defendant entitled to notice.

The fact that a decree under the former Chancery practice had been pronounced *pro confesso* against a defendant, did not *ipso facto* disentitle the defendant to notice of proceedings in the Master's office: see *Robinson* v. *Whitcomb*, 20 Gr. 415. In mortgage suits, incumbrancers made parties before the hearing were expressly required to be served with notice, notwithstanding the bill may have been taken *pro confesso* against them: see *Rule* 128.

How far defendant who has not appeared is entitled to notice in M. O.

Chy. Ord. 111 now obsolete, dispensed with service of an order to take a bill *pro confesso*, and provided that "all further proceedings in the case may be *ex parte* as to such defendant, unless the Court orders otherwise." Notwithstanding that Order, it was held improper, as a general rule, for a Master to proceed *ex parte* with a reference, against a defendant as to whom the bill was taken *pro confesso*, and that the Master was bound to exercise his discretion as to requiring, or dispensing with, service on such defendants: *Robinson* v. *Whitcomb*, 20 Gr. 415; and see *Buchanan* v. *Tiffany*, 1 Gr. 98; *Walsh* v. *Bourke*, *Ib.* 105; *Hawkins* v. *Jarvis*, *Ib.* 257; 1 E. & A. 246; *McCormick* v. *Mc Cormick*, 6 P. R. 208; but see *Perrin* v. *Davis*, 3 Gr. 161. And where the reference was directed by an administration order obtained without a bill being filed, it was held that notice of the proceedings on the reference must be given to the defendant, and that the proceedings taken *ex parte* under such circumstances were irregular, and the Court refused to act on a report so made: *Jackson* v. *Matthews*, 12 Gr. 47.

Under the present practice there is no provision for taking the action *pro confesso* as under the former Chancery practice; and although judgments may be awarded against a defendant for default of appearance, or for default of defence, there is no provision enabling the future proceedings to be carried on against him, *ex parte*. In such cases, therefore, it would seem that the defendant is entitled to notice of proceedings upon a reference.

In order to get over the difficulty which arose under the *Rules* of 1881 which allowed a defendant to file his defence at any time before judgment, *Rule* 393 enables a plaintiff to file a note closing the pleadings as soon as the ordinary time for pleading has expired.

The *Rules* make no provision for service on a defendant who has not appeared. It would seem, therefore, that personal service is necessary, unless expressly dispensed with, or some other mode of service be authorized by order to be obtained for that purpose.

Rules 55, 56.

Warrant to consider proceedings on return.

55. Upon the return of the warrant to consider, or upon the bringing in of the reference where the warrant is dispensed with, the Master is to fix a time at which to proceed to the hearing and determining of the reference, and is to regulate in all other respects the manner of proceeding with the reference, and is to give any special directions, he thinks fit as to:—

(1) The parties who are to attend on the several accounts and inquiries;

(2) The time at which, or within which, each proceeding is to be taken;

(3) The mode in which any accounts referred to him are to be taken or vouched;

(4) The evidence to be adduced in support thereof;

(5) The manner in which each of the accounts and inquiries is to be prosecuted;

And such directions as may be afterwards varied or added to, as may be found necessary. Chy. O. 217.

Master may regulate who to appear on creditors' claims against estate.

In any cause, or matter, for the administration of the estate of a deceased person, no party, other than the personal representative, shall, unless by the leave of the Master, be entitled to appear on the claim of any person not a party to the cause, against the estate of the deceased, in respect of any debt or liability. The Master may direct any other party to the cause to appear, either in addition to, or in the place of, the personal representative, upon such terms as to costs and otherwise as he shall see fit: see *Rule* 334.

As to mode of taking and verifying accounts generally: see *Rules* 64-69, 73; and as to taking accounts of creditors' claims against the estate of a deceased person: see *Rules* 975-986.

Subject to appeal.

The ruling of the Master is not conclusive, and the Court may give a party leave to attend proceedings whom the Master has excluded: *Davis* v. *Comber-mere*, 9 Jur. 76. But it would seem that any objection to the Master's ruling should be brought up by way of appeal, and not as a substantive motion.

No statement in pleading or evidence at trial necessary to enable Master to exercise his powers.

56. To enable the Master to exercise all or any of the powers conferred upon him by, or to take the accounts and make the inquiries referred to in, the following Rules, it shall not be necessary that any of the matters therein mentioned, shall have been stated in the pleadings, or that evidence thereof shall have been given before the judgment or order of reference, or that the judgment or order shall contain any specific direction in respect thereof. Chy. O. 219.

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Rule 57.

Jurisdiction of Master enlarged by *Rules* 56,57.

Chy. Ord. 219, 220, from which this and the following *Rule* are taken, very materially altered the practice previously in force, and extend the jurisdiction, and discretion, of the Masters in taking accounts, very far beyond that exercised by the Chief Clerks, or even by a Judge in Chambers, under the English practice: *Sculthorpe* v. *Burn*, 12 Gr. 427.

Former rule required case to be made in pleadings, etc.

The former rule, as laid down by Lord Eldon, was that the plaintiff must aver in his bill, and prove, at least one act of wilful neglect, or default, in order to obtain a decree directing an inquiry as to wilful neglect, or default: Seton 477; *Sleight* v. *Lawson*, 3 K. & J. 292. In the same way, according to the English practice, a foundation is required to be laid in the pleadings for, and the judgment must specially direct, the taking of an account with rests: Seton 474; or the setting of an occupation rent: *Trulock* v. *Robey*, 15 Sim. 265.

This *Rule* distinctly abrogates those rules of practice, and enables the Master to take an account with rests, and to charge the accounting party for rents, and profits, which might have been received, but for wilful neglect and default, and to set an occupation rent, in any case referred to him; although there be nothing in the pleadings: *McLennan* v. *Heward*, 9 Gr. at pp. 178 and 187; and though no evidence may have been given as to any such matters at the trial.

It was formerly held that under a common administration order obtained on motion without bill, by any person but the personal representative himself, there could be no inquiry as to wilful neglect, or default: *Harrison* v. *McGlashan*, 7 Gr. 532. But where the order was obtained by the personal representative himself, such an inquiry might be made: *Ledgerwood* v. *Ledgerwood*, 7 Gr. 584.

Inquiry as to neglect and default, etc., can now be made without special direction.

The case of *Carpenter* v. *Wood*, 10 Gr. 354, though not referring to *Harrison* v. *McGlashan*, is said in effect to have over-ruled it; and the practice was stated by Boyd, C., to be now settled that under Chy. Ord. 219, 220, (*Rules* 56, 57) the inquiry as to wilful neglect and default, may be made in all cases under the common administration order: *Re Allan*, *Pocock* v. *Allan*, 9 P. R. 277.

If the Master refuse to exercise the power to take the accounts in the manner mentioned in *Rule* 57, his ruling would be appealable; but it would seem to be more proper to bring the question up on further directions: see *Sievewright* v. *Leys*, 1 Ont. 375.

Where the judgment gives further relief than claimed by the pleadings, it has been held that the judgment is not to be construed by reference to the pleadings if it is unambiguous: *Smith* v. *Goldie*, 11 P. R. 24.

Powers of Master to take accounts.

57. Under a judgment or order of reference, the Master shall have power:

With rests.

(1) To take the accounts with rests or otherwise;

To inquire as to wilful neglect and default.

(2) To take account of rents and profits received or which, but for wilful neglect or default, might have been received;

To set occupation rent.

(3) To set occupation rent;

To allow for improvements.

(4) To take into account necessary repairs, and lasting improvements, and costs and other expenses properly incurred otherwise, or claimed to be so;

(5) To make all just allowances.

(6) To report special circumstances;

(7) And generally, in taking the accounts, to inquire, adjudge, and report as to all matters relating thereto, as fully as if the same had been specially referred. Chy. O. 220.

Rule 57.
To make just allowances.
To report special circumstances.
And to inquire as to all matters relating to accounts.

Taking the account with rests:—

Taking an account with "rests" means, either that the accounting party is charged with compound interest on the amount found due from him; or that the surplus income remaining after satisfying the interest due to him, is applied at certain periods in reduction of the principal. The amalgamation of principal and interest, or the application of income to pay off the principal, may take place yearly, half-yearly; or at other times more or less frequently, and these periods are termed "rests." In *Robinson* v. *Cumming*, 2 Atk. 410, Lord Hardwicke said rests were only ordered in accounts of realty, and not of personalty, but this is no longer the rule. When the Master declines to take an account with rests, if it is intended to appeal from his decision, he should be required to report the facts, so as to enable the Court to judge of the propriety of his decision: *Sievewright* v. *Leys*, 1 Ont. 375; but it has been said the preferable method is to bring the question up on further directions: *Ib.*

Taking account with rests, what it is.

Rests, as Against Executors, and Trustees.—In taking accounts against an executor, or trustee, he is to be charged "with what he ought to have made, with what he actually did make, or with what he must be presumed to have made": *per* Esten, V.C., *Smith* v. *Roe*, 11 Gr. 312. The principle on which the Court proceeds in charging an executor, or trustee, with interest, is that of restoring to the *cestui que trust* his own, and of fairly compensating him for loss directly attributable to the neglect, or breach of duty, by the trustee; and on the other hand, that of withdrawing from the trustee any advantage he has appropriated by abusing his position: *per* Moss, C.J.; *Inglis* v. *Beatty*, 2 Ont. App., at p. 490. It is not that of punishment to the executor, or trustee: *Attorney-General* v. *Alford*, 4 D. M. & G. 843; *Burdick* v. *Garrick*, 5 Chy. 233; *Vyse* v. *Foster*, 8 Chy. 309; 7 H. L. 318. Compound interest may in some cases be a convenient mode of making this compensation, but in other cases it may be oppressive, and sound more as punishment than compensation, and therefore in such cases it ought not to charged: see *Fielder* v. *O'Hara*, 14 Gr. 223.

Rests—when allowed as against executors, and trustees.

In England the amount of interest with which an executor, or trustee is charged, depends on the circumstances: (1) When he is guilty of mere neglect, and gets no personal benefit, he is charged with simple interest at 4 per cent.: *Forbes* v. *Ross*, 2 Cox 116; *Rocke* v. *Harte*, 11 Ves. 58; *Robinson* v. *Robinson*, 1 D. M. & G. 247; *Tebbs* v. *Carpenter*, 1 Mad. 290; *Mousley* v. *Carr*, 4 Beav. 49; *Attorney-General* v. *Alford*, 4 D. M. & G. 843; or with the interest he should have received with half-yearly rests: *Gilroy* v. *Stephen*, 46 L. T. N. S. 761. (2) Where he is guilty of a positive breach of trust, or has employed trust money for his own benefit, he is charged with 5 per cent.; or, at the option of the beneficiary, with the profit actually made: *Jones* v. *Foxall*, 15 Beav. 388. The neglect to comply with a specific direction for investment, has been held to be such a positive breach of trust; *Crackelt* v. *Bethune*, 1 J. & W. 586; *Berwick* v. *Murray*, 7 D. M. & G. 519; *Mosley* v. *Ward*, 11 Ves. 581; and when the trust directed accumulation, the accounts have been taken with rests: *Raphael* v. *Boehm*, 11 Ves. 92; *Knott* v. *Cottee*, 16 Beav. 77; *Jones* v. *Foxall*, 15 Beav. 388; and where a breach of trust, and the employment of the trust fund for his own benefit, in trade, or speculation, concur, whether there be any direction for accumulation or investment or not, the trustee is charged with 5 per cent., sometimes with: *Burdick* v. *Garrick*, L. R. 5 Chy. 233; and sometimes without rests, or, in the option of the beneficiary, with the profits actually

English rule when executor, or trustee, guilty of mere neglect.

When guilty of positive breach of trust—or has employed trust funds in his own business.

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Rule 57.

realised from the fund: *Flocton* v *Bunning*, 8 L. R. Chy. 323; *Saltmarsh* v. *Barrett*, 31 Beav. 349; *Docker* v. *Somes*, 2 My. & K. 655; *Heathcote* v. *Hulme*, 1 J. & W. 122; *Sutton* v. *Sharpe*, 1 Russ. 146; *Robinson* v. *Robinson*, 1 D. M. & G. 247. In *Walker* v. *Woodward*, 1 Russ. 107, annual rests were ordered, but this was said to have been obtained by surprise: see *Attorney-General* v. *Solly*, 2 Sim. 518. In *Jones* v. *Foxall*, 15 Beav. 388; *Williams* v. *Powell*, 15 Beav. 461; *Heighington* v. *Grant*, 1 Ph. 600: rests were ordered. In *Docker* v. *Somes*, 2 My. & K. 655; *Palmer* v. *Mitchell*, 2 My. & K. 672; *Macdonald* v. *Richardson*, 1 Giff. 81; accounts of profits arising from employment of trust funds in trade were ordered; and see *Crawshay* v. *Collins*, 15 Ves. 218; 1 J & W. 267; 2 Russ. 325; *Witlett* v. *Blanford*, 1 Ha. 253; *Wedderburn* v. *Wedderburn*, 22 Beav. 84. The paying in money to the general account of a firm of solicitors, of which the trustee was a partner, was held not to be a using of the money in his own business, so as to render him liable for compound interest: *Burdick* v. *Garrick*, 5 L. R. Chy. 233. When an infant is interested, an inquiry will be directed whether it is for his advantage to take interest, or profits: *Burden* v *Burden*, cited in *Heathcote* v. *Hulme*, 1 J. & W. 134-5. No special direction seems necessary to authorize the Master making that enquiry in Ontario.

Rule in Ontario as to rate of interest.

In this Province prior to the repeal of the usury laws, the rule was to charge interest at the rate of 6 per cent., and where accordjng to the English cases a higher rate of interest than 4 per cent. would be charged, to take the account with half-yearly rests: see *Landman* v. *Crooks*, 4 Gr. 353; *Small Eccles*, 12 Gr. at p. 40. Since the abolition of the usury laws, an accounting party chargeable according to the English cases with more than 4 per cent., may now be charged, either with a higher rate of interest than 6 per cent., according to the value of money, as was done in *Wightman* v. *Helliwell*, 13 Gr. 330 (where an executor was charged with 8 per cent. simple interest); or it would seem he may be charged with compound interest at 6 per cent.: *Wiard* v. *Gable*, 8 Gr. 458; *Erskine* v. *Campbell*, 1 Gr. 570; or even at a higher rate if the money have been used in trade: *Wightman* v. *Helliwell*, 13 Gr. at p. 343; *Small* v. *Eccles*, 12 Gr. 40, or, at the option of the *cestui que trust*, with the actual profits realised.

Interest on sums neglected to be paid over.

But where the trustee, or executor, has neglected to pay over sums in his hands to the parties entitled, he is chargeable with interest on such sums, no matter what the amount, from the time the payment ought to have been made: *McLennan* v. *Heward*, 9 Gr. at p. 190.

In re Honsberger v. *Kratz*, 10 Ont. 521; 21 C. L. J. 400, Boyd, C., laid down the rule on which executors and trustees should be charged with interest as follows:—(1) An executor or trustee who negligently retains funds in his hands which he should have paid over, or made productive for the estate, is to be charged with simple interest thereon at 6 per cent. (2) An executor or trustee who in violation of his trust has used the money for his own purposes (though not in trade or speculation), is to be charged at such rate as is the then current value of money. (3) An executor or trustee who makes a gain out of the trust by embarking the money in speculation or trading adventures, is to be charged either with the profits or compound interest.

Where retained under *bona fide* belief of ownership.

Where the executor, or trustee, retains trust money in his hands, under a *bonâ fide*, though mistaken, belief that it is his own, he may be exonerated altogether from payment of interest: *Bruere* v. *Pemberton*, 12 Ves. 386; *Davenport* v. *Stafford*, 14 Beav. 319; or he may be ordered to pay simple interest: *Inglis* v. *Beatty*, 2 Ont. App. 453; and where there has been great delay on the part of the *cestui que trust* in making claim to the trust fund: *Browne* v. *Cross*, 14 Beav. 105, provided such delay can be said to amount to acquiescence: *The Life Assurance Co.* v. *Siddal*, 3 D. G. F. & J. 72; *Blain* v. *Terryberry*, 12 Gr. 221; the trustee or executor may be relieved from paying interest thereon: but see *Boys' Home* v. *Lewis*, 4 Ont. 18.

Neglect of *c. q. t.* to demand payment.

Neglect of trustee to invest.

An executor who paid over money under what proved to be a mistaken construction of his testator's will, was held nevertheless bound to pay interest thereon to the parties properly entitled; but not to a person who had acquiesced in the misapplication of the fund: *In re Hulkes, Powell* v. *Hulkes*, 33 Ch. D. 552; 55 L. T. N. S. 209; and see *In Re Deane, Bridger* v. *Deane*, 42 Ch. D. 9.

A trust to invest in "public securities," is violated by investing in municipal debentures: *Ewart* v *Gordon*, 13 Gr. 40; see, however R. S. O. c. 110, ss. 29, 30; 52 V. c. 18 (O); and a direction to carry on a business will not justify an executor in embarking more capital in it: *Smith* v. *Smith*, 13 Gr. 81. **Rule 57.**

In cases of simple neglect to invest, the Master is not justified in charging interest against the trustee until the balance amounts to a sum sufficient for an ordinary investment. $400 was considered a reasonable sum for this purpose: *McLennan* v. *Heward*, 9 Gr. 178; and see *Re Jones*, *Jones* v. *Searle*, 49 L. T. N. S. 91. No interest on sums charged to executor, he has not actually received.

When trustees, or executors, lend money to themselves at a lower rate than could have been obtained by investing it according to the trust, they will be chargeable with the higher rate, but not with rests: *Smith* v. *Roe*, 11 Gr. 311, at p. 315; and see *Forbes* v. *Ross*, 2 Cox 116. Executors lending money to themselve

But when a trustee is authorized to invest in either of two specified modes, and by mistake invests in neither, the measure of his liability is the loss arising from his not having invested in the less beneficial of the authorized modes. Thus when a trustee was authorized to invest in Government securities, or mortgages, and he invested in Bank stocks, which proved a loss; he was charged with what would have been obtained had the investment been made in Government securities, although a larger rate of interest could have been obtained on mortgages: *Paterson* v. *Lailey*, 18 Gr. 13; and see *Cameron* v. *Bethune*, R. 15 Gr. 486; and see *Re Gabourie*, *Casey* v. *Gabourie*, 13 Ont. 635. Or not investing as directed.

Nor is an executor, or trustee, liable to neglect in not calling in investments made by the testator, in order to invest at a higher rate of interest, although authorized so to do: *Smith* v. *Roe*, 11 Gr. 311. Where a trust company was appointed executor of an estate and took over certain securities of the estate, and without giving any security or covenant, paid interest at a lesser rate than that received from the securities, to the beneficiaries, on the ground that they had "guaranteed" the payment of interest on the fund, it was held that the transaction could not be supported and that the company was accountable for the interest actually received: *Hiddingh* v. *De Villiers*, 12 App. Cas. 107, 624, 57 L. T. N. S. 886.

An administratrix, who allowed the moneys of the estate in her hands to be used by her husband, was charged with simple interest at six per cent.; it not being shown that the money had been used in trade, or that any larger sum had been realised: *Fielder* v. *O'Hara*, 14 Gr. 223.

When an executor, or trustee, has properly deposited the trust fund for safe keeping, or not unreasonably kept it in his hands unemployed, he may be relieved from payment of interest, except such as he has actually received; but if he have not kept it apart from his own moneys, or have used it, he will be liable for interest on it; *Beaton* v. *Boomer*, 2 Chy. Ch. 89.

An executor, or trustee, charged with principal sums which have never come to his hands, but which have been lost by his neglect, is not always chargeable with interest thereon as well: *Vanston* v. *Thompson*, 10 Gr. 542; *Re Shaw*, 15 Gr. 626; *Re Crowter*, *Crowter* v. *Hinsmann*, 10 Ont. 159; unless his neglect or default amounts to acquiescence in the spoliation of the estate: *Sovereign* v. *Sovereign*, 15 Gr. 559; *Cudney* v. *Cudney*, 21 Gr. 153; *Archer* v. *Severn*, 13 Ont. 316. Interest when it runs.

The commencement of a suit does not stop interest running: *McLennan* v. *Heward*, 9 Gr. 178; *McMillan* v. *McMillan*, 21 Gr. 369; but see *Blogg* v. *Johnston*, L. R. 2 Chy. 225.

As against executors, interest should not ordinarily be charged, until after the lapse of a year from the testator's death.

When a trustee or executor has made advances to the trust estate, he may be allowed simple interest on the balances of principal due to him from year to year, but not compound interest: *Finch* v. *Prescott*, L. R. 17 Eq. 554.

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Rule 57.

Principal and agent.

PRINCIPAL AND AGENT.—An agent who had used moneys of his principal, with his consent, was only charged simple interest: *McLennan* v. *Heward*, 9 Gr. 178; and where the state of accounts could not be ascertained until they had been taken by the Court, interest on the balance was charged only from the date of the Master's certificate: *Turner* v. *Burkinshaw*, L. R. 2 Chy. 488; and see *Blogg* v. *Johnston*, *Ib.* 225.

Where the principal was found indebted to the agent, interest on the balance was allowed from the filing of the declaration in the action by the agent to recover the amount: *Ridley* v *Sexton*, 19 Gr. 146.

Legatees.

LEGATEES.—Interest on legacies runs from the end of a year from the death of the testator, in the absence of any express direction in the will to the contrary: see *Smith* v. *Seaton*, 17 Gr. 397; even though the income of the whole estate be bequeathed to another for life: *Toomey* v. *Tracey*, 4 Ont. 708; and see *Re Olive*, *Olive* v. *Westerman*, 50 L. T. N. S. 355; but this rule does not apply to sums appointed by will, under a power. As to such sums, interest runs from the death of the testator: *Deedes* v. *Graham*, 20 Gr. 258. But no interest can be usually recovered on arrears of annuities, bequeathed by will: *Goldsmith* v. *Goldsmith*, 17 Gr. 213; *Crone* v. *Crone*, 27 Gr. 425; and see *Snarr* v. *Badenach*, 10 Ont. 131; 21 C. L. J. 401.

When a legacy is vested in trustees upon an express trust, more than six years arrears of interest are recoverable: *Loring* v. *Loring*, 12 Gr. 374.

A legatee receiving more than his share may be ordered to refund, with interest: *Davidson* v. *Boomer*, 17 Gr. 509; as to creditors overpaid their proportion of the assets: see *Chamberlen* v. *Clarke*, 1 Ont. 135; 9 Ont. App. 273.

Policies of insurance.

POLICIES OF INSURANCE.—Interest does not begin to run, until the party claiming is in position to give a full discharge: *Toronto Savings Bank* v. *Canada Life*, 14 Gr. 509.

Partnership accounts.

PARTNERSHIP ACCOUNTS.—In the absence of any agreement to the contrary, advances of capital made by a partner do not bear interest: *Hill* v. *King*, 9 Jur. N. S. 527; 3 D. J. & S. 418; *Cooke* v. *Benbow*, 3 D. G. J. & S. 1; *Stevens* v. *Cook*, 5 Jur. N. S. 1415; but see *Millar* v. *Craig*, 6 Beav. 433. This applies not only to the original capital put in, but also to subsequent advances made by a partner on capital account: *Jardine* v. *Hope*, 19 Gr. 76.

No interest allowed on capital.

Neither is interest chargeable on capital agreed to be advanced by a partner, but not advanced by him: *Wilson* v. *McCarthy*, 13 C. L. J. 303; *Rishton* v. *Grissell*, L. R. 5 Eq. 326.

As to temporary loans—*quaere*.

As to advances in the way of temporary loans there seems to be no settled rule. In *Cooke* v. *Benbow*, *supra*, Turner, L.J., thought interest should not be allowed: and see *De Hertel* v. *Supple*, 14 Gr. 421. But in *Ex parte Chippendale*, 4 D. M. & G. 36, Knight Bruce, L. J., was of the contrary opinion; and see *Re German Mining Co.*, 17 Jur. 745, 747; *Pim* v. *Harris*, 10 L. R. Ir. Eq. 442.

Interest allowed on sums in the hands of a partner, or not accounted for.

Interest is chargeable on sums in the hands of a partner, and not accounted for: *Hutcheson* v. *Smith*, 5 Ir. Eq. 117; or improperly applied: *Evans* v. *Coventry*, 8 D. M. & G. 835. But a partner in possession of partnership property is not obliged to account on the footing of wilful default: *Rowe* v. *Wood*, 2 J. & W. 556: *Davidson* v. *Thirkell*, 3 Gr. 330, at pp. 347-8.

No interest on capital withdrawn, or profits.

Interest is not chargeable on withdrawal of capital, unless fraudulent or improper: *Cooke* v. *Benbow*, *supra*; *Meymott* v. *Meymott*, 31 Beav. 445; nor on undrawn profits: *Dinham* v. *Bradford*, L. R. 5 Chy. 519.

Interest payable on capital where stopped by dissolution.

When capital carries interest during the continuance of a partnership, it does not do so after a dissolution: *Watney* v. *Wells*, L. R. 2 Chy. 250; *Rhodes* v. *Rhodes*, John 653; although the business is carried on for the purposes of a sale: *Watney* v. *Wells*, *supra*; unless where the capital is treated as a debt: *Wood* v. *Scoles*, L. R. 1 Chy. 369; *Barfield* v. *Loughborough*, L. R. 8 Chy. 1; or in the case of a sleeping partner: *Parsons* v. *Hayward*, 4 D. F. & J. 474.

After the Master's report, simple interest at six per cent. runs on the amount found due: *Bonville* v. *Bonville*, 35 Beav. 129; *Brewer* v. *Yorke*, 46 L. T. N. S. 289. **Rule 57. Interest from date of report.**

Losses resulting from investments of partnership moneys, are to be borne by the partners, in the same proportions they are entitled to share in the profits of the partnership business: *Storm* v. *Cumberland*, 18 Gr. 245. **Losses how borne.**

MORTGAGEES IN POSSESSION.—When a mortgagee in possession, has in that character received rents and profits, or is chargeable with an occupation rent, in excess of the interest due, the Master may strike a balance periodically, and apply the surplus to the reduction of the principal; this is called taking the account with rests: *Thorneycroft* v. *Crockett*, 2 H. L. C. 239; *Wilson* v. *Cluer*, 3 Beav. 136; *Schofield* v. *Ingham*, 1 C. P. Co. 477; *Thompson* v. *Hudson*, L. R. 10 Eq. 407; and see Fisher on Mortgages, 957, *et seq.* And where a mortgagee, after having been paid in full, has continued in possession, he may be charged with compound interest on his receipts: *Wilson* v. *Metcalfe*, 1 Russ. 530; *Lloyd* v. *Jones*, 12 Sim. 490; *Ashworth* v. *Lord*, 36 Ch. D. 545; 58 L. T. N. S. 18. **Mortgagee in possession, when rests chargeable against.**

In *Coldwell* v. *Hall*, 9 Gr. 110, VanKoughnet, C., stated it to be the settled practice of the Court, "that when a mortgagee enters, his money being in arrear, he is not liable to account for the rents received by, or chargeable against him, with rests, until he is paid off in full." And see *Wilson* v. *Cluer*, 3 Beav. 136; *Wilson* v. *Metcalfe*, 1 Russ. 530; *Paul* v. *Johnson*, 12 Gr. at p. 482; *Davis* v. *May*, 19 Ves. 384; *Finch* v. *Brown*, 3 Beav. 70; *Latter* v. *Dashwood*, 6 Sim. 462. But if he enter when nothing is in arrear, it seems the account may be taken with rests from the beginning of the possession: *Nelson* v. *Booth*, 3 D. & J. 119.

But the mere fact of nothing being due when possession is taken is not conclusive as to the right to have the account taken with rests; every attendant circumstance must be regarded: *Horlock* v. *Smith*, 1 Coll. 287. Thus a mortgagee who took possession of leaseholds to prevent a forfeiture is not liable so to account, though nothing was in arrear when he entered: *Patch* v. *Wild*, 30 Beav. 99; and see *Gordon* v. *Eakins*, 16 Gr. 363. **Mortgagee when liable to account with rests.**

If a mortgagee holds bills, or notes, for arrears when he enters, he is nevertheless not liable to account with rests, if they are dishonoured: *Dobson* v. *Land*, 4 D. & S. 575.

Rests may be made when a mortgagee in possession sets up an unfounded claim to the equity of redemption, or resists the mortgagor's right to redeem; or when overpaid, has denied that his mortgage was satisfied: *Incorporated Society* v. *Richards*, 2 Dr. & W. 258; *Crippen* v. *Ogilvie*, 15 Gr. 569; *Montgomery* v. *Calland*, 14 Sim. 79.

When the mortgagee is in occupation and is charged with an occupation rent more than sufficient to pay the interest, the account may be taken with rests, if the mortgage debt was not in arrear when he entered, subject to the qualifications above mentioned, from the time he entered, or, if then in arrear, then from the time he was paid in full: *Wilson* v. *Metcalfe*, 1 Russ. 530; *Binnington* v. *Harwood*, T. & R. 477; *Coldwell* v. *Hall*, 9 Gr. 110; where the account is taken with rests, it would seem that the proper time for making the rests, is at the time of each payment of rent, whenever the payment exceeds the interest then in arrear.

The mere fact that a mortgagee resides with the owner of the equity of redemption on the mortgaged property, does not render him liable to account as a mortgagee in actual occupation: *Paul* v. *Johnson*, 12 Gr. 474.

A person entering as a *bona fide* purchaser from a mortgagee is not liable to account as a mortgagee in possession, in the event of his purchase being held invalid: *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1; *Carroll* v. *Robertson*, 15 Gr. 173. But a mortgagee who entered claiming to have purchased the equity of redemption, but who was held to be still redeemable, was ordered to account with rests: *Aitchison* v. *Coombs*, 6 Gr. 643; this point is not noticed in the report, but see the decree, D. B. 4, fo. 576; but see *Parkinson* v. *Handbury*, *supra*.

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Rule 57.

No special direction now necessary.

Prior to Chy. Ord. 220, (*Rule* 57) the account could not be taken against a mortgagee with rests, without an express direction in the decree to that effect: *Webber* v. *Hunt*, 1 Mad. 13. Under *Rules* 56, 57, no express direction in the judgment is necessary; but the Master of course cannot properly take the account with rests in cases where it would not, under the former practice, have been ordered by the Court.

Statute of Limitations.

STATUTE OF LIMITATIONS.—A mortgagee in occupation is liable to account for more than six years' occupation rent prior to the commencement of the action, the Statute of Limitations is no bar: *Coldwell* v. *Hall*, 9 Gr. 110; *S. C.* 7 U. C. L. J. 42; 8 U. C. L. J. 93.

Statute of Limitations how far a bar to recovery of interest.

As against the person of the debtor, arrears of interest, or rent, payable under a covenant, accruing, or acknowledged in writing, or by part payment, to be due, at any time within twenty years of the commencement of the action, have been held recoverable, even though such interest, or rent, be charged upon, or payable out of land: R. S. O. c. 60, ss. 1, 9; *Allan* v. *McTavish*, 2 Ont. App. R. 278; but see *contra*, *Sutton* v. *Sutton*, 22 Chy. D. 511; 48 L. T. N. S. 95; *Fearnside* v. *Flint*, *Ib*, 154; 22 Chy. D. 579, where it was held that the remedy on a collateral bond was barred, after the lapse of the time for bringing an action in respect of the land mortgaged by the principal security; but as against land, no arrears of rent, or interest, in respect of any sum of money charged upon, or payable out of any land, or rent, or in respect of any legacy charged upon land, can be recovered but within six years after the same shall have respectively become due, or next after any acknowledgment of the same, in writing has been given to the person entitled thereto or his agent signed by the person by whom the same was payable, or his agent: R. S. O. c. 111, s. 17; but a bond given by third parties as sureties for a mortgage debt was held not to be barred under R. S. O. c. 111, s. 17: see *Re Powers*, *Lindsell* v. *Phillips*, 30 Ch. D. 291; 53 L. T. N. S. 647. But where any prior mortgagee, or other incumbrancer, has been in possession of any land, or in the receipt of the profits thereof, within one year next before an action is brought by any person entitled to a subsequent mortgage, or other incumbrance, on the same land, the person entitled to the subsequent mortgage, or incumbrance, may recover in such action the *arrears of interest* which have become due during the whole time that such prior mortgagee, or incumbrancer, was in possession, or receipt, as aforesaid, although such time may have exceeded the time of six years: see R. S. O. c. 111, s. 18.

In *Macdonald* v. *McDonald*, 11 Ont. 187, Proudfoot, J., refused to follow *Sutton* v. *Sutton*, *supra*, on the ground that he was bound by the contrary decision of the Court of Appeal in *Allan* v. *McTavish*, *supra*; and in *McDonald* v. *Elliott*, 12 Ont. 98; 22 C. L. J. 229; but see *Trimble* v. *Hill*, 5 App. Cas. 342, and 14 Ont. App. R. 256.

When the Statute of Limitations is intended to be relied on as a bar to the whole claim, it should be specially pleaded: *Rule* 402; but it would seem that it may be set up in the Master's office as a bar to part of the claim, without having been pleaded: *Wright* v. *Morgan*, 1 Ont. App. R. 613; *Cattanach* v. *Urquhart*, 6 P. R. 28; when no claim for interest is made by the pleadings and there is no covenant, six years' arrears only are recoverable: *Wiley* v. *Ledyard*, 10 P. R. 182; 20 C. L. J. 142.

The Statute of Limitations may be pleaded as a bar to the taking of partnership accounts: *Noyes* v. *Crawley*, 10 Ch. D. 31; and see *Storm* v. *Cumberland*, 18 Gr. 245; *Carroll* v. *Eccles*, 17 Gr. 529; this latter decision, however, would seem to be qualified by *Wright* v. *Morgan*, *supra*, but see *Rule* 402.

Wilful neglect and default; English rule regarding.

Wilful Neglect and Default.—Under the present English practice, the accounts cannot be taken on the footing of wilful default without a special direction in the judgment, or order, of reference; and where wilful default is not pleaded, no order can be made on the footing of wilful default, either at the trial, or any subsequent time; but where wilful default has been alleged and a case made for it in the pleadings, an account may be directed on the footing of wilful default, either at the hearing or trial of the action, or at any

subsequent stage: *Re Symons, Luke* v. *Tonkin*, 47 L. T. N. S. 684; *Barber* v. *Mackrell*, 12 Ch. D. 534; 41 L. T. N. S. 23, 201; where *affidavits* raising a case of fraud, were treated as pleadings; and see *Job* v. *Job*, 6 Ch. D. 562; *Mayer* v. *Murray*, 8 Ch. D. 424: *Re Bowen, Bennett* v. *Bowen*, 47 L. T. N. S. 114; 20 Ch. D. 538. **Rule 57.**

In Ontario no statement in the pleadings is necessary, in order to authorize the Master to take accounts in any proper case, on the footing of wilful default: see *Rule* 56. Mortgagees in possession, were always liable, as of course, to account on the footing of wilful neglect and default, and the effect of *Rules* 56, 57, is to place trustees, executors, and others, liable for wilful default, upon the same footing in this respect as mortgagees in possession. Section 2 of *Rule* 57, applies in terms only to accounts of realty, but it has been held that under Sec. 7, the Master may inquire as to wilful neglect and default, in all cases referred to him without any special direction so to do: *Carpenter* v. *Wood*, 10 Gr. 354. Wherever wilful neglect and default is charged against an accounting party, the Master is to determine whether or not he is liable to account on that footing, and if so, the amount that is due; he should not report the facts as "special circumstances": *Walmsley* v. *Bull*, 3 Chy. Ch. 344; and in his report he should distinguish between sums actually received, and those charged by reason of wilful default, in order to enable the Court to deal with the question of costs: *Moodie* v. *Leslie*, 12 Gr. 537. When a person becomes beneficially entitled to a trust fund, which, prior to his interest vesting in possession, he has actively assented to being applied otherwise than according to the terms of the trust, neither he nor his representatives have any right to sue for the breach of trust: *Evans* v. *Benyon*, 37 Ch. D. 329; 58 L. T. N. S. 700. Ontario rule.

EXECUTORS AND TRUSTEES.—Formerly it was necessary to aver in the pleadings, and prove at the hearing, at least one act of wilful default, to entitle the plaintiff to a decree to inquire as to wilful neglect and default: *Sleight* v. *Lawson*, 3 K. & J. 292; this is no longer necessary, and the Master may now make the inquiry, though no case of wilful neglect or default be averred at the pleadings, or proved at the trial: *Carpenter* v. *Wood*, 10 Gr. 354, and see *Rule* 56. Formerly it was thought that the inquiry could not be made under the common administration order obtained in Chambers: *Harrison* v. *McMahan*, 7 Gr. 531; except when obtained by the personal representative himself: *Ledgerwood* v. *Ledgerwood*, *Ib.*, 584; but the practice is now settled that the inquiry may be made in every case per Boyd, C., *Re Allan, Pocock* v. *Allan*, 9 P. R. 277; *Sullivan* v. *Harty*, 9 P. R. 500. Executors and trustees, when liable for wilful neglect and default.

An executor improperly delaying to sell lands which, by the will are saleable for the payment of debts, in order to benefit himself, is liable to account for rents and profits: *Emes* v. *Emes*, 11 Gr. 325; and executors without authority intermeddling with, and assuming the management of, the realty, are liable to account as if duly empowered to act as trustees: *Chisholm* v. *Barnard*, 10 Gr. 479; but in such a case they are not entitled to any compensation for so doing: *Dagg* v. *Dagg*, 25 Gr. 542: see now R. S. O. c. 108, s. 4.

But it is the duty of the Court in all cases where executors, or trustees, are concerned, to administer equity in such a manner, that honest and respectable men shall not be deterred from accepting the office, and if there is a doubt, where men have acted honestly and *bonâ fide* in discharge of their duty, although they have made mistakes, the doubt should be determined in favour of the executor, or trustee: *Re Owens, Jones* v. *Owens*, 47 L. T. N. S. 61; *In re Speight, Speight* v. *Gaunt*, 22 Ch. D. 727; 48 L. T. N. S. 279; 9 App. Ca. 1; 50 L. T. N. S. 330. In *Re Crowter, Crowter* v. *Hinman*, 10 Ont. 159, an executrix was held not to be liable for moneys misappropriated by her co-executor. Executors and trustees entitled to benefit of doubt.

When a testator expressed the fullest confidence in one of the trustees named in his will and directed the other trustees to be guided by his views as to sale, disposal, and reinvestment, of his American securities, and declared that his trustees should not be responsible for any loss occasioned thereby. It was held that the co-trustees were not answerable to legatees for loss occasioned by unauthorized investments of their moneys, made by the trustee: *Burritt* v. *Burritt*, 29 Gr. 321. But as regards creditors it seems they might not be discharged: *Doyle* v. *Blake*, 2 Sch. & L. 239.

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Rule 57. A trustee is liable for not taking proper steps to get the trust fund into his hands: *Re Brogden Billing* v. *Brogden*, 38 Ch. D. 546; 59 L. T. N. S. 650; but see *Tudball* v. *Medlicott*, 59 L. T. N. S. 370.

While the Court will not require from executors, and trustees, any greater care than a prudent man ordinarily bestows on the management of his own property, yet it will require them to give full explanations of all their dealings, and of the causes why outstanding assets were not collected, or property of the estate has disappeared; and a trustee, or executor, who cannot account for the one or the other, will be chargeable with them: *Chisholm* v. *Barnard*, 10 Gr. 481; a trustee is not liable for losses arising through the default of agents to whom he may have properly confided the management of the trust: *Speight* v. *Gaunt*, *supra*; and see *Re Brier*, *Brier* v. *Evison*, 26 Ch. D. 238; but he is for the loss occasioned by employing improper agents: *Fry* v. *Tapson*, 28 Ch. D. 268; 51 L. T. N. S. 326; or for negligently allowing the money of the estate to remain in the hands of proper agents: *McCarter* v. *McCarter*, 7 Ont. 243; *Cann* v. *Cann*, 51 L. T. N. S. 770; *Re Mitchell*, *Mitchell* v. *Mitchell*, 52 L. T. N. S. 178; *Dewar* v. *Brooke*, 52 L. T. N. S. 489; but not for moneys misappropriated by a co-executor: *Re Crowter*, *Crowter* v. *Hinman*, 10 Ont. 159; unless he has knowingly allowed them to remain in his co-executor's hands uninvested without making any effort to secure the fund from loss.

Executors have a fair discretion in taking or delaying legal proceedings against a debtor, and a delay in suing, even though causing a loss of the debt, is not necessarily such negligence as subjects them to any liability: *Re Owens*, *Jones* v. *Owens*, 47 L. T. N. S. 61. In the absence of special circumstances, an executor is only liable for his own individual receipts, and not for those of his co-executor, but he is liable for the receipts of any agent jointly employed by himself and his co-executor: *Harrison* v. *Patterson*, 11 Gr. 105.

Losses on investments. There is no fixed rule as to the relative proportion which loans made by trustees ought to bear to the value of the property. As a general rule more than two-thirds the value should not be advanced; but a trustee who, in the honest exercise of his discretion, lends a little more than two-thirds, is not liable in the event of the security proving insufficient: *Re Godfrey*, *Godfrey* v. *Faulkner*, 23 Chy. D. 483; 48 L. T. N. S. 853; and see *Re Pearson*, *Oxley* v. *Scarth*, 51 L. T. N. S. 692. When trust funds are lost through improper investments, the trustees are all equally liable, and as a general rule one trustee who has merely passively assented to the breach of trust has no right to be indemnified by his co-trustee who has acted honestly in making an improper investment: *Bahin* v. *Hughes*, 31 Ch. D. 390; 54 L. T. N. S. 188; *Bacon* v. *Camphausen*, 58 L. T. N. S. 851; but see *Re Partington*, *Partington* v. *Allen*, 57 L. T. N. S. 654.

To accept a valuation made on behalf of the borrower is improper: *Walcott* v. *Lyons*, 54 L. T. N. S. 786; as also neglecting so obtain a formal valuation: *Re Olive*, *Olive* v. *Westman*, 34 Ch. D. 70; 55 L. T. N. S. 83; and see *Re Partington*, *Partington* v. *Allen*, *supra*, where trustees were held liable for neglecting to give proper instructions to the valuators; and see *Learoyd* v. *Whiteley*, 12 App. Ca. 727; 58 L. T. N. S. 93.

Mortgagees in possession, liable for wilful neglect and default. MORTGAGEES.—A mortgagee in possession is bound to account, as of course, for what he has, or but for his wilful default might, or ought to have, received: *Chaplin* v. *Young*, 33 Beav. 330; *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1; *Hughes* v. *Williams*, 12 Ves. 493; *Kensington* v. *Bouverie*, 7 D. M. & G. 134; *Quarrel* v. *Beckford*, 1 Mad. 274. But he is not liable for more than he has actually received, unless it is clearly proved that he knew a greater rent might and could have been obtained, and that he refused or neglected to obtain it: *Merriam* v. *Cronk*, 21 Gr. 60; *Coldwell* v. *Hall*, 9 Gr. 110, 114; *Metcalfe* v. *Campion*, 1 Moll. 238; *Hughes* v. *Williams*, 12 Ves. 493; *Brandon* v. *Brandon*, 10 W. R. 287; *Cocks* v. *Gray*, 1 Giff. 77.

Rents not received. A mortgagee not in possession, is not chargeable with rent which a tenant of the mortgagor had promised to pay him, but did not: *Waddell* v. *McColl*, 14 Gr. 211.

A mortgagee in possession who lets the mortgaged premises subject to a proviso that the lessee shall buy goods from him, is bound to account for the rent that could have been obtained for the premises without such a restriction as to trade, but he is not bound to account for the profits so made: *White* v. *City of London Brewery Company*, 39 Ch. D. 559; 60 L. T. N. S. 19. **Rule 67.** Agreement between mortgagee and mortgagor, subsequent incumbrancers not bound by.

Where a mortgagee takes possession at a rent agreed on between him and the mortgagor, he is only liable to account to the mortgagor on the footing of the agreement, but such agreement is not binding on any subsequent incumbrancer, and as to him the Master may charge the mortgagee with a fair occupation rent, though it exceed the amount agreed to by the mortgagor: *Court* v. *Holland*, 29 Gr. 19, and see *Gilmour* v. *Roe*, 21 Gr. 284; *Gregg* v. *Arrott*, Ll. & Goo. *temp. Sugd.* 246.

A mortgagee who concurs in a sale by a mortgagor and permits the surplus of the purchase to be paid to the mortgagor to the prejudice of subsequent incumbrancers, is liable therefor to the latter: *West London Commercial Bank* v. *Reliance Permanent Building Society*, 29 Ch. D. 954; 53 L. T. N. S. 442.

A puisne mortgagee who has cut timber on mortgaged property is liable to account to the prior mortgagee for the proceeds, where the mortgaged land proves an insufficient security: *McLeod* v. *Avey*, 16 Ont. 365.

VENDOR AND PURCHASER.—After the time fixed for completion of the contract, the vendor is liable for rents and profits, but usually only for those actually received: *Howell* v. *Howell*, 2 My. & Cr. 486, unless he allow the rent to fall in arrear, when he will be held accountable for the arrears: *Acland* v. *Gaisford*, 2 Mad. 28; *Wilson* v. *Clapham*, 1 J. & W. 36; formerly a special case must have been made at the hearing to entitle a purchaser to have the account taken on the footing of wilful default: *Sherwin* v. *Shakespear*, 5 D. M. & G. 517, 532; *Phillips* v. *Sylvester*, L. R. 8 Chy. 173. But this is no longer necessary in Ontario: see *ante* p. 165. Where no time was named in the contract for delivery of possession, the purchaser was held entitled to the rents from the date of the contract: *Brady* v. *Keenan*, 6 P. R. 262; and see *Dudley* v. *Berczy*, 2 Ch. Ch. 364, as to liability of vendor in possession. Vendor after time fixed for completing is liable to purchaser for rents and profits.

No more than six years' arrears of interest on purchase money can be recovered from a purchaser as a charge on the land, whether he has been in possession or not: *Airey* v. *Mitchell*, 21 Gr. 512; *Gunn* v. *Trust & L. Co.*, before Boyd, C., 19th Jan., 1882; but in some cases where more than six years' arrears was recoverable against the estate of a deceased person, the excess beyond six years was allowed to avoid circuity of action: *Carroll* v. *Robertson*, 15 Gr. 173; *Taylor* v. *Hargrave*, 19 Gr. 271; *Howeren* v. *Bradburn*, 22 Gr. 96; *Weaver* v. *Vandusen*, 27 Gr. 481. Interest on purchase money.

PRINCIPAL AND AGENT.—A bailiff at common law was liable to account for what he might have made of the lands, but for his wilful default: Seton 779; *Wheeler* v. *Horne*, Willes 208; Co. Lit. 172 *a*; and an agent acting under a power of attorney is liable so to account, though the power be defective: *Bradburne* v. *Shanly*, 7 Gr. 569. But a solicitor who paid off a mortgage for a client, and entered into the receipt of rents, was not held to be liable on the footing of wilful default, his possession being that of his client: *Ward* v. *Carttar*, L. R. 1 Eq. 29. Bailiff liable for neglect and default.

Persons not Liable to Account for Wilful Default:—

PARTNERS in possession of partnership property are not liable to account on the footing of wilful default: *Davidson* v. *Thirkell*, 3 Gr. 330, at p. 348: *Rowe* v. *Wood*, 2 J. & W. 556: but one partner may have a demand against another for compensation for negligence or fraud: *Bury* v. *Allen*, 1 Coll, 589: *Doupe* v. *Stewart*, 13 Gr. 637. Persons not liable to account for wilful neglect and default.

TENANTS IN COMMON who have received more than their share, though liable to account for the excess: *Lorimer* v. *Lorimer*, 5 Mad. 363: *Turner* v. *Morgan*, 8 Ves. 145; are not answerable for wilful default: *Wheeler* v. *Horne*, Willes, 208. Tenants in common.

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Rule 57.

Tenants for life. TENANT FOR LIFE.—A tenant for life may cut down timber in the proper course of husbandry, in order to bring the proper proportion of land into cultivation and perhaps destroy such timber, but he cannot cut down timber even for that purpose and sell it for his own benefit: *Drake* v. *Wigle*, 22 C. P. 341; *Saunders* v. *Breakie*, 5 Ont. 603.

Purchasers for value. PURCHASER FOR VALUE evicted by person having a better title, and of which he is fixed with constructive notice, is not liable to account on the footing of wilful default: *Howell* v. *Howell*, 2 My. &. Cr. 478.

Persons in possession by fraud. PERSONS WHO HAVE OBTAINED POSSESSION BY FRAUD, are not liable to account on the footing of wilful default: *Murray* v. *Palmer*, 2 Sch. & L. 474; *Trevelyan* v. *Charter*, 9 Beav. 140; 4 L. J. N. S. 209; 11 Cl. & F. 74.

Occupation rent, when chargeable. **Occupation Rent.**—A person liable to account for rents and profits may generally, if he have been himself in actual occupation of the property in question be charged with a fair rent for the time he has so occupied,—which account of rent is liable to be taken with rests, wherever rests would be charged if rents and profits had been received.

As against Vendors. VENDORS.—A vendor who continues in occupation after the time fixed for completion may be charged with an occupation rent: *Leggott* v. *Metropolitan R. W. Co.*, L. R. 5 Chy. 716; *Dyer* v. *Hargrave*, 10 Ves. 505; but not in cases where the purchaser could, and ought to have taken possession: *Dakin* v. *Cope*, 2 Russ. 170; nor where—the purchaser making default in payment—the vendor continues to carry on his business: *Leggott* v. *Metropolitan R. W. Co.*, *supra*.

Purchasers. PURCHASERS.—Where a conveyance is set aside, an occupation rent may be charged against a purchaser who has been in occupation: *Bloomer* v. *Spittle*, L. R. 13 Eq. 427, *Neesom* v. *Clarkson*, 2 Ha. 163, but see *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1.

Mortgagee, liability of, for occupation rent. MORTGAGEE.—A mortgagee may be charged with an occupation rent, if it be proved that he has actually occupied the mortgaged premises: *Trulock* v. *Robey*, 15 Sim. 265. Any agreement as to the amount of the rent made between mortgagor and mortgagee, though binding between them, is not binding on others interested in the equity of redemption who are not parties to it: *Court* v. *Holland*, 29 Gr. 19; *Gregg* v. *Arrott*, Ll. & G. temp. Sugd. 246. And where rent is paid in advance to a prior mortgagee, and applied, with the consent of the mortgagor, in discharge of other liabilities than the mortgage debt, a subsequent assignee of the equity of redemption is entitled to have all rents accruing subsequent to the assignment applied in reduction of the prior mortgage, notwithstanding the payment and application in advance: *Gilmour* v. *Roe*, 21 Gr. 284. A mortgagee who continues in occupation after payment in full, is chargeable with interest on the occupation rent, with rests: *Wilson* v. *Metcalf*, 1 Russ. 537; *Quarrel* v. *Beckford*, 1 Mad. 269; *Lloyd* v. *Jones*, 12 Sim. 491; *Ashworth* v. *Lord*, 36 Ch. D. 545; 58 L. T. N. S. 18; and, if after exercising a power of sale, he retains a balance in his hands, he is bound to make it productive, and is chargeable with interest thereon if he do not: *Charles* v. *Jones*, 35 Ch. D 544; 56 L. T. N. S. 848.

May set off arrears of interest. A mortgagee in occupation is entitled to set off, against the occupation rent, with which he is charged, the arrears of interest, so far as they were recoverable against the land at the time the rent accrued; *i. e.*, for six years prior to its accruing: *Walton* v. *Bernard*, 2 Gr. 358; *Harrison* v. *Jones*, 10 Gr. 99. A prior mortgagee is not bound to account to a subsequent mortgagee on the footing of a mortgagee in possession, merely because there is an attornment clause in the prior mortgage, if he have not actually taken possession: *Western District Bank, Limited*, v. *Turner*, 47 L. T. N. S. 433; *Stanley* v. *Grundy*, 22 Ch. D. 478; 48 L. T. N. S. 106.

Tenants in common, how far liable for occupation rent. TENANTS IN COMMON.—A tenant in common who has been in exclusive occupation, cannot be charged with an occupation rent, if he have not ousted his co-tenant: *Rice* v. *George*, 20 Gr. 221: *Re Kirkpatrick*, *Stevenson* v. *Kirkpatrick*, 10 P. R. 4; except where his co-tenant is an infant: *Courcier* v. *Courcier*, 26 Gr. 307. But he cannot recover for substantial repairs and improvements; *Rice* v. *George supra*; nor even for incumbrances paid off by

him, unless he also submit to account for an occupation rent: *Teasdale* v. *Sanderson*, 33 Beav. 534; *Rivet* v. *Desourdi*, 12 C. L. J. 203. But a tenant in common who has been in exclusive occupation, and has ousted his co-tenant, is liable to account for an occupation rent: *Pascoe* v. *Swan*, 27 Beav. 508. **Rule 57.**

HEIRS.—Prior to the *Devolution of Estates Act, 1886*, (R. S. O. c. 108), an heir-at-heir-at-law was liable to account to a dowress for an occupation rent: *Bamford* v. *Bamford*, 5 Ha. 203. Heir-at-law.

DEVISEE.—Under the law as it stood previous to the *Devolution of Estates Act, 1886*, (R. S. O. c. 108, ss. 3-10), devisees in possession of land devised, charged with a legacy, were not bound to account for back rents, when the land proved insufficient to satisfy the legacy: *Garfitt* v. *Allen*, 37 Ch. D. 48.

TRUSTEES, express, or constructive, in occupation, of the trust property, are liable to account to their *cestui que trust* for an occupation rent: *Mill* v. *Hill*, 3 H. L. C. 828; *Lamont* v. *Lamont*, 7 Gr. 258. Trustees.

MISTAKE OF TITLE.—No occupation rent should be charged against a person who has been in occupation under a mistake of title, in respect of the increased value thereof arising from improvements made by him and which are not allowed to him: *McGregor* v. *McGregor*, 5 Ont. 617; *Munsie* v. *Lindsay*, 10 P. R. 173. Where occupation rent is charged in respect of property which has been improved by the occupant, according to the value as increased by the improvements, interest should be allowed on the outlay for the improvements: *Munsie* v. *Lindsay*, 11 Ont. 520.

Improvements:

PERSONS IN POSSESSION OF LANDS UNDER VOID DEEDS, making lasting improvements, by which the value of the estate has been enhanced, may, within certain limits, be allowed for such improvements: *Jortin* v. *South Eastern Railway Co.*, 2 Sm. & G. at p. 73; *Quarrel* v. *Beckford*, 14 Ves. at p. 179; and whether in as actual or constructive trustees: *Williamson* v. *Seeber*, 3 Y. & C. Ex. 717; *Cawdor* v. *Lewis*, 1 Y. & C. Ex. 427; *Bridge* v. *Brown*, 2 Y. & C. C. C. 191; *Bevis* v. *Boulton*, 7 Gr. 39; or as solicitors: *Robinson* v. *Ridley*, 6 Mad. 2; or agents: *Trevelyan* v. *White*, 1 Beav. 588; or as mortgagees believing themselves absolutely entitled: *Neesom* v. *Clarkson*, 2 Ha. 176; *S. C.* 4 Ha. 97; or as *bona fide* purchaser under the void deed: *Ashton* v. *Innis*, 26 Gr. 42; *Churcher* v. *Bates*, 42 U. C. Q. B. 466; *Pegley* v. *Woods*, 14 Gr. 47; *Gummerson* v. *Banting*, 18 Gr. 516; and the claim for such improvements may be actively enforced, and allowed, whether the party claiming them be plaintiff or defendant: *Ib*; but see *Re Brazill, Barry* v. *Brazill*, 11 Gr. at p. 256; and even though the party claiming adversely be an infant: *Bevis* v. *Boulton, supra*; and see *Biehn* v. *Biehn*, 18 Gr. 497; *Wood* v. *Wood*, 16 Gr. 471. Persons in possession under void deeds, how far entitled to.

But when possession had been taken in pursuance of an immoral agreement which was void, it was held that there could be no lien for improvements: *Moon* v. *Clarke*, 30 C. P. 417.

TENANTS IN COMMON are entitled to contribution from their co-tenants for the cost of repairs made to prevent the property going to ruin: Co. Lit. 200 b. Fitzherbert N. B. 127; but not for ordinary repairs: *Leigh* v. *Dickeson*, 12 Q. B. D. 194; 50 L. T. N. S. 124. Tenants in common.

TENANTS FOR LIFE are not entitled to charge for repairs as against the inheritance, however substantial or lasting: Lewin, 7th ed. 503: *Re Smith*, 4 Ont. 518; *sed vide*, *Conway* v. *Fenton*, 40 Ch. D. 512. Tenants for life.

TENANTS AT WILL.—Improvements made by a tenant at will cannot be allowed: *Foster* v. *Emmerson*, 5 Gr. 135; but improvements made on wild land by a son, to whom his father had promised to give it by way of advancement, which he failed to do, were allowed as against the co-heirs of the father: *Biehn* v. *Biehn, supra*; *Hovey* v. *Ferguson*, see 18 Gr. 498; but see *Foster* v. *Emmerson, supra*. Tenants at will, improvements by.

WRONGDOERS.—A mere wrongdoer, entering without colour of right, is not usually allowed for improvements made by him: *Townsley* v. *Neil*, 10 Gr. 72; Wrongdoers not

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Rule 57. allowed for improvements.

Scott v. *Hunter*, 14 Gr. 376; nor persons entering with actual notice of a paramount title: *Wyoming* v. *Bell*, 24 Gr. 564; *Smith* v. *Gibson*, 25 C. P. 248; *Kilborn* v. *Workman*, 9 Gr. 255; *Grasset* v. *Carter*, before Boyd, C., 2nd Sept., 1884.

Exceptions to rule.

But it would seem mere legal fraud will not deprive a party of the right to improvements: *McLaren* v. *Fraser*, 27 Gr. at p. 569; and see *Nevills* v. *Nevills*, 6 Gr. 121, 139; and the owner standing by and not objecting, may preclude himself from getting back his estate, except on the terms of paying for improvments: *Davis* v. *Snyder*, 1 Gr. 134.

Mistake of title, improvements made under, how far recoverable.

IMPROVEMENTS MADE UNDER MISTAKE OF TITLE.—Improvements made under a *bonâ fide* mistake of title may now be allowed under R. S. O., c. 100, s. 30: *Fawcett* v. *Burwell*, 27 Gr. 445; *McGregor* v. *McGregor*, *Ib.* 470; *McCarthy* v. *Arbuckle*, 29 C. P. 529; *Carrick* v. *Smith*, 34 U. C. Q. B. 389; *Skae* v. *Chapman*, 21 Gr. 549; *Munsie* v. *Lindsay*, 10 P. R. 173; 19 C. L. J. 186; *Plumb* v. *Steinhoff*, 2 Ont. 614. But improvements made with actual knowledge of the paramount title will not be allowed under that Act: *Wyoming* v *Bell*, 24 Gr. 564; *Smith* v. *Gibson*, 25 C. P. 248; and see *Kilborn* v. *Workman*, 9 Gr. 225. Improvements made after action commenced cannot be allowed: *O'Grady* v. *McCaffery*, 2 Ont. 309; *Bright* v. *Campbell*, 53 L. T. N. S. 428.

By mortgagee

Improvements made under mistake of title by a person in as mortgagee, but believing himself absolute owner, are allowed more liberally than improvements made by a mortgagee knowing he is a mortgagee: *Carroll* v. *Robertson*, 15 Gr. 173.

Improvements made by a purchaser from a mortgagor under the erroneous belief that the mortgage had been discharged, cannot be claimed as against the mortgagee: *Beaty* v. *Shaw*, 14 Ont. App. 600.

A husband is not entitled to be paid by his wife, for improvements made by him on her lands while in his occupation: *Till* v. *Till*, 15 Ont. 133.

Trustees are entitled to be allowed for improvements on trust estate.

TRUSTEES.—Substantial and lasting improvements, and repairs, made by a trustee on the trust property, are usually allowed to him: *Bevis* v. *Boulton*, 7 Gr. 39; *Mill* v. *Hill*, 3 H. L. C. 828; *Smith Bonnisteel*, 13 Gr. at p. 35; *Ex parte Hughes*, 6 Ves. 624; *Ex parte James*, 8 Ves. 352; *Campbell* v. *Walker*, 5 Ves. 682; *Davey* v. *Durant*, 1 D. G. & J. 535; *King* v. *Anderson*, 8 Ir. R. Eq. 625, 636. Repairs are allowed even in the case of actual fraud: *Baugh* v. *Price*, 1 G. Wils, 320; and in one case improvements also: *Oliver* v. *Court* Price 172; but see *contra*: *Kenney* v. *Browne*, 3 Ridg. 518; *Stratton* v. *Sims*, 1 Ir. R. Eq. 361.

Receivers.

RECEIVERS have been allowed for improvements made without the previous sanction of the Court: *Tempest* v. *Ord*, 2 Mer. 55.

Committee

COMMITTEE OF LUNATIC.—Also allowed for improvements made without previous sanction: *Re Shaw*, 15 Gr. 618; *Re Churchill*, 3 Jur. 719.

Personal representative.

PERSONAL REPRESENTATIVE.—An unauthorized expenditure by an executrix in improving the realty, was allowed, so far as the value of the estate had been enhanced, and those interested had benefited by it: *Morley* v. *Matthews*, 14 Gr. 551. But where an administratrix had occupied and improved the realty, in a suit by her for administration, such improvements were disallowed as against infant heirs; but she was not charged with any increase of rental in consequence of such improvements: *Re Brazill*, *Barry* v. *Brazill*, 11 Gr. 253.

Purchaser.

PURCHASER.—Failing to complete purchase is not entitled to be allowed for improvements: *Re Yaggie*, 1 Chy. Ch. 52.

Mortgagee.

MORTGAGEE.—The ordinary rule is, that a mortgagee will not be allowed for improvements further than is proper to keep the premises in necessary repair. But if buildings are incomplete or ruinous, he may complete or pull them down, and rebuild, and the rebuilding or repairing, may be done in an improved manner, and more substantially than before, so that the work be done providently, and that no new or expensive buildings be erected for purposes differ-

ent from those for which the former buildings were used; for the property when restored ought to be of the same nature as when the mortgagee received it, Fisher Mortg. 1532. And while the mortgagee in possession is not allowed to charge for lasting improvements which are not requisite for the purpose of keeping the property in necessary repair, he is not, on the other hand, chargeable with the increased rents and profits which are directly traceable to such improvements made by him: see Jones on Mortgages, s. 1127. **Rule 57.**

Mortgagees in possession are entitled to be allowed for necessary repairs, as just allowances. But in England no allowance for substantial repairs or, permanent improvements, can be made without an express direction: Seton 1080. In Ontario, under *Rules* 56, 57, no special direction in the judgment is necessary to enable the Master, in a proper case, to allow substantial improvements. Mortgagees entitled to be allowed for necessary repairs.

A mortgagee in possession cannot charge the mortgaged property with improvements that are not necessary for its preservation: *Harrison* v. *Jones*, 10 Gr. 99; unless with the consent of the parties entitled to the equity of redemption: *Kirby* v. *Kirby*, 5 Gr. 587. And improvements made even with the mortgagor's sanction must not be such as to improve him out of his property: *Sandon* v. *Hooper*, 6 Beav. 246; Fisher Mortg. 948. But a mortgagee is not bound to give the mortgagor notice before making any reasonable permanent improvement: *Shepherd* v. *Jones*, 47 L. T. N. S. 604; 21 Ch. D. 469. But only such as are necessary for preservation of property.

When a mortgagee is charged with rents, or improved rents, arising from his improvements, he should either be allowed for such improvements: *Constable* v. *Guest*, 6 Gr. 510, or he should not be charged with the rent, or improved rent, arising therefrom: *McGregor* v. *McGregor*, 5 Ont. 617; 19 C. L. J. 78; *Munsie* v *Lindsay*, 10 P. R. 173; *Bright* v. *Campbell*, 53 L. T. N. S. 428. When rents arising from improvements charged, improvements also allowed.

The Master is not necessarily bound to allow the actual cost of improvements, but should limit the allowance to the benefit which the property has derived therefrom: *Paul* v. *Johnson*, 12 Gr. at p. 479.

A person who had *bonâ fide* purchased under a power of sale in a mortgage, notwithstanding the sale being held invalid, was allowed improvements made by him as far as they enhanced the value of the property, and was not restricted to such improvements as a mortgagee in possession would have been entitled to make, knowing himself to be a mortgagee: *Carroll* v. *Robertson*, 15 Gr. 173; and see *McLaren* v. *Fraser*, 17 Gr. 567: *Davey* v. *Durant*, 1 D. G. & J. 534. But when a purchaser from a mortgagee, who had obtained a decree of foreclosure, which was defective owing to there being outstanding claims, which were not foreclosed, entered, and made improvements, having notice of the outstanding title, such improvements were disallowed as against the unforeclosed parties; *Russell* v. *Romanes*, 3 Ont. App. 635; and see *Romanes* v. *Herns*, 22 Gr. 469. Improvements by purchaser when sale invalid, allowed. *Secus* if he have knowledge of defect.

But where the mortgagor released his equity of redemption, and two months afterwards the mortgagee agreed to reconvey, upon being repaid principal and interest, and all costs of improvements made by him. On a bill to redeem, the mortgagee was held entitled to recover for all permanent improvements, although the estate might not have been increased in value to an amount equal to the sum expended: *Brotherton* v. *Hetherington*, 23 Gr. 187. Mortgagee submitting to redemption entitled to all improvements.

WHAT IMPROVEMENTS ALLOWED.—The clearing of land for farming purposes is a permanent improvement, under *The Dower Act*, R. S. O. c. 56, s. 12, s-s. 2; *Robinet* v *Pickering*, 44 U. C. Q. B. 337. What improvements allowed.

After suit commenced, the only improvements which can ordinarily be allowed, are such as are made to save the premises from deterioration: *Hawn* v. *Cushion*, 20 Gr. 518; and see *O'Grady* v. *McCaffrey*, 2 Ont. 309.

Trustees with power to invest in the purchase of real estate, may be allowed for erecting a new building where an increased income can be obtained thereby: *Re Henderson*, 23 Gr. 45.

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Rule 57. A rector cannot make a lease with a covenant, to pay for improvements, which will be binding on his successor: *Kirkpatrick* v *Lyster*, 13 Gr. 323; 16 Gr. 17; unless there be some statutory provision empowering him so to do.

Covenant to pay for improvements in rectorial lease invalid.

Costs, and other Expenses:—

Costs and expenses recoverable by mortgagees.

MORTGAGEES.—A mortgagee is entitled to charge against the estate, the costs of defending the title to the mortgaged estate, for the benefit of all parties interested in the equity of redemption; and also the costs of proceedings taken to perfect his security, *e. g.*, the costs of an equitable mortgagee of investigating the title for the purpose of preparing a legal mortgage, and the costs of preparing such legal mortgage are recoverable: *National Provl. Bank* v. *Games*, 53 L. T. N. S. 955; 54 L. T. N. S. 696; 31 Ch. D. 582; also, costs of a suit to redeem, brought by a subsequent incumbrancer, and dismissed: *McKinnon* v. *Anderson*, 17 Gr. 636; 18 Gr. 684; but not the costs of defending his own title to the mortgage, unless those interested in the equity of redemption had concurred in, or assisted, the litigation: *Parker* v. *Watkins*, John 133; nor yet the costs of an unsuccessful litigation undertaken by him without the concurrence of the mortgagor: *Wells* v. *The Trust and Loan Co.*, 9 Ont. 170.

In *Re Griffith*, 50 L. T. N. S. 434, it was said by Cotton, L.J., that in a foreclosure action "the mortgagor must pay all the costs of the mortgagee, including those payable by the latter to his solicitor."

Costs of sales.

The mortgagee may also be allowed the expenses of sales, and of receiving the purchase money: Fisher Mortg. 952; and also the costs of an abortive sale, where it has fallen through without the default of the mortgagee: *Farrer* v. *Lacy*, 31 Ch. D. 42; 50 L. T. N. S. 121. But he is not entitled to a commission on a sale in addition to the costs, even though he has stipulated for it: *Eyre* v. *Hughes*, 2 Ch. D. 148; *Broad* v. *Selfe*, 9 Jur. N. S. 885.

Costs of taking possession, etc.

A mortgagee is also entitled to the expenses of taking and holding possession of a ship, advertising it for sale, and insurances: *Wilkes* v. *Saunion*, 7 Ch. D. 188.

Cannot charge for personal services, but may for agent's services, collecting rents.

He is not entitled to charge for personal trouble in collecting rents: *Bomthon* v. *Hockmore*, 1 Vern. 316; *Langstaffe* v. *Fenwick*, 10 Ves. 405; *Godfrey* v. *Watson*, 3 Atk. 518; *Leith* v. *Irvine*, 1 M. & K. 277; not even if he have stipulated for it with the mortgagor: *French* v. *Baron*, 2 Atk. 120; *Barrett* v. *Hartley*, L. R. 2 Eq. 789; *Chambers* v. *Goldwin*, 9 Ves. 271. But the mortgagee is entitled to an allowance for an agent, or bailiff, collecting rents when the property is of such a character that a prudent owner whose time was of value would appoint an agent: *Union Bank* v. *Ingram*, 16 Chy. D. 53.

It has been held that a solicitor mortgagee, who is a trustee, is not entitled to profit costs of suits brought by him in respect of the mortgaged property: *Sclator* v. *Colton*, 29 L. T. O. S. 309; 3 Jur. N. S. 630; but see *contra Re Donaldson*, 27 Chy. D. 544; 51 L. T. N. S. 622.

Insurance, when recoverable.

INSURANCE.—Sums paid for insurance by a mortgagee cannot, in the absence of a special contract, be charged against the mortgaged estate: *Bellamy* v. *Brickenden*, 2 J. & H. 137; *Brook* v. *Stone*, 13 W. R. 401; *Dobson* v. *Land*, 8 Ha. 216; *Russell* v. *Robertson*, 1 Chy. Ch. 72; 6 U. C. L. J. 143; but see *Scholefield* v. *Lockwood*, 11 W. R. 555. But in the case of a trustee, such payments may be allowed, without any express stipulation to that effect in the instrument creating the trust: *Heron* v. *Moffatt*, 22 Gr. 370.

Where a subsequent account is directed to be taken, sums properly paid for insurance since the last account, may be allowed under the head of just allowances, without any express direction: *Belaune* v *Calcutt*, 3 Gr. 648.

Prior incumbrances.

PRIOR INCUMBRANCES.—A mortgagee paying off prior incumbrances, is entitled to recover the amount paid, and interest on the principal; at the rate in his own mortgage, and on the interest and costs, at six per cent.: *McMaster* v. *Hector*, 8 C. L. J. 284; and see *Teeter* v. *St. John*, 10 Gr. 85. But a tenant in common in sole possession paying off incumbrances, is not entitled to be allowed therefor, unless he submit to account for an occupation rent: *Rivet* v. *Desourdi*, 12 C. L. J. 203.

Rule 57. Trustees entitled as against *c. q. t.* to expenses of bailiffs, etc.

TRUSTEES are entitled to recover as against the beneficiaries the expense of bailiffs, surveyors, and accountants, when necessarily employed, and also the necessary legal expenses of carrying the trust into effect: *Wilkinson* v. *Wilkinson*, 2 S. & S. 237; *McNamara* v. *Jones*, 2 Dick. 587; *Henderson* v. *McIver*, 3 Mad. 275.

Trustees are also entitled to be allowed the costs paid to the representatives of a deceased trustee properly incurred by the latter in reference to the trust; also the costs incurred by them on being appointed to the trust of examining into the state of the trust property, the validity of the power under which they were appointed, and the costs paid of the donee of the power in making the appointment: *Harvey* v. *Oliver*, 57 L. T. N. S. 239.

So also a trustee is entitled to have his costs out of the trust estate even though by reason of subsequent events the trust becomes invalid: *In Re Holden*, 20 Q. B. D. 43.

But solicitor trustee not entitled to charge for professional services, unless expressly authorized by trust so to do.

But a trustee acting as solicitor for himself, or for himself and others as trustees, in any action in which he, or they, are plaintiffs, is in general, only entitled to costs and expenses out of pocket, properly incurred: *Moore* v. *Frowd*, 3 My. & Cr. 45, 50; *Robinson* v. *Pett*, 2 W. & T. Lead. Ca. Eq. 214; *Re Corsellis, Lawton* v. *Elwes*, 33 Chy. D. 160; 34 Ch. D. 675; 55 L. T. N. S. 167; unless there be a special power to charge for professional services: *Re Sherwood*, 3 Beav. 338; *Moore* v. *Frowd, supra*; *Re Wyche*, 11 Beav. 209; but even then, no charge can be allowed for doing professionally, any thing that he would have been bound to do himself, if not a solicitor: *Harbin* v *Darby*, 28 Beav. 325; *Re Chapple, Newton* v. *Chapman*, 27 Ch. D. 584; 51 L. T. N. S. 748; and what he cannot charge for professionally himself, he cannot recover for, if done by a partner though not a trustee: *Christophers* v. *White*, 10 Beav. 523; *Collins* v. *Carey*, 2 Beav. 128; unless the business was done by the partner for his own benefit, and the trustee does not share therein: *Clack* v. *Carlow*, 7 Jur. N. S. 441; 9 W. R. 568; and where a solicitor trustee, who is one of several trustees, and acts for them as *defendants*, he may recover profit costs against the trust estate: *Cradock* v. *Piper*, 1 Mc. & G. 664; 17 Sim. 41; *In Re Barber, Burgess* v. *Vinicome*, 34 Ch. D. 77; 55 L. T. N. S. 882; provided the costs have not been increased by his so acting: *Re Corsellis, Lawton* v. *Elwes*, 33 Ch. D. 160; 34 Ch. D. 675; 55 L. T. N. S. 167; but see Lewin 249; *Manson* v. *Baillie*, 2 Macq. 80. The profit costs of professional services which cannot be recovered against the *c. q. t.* or out of the trust estate may be recoverable by the trustee against a third party: *Colonial Trusts Co.* v. *Cameron*, 24 Gr. 548; *Meighen* v. *Buell*, 25 Gr. 604; *Re Donaldson*, 27 Ch. D. 544; 51 L. T. N. S. 622; but see *Re Corsellis, Lawton* v. *Elwes*, 33 Ch. D. 160; 34 Ch. D. 675; 55 L. T. N. S. 167; and 82 Law Times Jour., 280; 23 C. L. J. 146.

Or where he is defendant.

Profit costs recoverable against third parties.

Retaining fee and costs paid by trustees, how far recoverable.

A retaining fee paid by trustees to their solicitor in an administration suit, may be allowed under certain circumstances: see *Chisholm* v. *Barnard*, 10 Gr. 479; and see *Hayes* v. *Hayes*, 29 Gr. 90; but they are not entitled to any allowance for gratuitous services of an agent: *Chisholm* v. *Barnard*, 10 Gr. 479.

Costs paid by an executor, administrator, or trustee, to his solicitor, in respect of business of the trust estate, may be allowed, but the Master should examine the bill, and without strictly taxing it, should moderate it, by deducting such charges, if any, as are improper: *McCargar* v. *McKinnon*, 17 Gr. 525; *Hayes* v. *Hayes*, 26 Gr. 90; and when the costs have been paid out of the trust estate, and *bonâ fide* received by the solicitor without notice of any breach of trust on his client's part, he cannot be made to refund the costs so received to the estate, even though it should turn out that the trustee has disentitled himself to get the costs out of the estate: *Re Blundell, Blundell* v. *Blundell*, 58 L. T. N. S. 933.

A personal representative is not liable to pay costs incurred by a beneficiary in reference to the estate and for its protection, before the grant of probate, or letters of administration: *Re Watson*, 19 Q. B. D. 234; 57 L. T. N. S. 215.

Trustees expenses are a lien

Trustees' expenses are a lien upon the trust estate, and have priority to the costs of suit: *Morison* v. *Morison*, 7 D. M. & G. 214; 2 S. & G. 564; *Gaunt* v. *Taylor*, 2 Ha. 413; *Hughes* v. *Rees*, 10 P. R. 301; unless the payments are

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not strictly authorized and the estate is insufficient : *Robinson* v. *Killey*, 30 Beav. 520 ; or they have misconducted themselves : *Rose* v. *Sharrod*, 11 W. R. 350.

Just allowances.

Just Allowances.—Several of the matters which may be allowed under the head of "just allowances" have already been discussed in the preceding notes to this *Rule*.

Compensation to executors and trustees.

ALLOWANCES TO EXECUTORS, AND TRUSTEES.—Compensation for care, pains, and trouble, may be allowed by the Master to trustees under any deed, settlement, or will ; or to any other trustee, however the trust is created ; and to executors, and administrators ; and to any guardian appointed by any Court ; or to any testamentary guardian : R. S. O. c. 110, ss. 38-40 : *Re Commissioners of Cobourg*, 22 Gr. 377 ; *Re Toronto Harbor Commissioners*, 28 Gr. 195. The Act is retrospective : *Thompson* v. *Freeman*, 15 Gr. 384 ; *McMillan* v. *McMillan*, 21 Gr. 369. The Surrogate Judge has also power to allow compensation to trustees under wills, and to executors, and administrators : R. S. O. c. 110, s. 41. But when an action is pending in the High Court in regard to the administration of an estate, it is improper for the Surrogate Judge to interfere by ordering the allowance of compensation to the executors, or trustees : *McLennan* v. *Heward*, 9 Gr. 279 ; *Cameron* v. *Bethune*, 15 Gr. 486. And the Master is bound to exercise his own discretion as to the compensation to be allowed, regardless of any order of a Surrogate Judge made under such circumstances : *Biggar* v. *Dickson*, 15 Gr. 233.

No fixed rule as to amount of compensation.

No fixed rule can be laid down as to the amount of compensation proper to be allowed, as it must necessarily depend on the circumstances of each case : see *Robinson* v. *Pett*, 2 W. & T. L. C. Eq. 214. Usually the amount is fixed by a percentage on the amount of money passing through the hands of the trustee, or executor. In some cases five per cent. has been allowed : *Bald* v. *Thompson*, 17 Gr. 154 ; *McLennan* v. *Heward*, 9 Gr. 178 ; *Chisholm* v. *Barnard*, 10 Gr. 479 ; *Re Batt*, *Wright* v. *White*, 9 P. R. 447 ; *Re Fleming*, 11 P. R. 272, 426 ; *Archer* v. *Severn*, 13 Ont. 316. But this may in some cases be more, and in some, less, than an adequate compensation. In *Torrance* v. *Chewett*, 12 Gr. 407, four per cent. was allowed ; and in *McMillan* v. *McMillan*, 21 Gr. 381, two and a-half per cent. was allowed. The Master may, instead of a percentage, allow a lump sum, but only upon proper evidence as to the services rendered : *Stinson* v. *Stinson*, 8 P. R. 560 ; *Denison* v. *Denison*, 17 Gr. 306.

Usually a precentage on receipts, and payments.

But a lump sum may be allowed

A sliding scale suggested.

In fixing compensation, it has been suggested that it would be proper to adopt a sliding scale, similar in principle to that on which the poundage of Sheriffs is fixed ; see observations of Spragge, V.C. : *Thompson* v. *Freeman*, 15 Gr. at p. 387. In that case, the estate amounted to nearly $300,000, and five per cent. on the amounts disbursed, which included investments, and reinvestments, made in the course of fifteen years, was considered excessive ; and on appeal, the allowance was reduced to five per cent. on investments of sums of $600, and three per cent. on investments over that amount.

Allowance of percentage on investments, and reinvestments, disapproved.

But in a later case it was considered vicious in principle, to allow any commission on investments, or reinvestments, on the ground that it offered an inducement to trustees to be constantly, and unnecessarily, calling in and changing, the investments : *Re Berkeley's Trusts*, 8 P. R. 193. No commission should be allowed for merely receiving the trust estate until it has also been duly accounted for : *Ib.*

Where trust property consisting of land was exchanged, with the consent of the *cestui que trust*, for stock in a land company, from which nothing had been realized by way of income, and both land and stock were said to be valueless, a percentage on the nominal value of the stock was held an improper way of fixing the trustees' compensation ; and a lump sum to cover their care and trouble was allowed instead : *Re Prittie*, 13 P. R. 19.

Legacies given to executors as compensation.

A legacy given to a person appointed executor is *prima facie* intended as a compensation, and if the legatee renounce, he is not entitled to the legacy : Williams on Executors (8th Ed.), 1287 ; *Re Appleton*, *Barber* v. *Tebbitt*, 52 L. T. N. S. 906 ; and the fact that legacies are left to other executors of unequal amount is not sufficient to destroy the presumption : *Ib.*

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When a legacy is given to executors or trustees as a compensation for their trouble, they are not precluded from claiming a further sum under the statute, if the legacy is inadequate: *Denison* v. *Denison*, 17 Gr. 306; *Hiddingh* v. *De Villiers*, 12 App. Cas. 107, 624; but see R. S. O. c. 110, s. 42: *Williams* v. *Roy*, 9 Ont. 534; 21 C. L. J. 236; *Kennedy* v. *Pingle*, 27 Gr. 305. Such a legacy precludes any presumption that the executor is entitled beneficially to the undisposed of residue: *Loveless* v. *Clarke*, 24 Gr. 14. Such a legacy in the event of a deficiency of assets, does not abate with other legacies, even though it exceed what the executor would be entitled to under the statute: *Anderson* v. *Dougall*, 15 Gr. 405; and such legacies bear interest at the expiration of a year from the testator's death: *Anderson* v. *Dougall*, *per* Strong, V.C., on appeal from report, 8th & 14th Dec. 1870. Where the executor is also a residuary legatee, he is entitled to commission on the receipt, but not on the payment of the share of the residue to which he is beneficially entitled: *Boys' Home* v. *Lewis*, 19 C. L. J. 139; *Re Fleming*, 11 P. R. 272, 426.

Do not abate.

Bear interest.

Where on appeal from the Master the Court increased the allowance for compensation, the Court of Appeal refused to interfere: *McDonald* v. *Davidson*, 6 Ont. App. 320.

When the amount of a trustee's compensation is fixed by the trust deed, the Master cannot reduce the amount: *Heron* v. *Moffatt*, 7 P. R. 438.

When trust fixes compensation Master cannot allow less.

Executors are entitled to some compensation for moneys received by them *pendente lite* but not so much as in other cases: *Re Honsberger*, 10 Ont. 521; *Thompson* v. *Fairbairn*, 11 P. R. 333.

An allowance to trustees, or executors, for compensation is prior to the claims of creditors: *Harrison* v. *Patterson*, 11 Gr. 105, at p. 113; or of *cestui que trust*: *The Life Association of Scotland* v. *Walker*, 24 Gr. 293; and a trustee may retain it from time to time, out of moneys received, and is not bound to wait until the expiration of his trust: *Heron* v. *Moffatt*, *supra*.

Executors compensation is prior to claims of creditors.

Misconduct in the management of the estate may, but does not necessarily, disentitle an executor, or trustee, to compensation for what he has properly done; see *Kennedy* v. *Pingle*, 27 Gr. 305; *Sievewright* v. *Leys*, 1 Ont. 375; *Gould* v. *Burrit*, 11 Gr. 523; *City Bank* v. *Maulson*, 3 Chy. Ch., 334. But commission cannot be allowed on moneys which were not actually received, but charged against the executor, or trustee, on the ground of wilful default: *Bald* v. *Thompson*, 17 Gr. 154; and an allowance cannot be made to an executor, for unauthorized receipts of rents, and profits, of the real estate: *Dagg* v. *Dagg*, 25 Gr. 542.

Misconduct, how far it disentitles executor to compensation.

When one executor incurs greater responsibility than another a larger proportion of the compensation will be allotted to him: *Re Fleming*, 11 P. R. 272.

A trustee who properly employs an agent to collect rents is entitled to an allowance for his own care and responsibility in addition to the sum paid to the agent (in this case the trustee was allowed two and one half per cent.): *Re Prittie*, 13 P. R. 19.

Where a testator's estate was worth $200,000 an expenditure of $3,000 for a burial plot and monument was allowed: *Archer* v. *Severn*, 13 Ont. 316.

Trustees who have invested the trust fund, at the instance of one of their number, in a defective security, are nevertheless entitled to credit for the value of such security: *Larkin* v. *Armstrong*, 9 Gr. 390.

Trustees entitled to credit *pro tanto* for defective securities; And for sums paid for maintenance.

An allowance may be made to executors, for sums paid for the maintenance and education of infant *cestuis que trustent* out of the capital of the fund to which they are entitled, where the income thereof is insufficient: *Stewart* v. *Fletcher*, 16 Gr. 235.

Claims not referred to Master, cannot be allowed.—But the authority to make "just allowances" does not authorize the Master to allow claims which are not referred to him by the judgment to take an account of, however reasonable they may appear to be. The Master may, however, report such a claim as "a special circumstance," and on the hearing on further directions

Claims not referred cannot be allowed.

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Rule 57. or otherwise, an application may be made to the Court for its allowance: *Fielder* v. *O'Hara*, 2 Chy. Ch. 255; *Kellar* v. *Taché*, 1 Chy. Ch. 788; *Stewart* v. *Fletcher*, *supra*.

Special Circumstances:—

Special circumstances, Master may report.

Notwithstanding this *Rule* the Master may refuse to report as special circumstances, facts which would be immaterial on a hearing on further directions, or which would lead to evidence in relation to matters not necessary to the inquiry directed by the decree: *Braun* v. *Aumond*, 19 Gr. 172. But he may, at the request of any party, report specially as to any matters which he may deem proper for the information of the Court: *Rosebatch* v. *Parry*, 27 Gr. at p. 199; and he ought to report any matter bearing on the question of costs: *Simpson* v. *Horne*, 28 Gr. at p. 7; *Hayes* v. *Hayes*, 29 Gr. 90. And the Master may, at the request of a party, report specially as to matters not particularly referred to him, but which form the subject of charges of fraud in the pleadings: *Ib.*

In a mortgage suit the Master may report specially, as to the existence of a claim of the wife of a mortgagor to dower in the surplus: *Rowe* v. *Wert*, 13 C. L. J. 326; 7 P. R. 252.

The Master should not report circumstances, showing an accounting party to have been guilty of wilful neglect, and default, as a "special circumstance," but he should himself determine whether or not the party is so liable, and if so, find the amount due on that footing: *Walmsley* v. *Bull*, 2 Chy. Ch. 344.

Claims which are not referred to the Master to take an account of, cannot be allowed by the Master, but may be reported as "special circumstances": see *Fielder* v. *O'Hara*, etc., *supra*.

When money has been received by a trustee during his minority the Master should report the amount so received, notwithstanding the infancy: *Re Garnes*, *Garnes* v. *Applin*, 31 Ch. D. 147; 54 L. T. N. S. 141.

General Powers of Master:—

General powers of Master, to inquire as to all matters relating to accounts.

Rule 57 provides that, generally, in taking the accounts, the Master is to inquire, adjudge, and report as to all matters relating thereto, as fully as if the same had been specially referred to him.

The general powers here given, enable the Master to inquire as to, and to take the accounts on the footing of, wilful default in accounts of personalty, as well as of realty, and he is not limited to the matters of inquiry specially enumerated in this *Rule*: *Carpenter* v. *Wood*, 10 Gr. 354. But the Master cannot inquire into the validity of the instrument upon which the plaintiff's judgment was obtained: *Bickford* v. *Grand Junction Ry. Co.*, 1 S. C. R. 696, see p. 725 *et seq.*; not even at the instance of parties added in his office: *McDougall* v. *Lindsay Paper Mills Co.*, 10 P. R. 247; 20 C. L. J. 133; and see *Re Munsie*, 20 C. L. J. 112; *Wiley* v. *Ledyard*, 10 P. R. 182; 20 C. L. J. 142; nor, when the judgment awards larger relief than was claimed by the pleadings, can the Master restrict the inquiry as to damages or otherwise, to the relief claimed by the pleadings: *Smith* v. *Goldie*, 11 P. R. 24; neither can he extend the inquiry under a general reference "to take accounts" to matters beyond the scope of the pleadings: *Rowland* v. *Burwell*, 12 P. R. 607. But the mere fact that a plaintiff claiming to be a creditor has obtained a judgment directing the taking of accounts, reserving further directions, was held not to preclude the defendants from taking the objection that the plaintiff is not in fact a creditor, and consequently has no *locus standi*, and insisting on the hearing on further directions that his action should, on that ground, be dismissed: *Bank of Toronto* v. *Beaver Mutual*, 28 Gr. 87.

But it will be seen that it is only matters *relating* to the accounts which are referred to him to take, as to which he has these general powers he cannot allow claims altogether outside of the accounts he is directed to take, and not necessarily connected therewith. Such claims, though they cannot be allowed by the Master, may, however, be reported by him as "special circumstances,"

and the Court, in its discretion, may on further directions, or on special application for that purpose, allow them: *Fielder* v. *O'Hara*, 2 Chy. Ch. 255; and see *Wiley* v. *Ledyard*, *supra*. Rules 58, 59.

Under these general powers, in an administration suit where a creditor made a claim by virtue of a partnership with the testator, it was held that the partnership accounts might be taken in order to establish the claim: *Kline* v *Kline*, 3 Chy. Ch. 137; and the Master may inquire as to a stated account set up in the defence, though no evidence was given of it at the hearing: *Edinboro' Life Association* v. *Allen*, 23 Gr. 230; *Holgate* v. *Shutt*, 28 Ch. D. 111; but *semble*, not as to usury, as affecting the amount recoverable on a security: see *Penn* v. *Lockwood*, 1 Gr. 547. Stated accounts.

58. Under a judgment or order of reference, witnesses may be examined before any Examiner of the Court. Chy. 221, *part*. Master may order witnesses to be examined before Examiner.

The Master may direct witnesses to be examined before any other Master, or Examiner, of the Court, without the consent of the parties: *Re Casey*, *Biddell* v. *Casey*, 1 Chy. Ch. 198.

The Master may also grant a certificate for a commission to issue on præcipe to take evidence out of the jurisdiction: see *Rule* 590.

The Master cannot grant a certificate for a commission *ex parte*, *McLennan* v. *Helps*, 3 Chy. Ch. 193; except where the reference is *ex parte*. A commission to take evidence is not granted as of course: *Coch* v. *Allcock*, 21 Q. B. D. 178; *Mills* v. *Mills*, 12 P. R. 473; *Light* v. *Anticosti*, 58 L. T. N. S. 25; *Thomas* v. *Storey*, 11 P. R. 417; *Price* v. *Bailey*, 6 P. R. 256; *Berdan* v. *Greenwood*, 46 L. T. N. S. 524, note *a*; *Vivian* v. *Mitchell*, 13 C. L. J. 198; *Re Boyse*, *Crofton* v. *Crofton*, 20 Ch. D. 760; 46 L. T. N. S. 522. As to proceedings under a commission; see *Rules* 594-604. Foreign commission not issued of course.

Where an application is made to the Master for a commission to cross-examine a plaintiff resident abroad, on an affidavit filed by him in support of his account, the Master cannot properly refuse it, so long as the plaintiff relies on the affidavit in support of his claim: *Townend* v. *Hunter*, 3 C. L. T. 310.

The Master's certificate for a commission should, *mutatis mutandis*, follow, as nearly as may be, the form of order given in the *Rules*: see Form No. 138; and see *Rule* 593.

59. The Master may cause parties to be examined, and to produce books, papers and writings, as he thinks fit, and may determine what books, papers and writings are to be produced, and when and how long they are to be left in his office; or in case he does not deem it necessary that such books and papers or writings should be left or deposited in his office, he may give directions for the inspection thereof, by the parties requiring the same, at such time and in such manner as he deems expedient. Chy. O. 222. Master may cause parties to be examined, and may order production of documents.

Witnesses.—Any party to an action is now eligible as a witness in his own behalf: see R. S. O. c. 61, ss. 2-11. Witnesses in M. O.

In action by, or against, heirs, or personal representatives, or assigns, of a deceased person: *Ib.* s. 10; or by or against a lunatic, or an inmate of a lunatic asylum: *Ib.* s. 11. The evidence of any opposite, or interested party, must be corroborated. As to the nature of the corroboration required, see *Sugden* v. Corroboration when necessary.

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Rule 60. *Lord St. Leonards*, 1 P. D. 154, 179; *McDonald* v. *McKinnon*, 26 Gr. 12; *Stoddart* v. *Stoddart*, 39 U. C. Q. B. 203; *McKay* v. *McKay*, 31 C. P. 1; *Adamson* v. *Adamson*, 28 Gr. 228; *Brown* v. *Capron*, 24 Gr. 91; *Re Robbins*, 23 Gr. 162; *Halleron* v. *Moon*, 28 Gr. 319; *Re Ross*, 29 Gr. 385; 18 C. L. J. 11; *Re Laws* *Laws* v. *Laws*, 28 Gr. 382; *Parker* v. *Parker*, 32 C. P. 113; *Birdsell* v. *Johnson*, 24 Gr. 202; *Findley* v. *Pedan*, 26 C. P. 483; *Rose* v. *Hickey*, 3 Ont. App. 309; *Re Murray*, 29 Gr. 443; 9 Ont. App. 369; *Burn* v. *Burn*, 20 C. L. J. 148.

Cross-examination of witnesses.

A witness may be cross-examined in the Master's office on the whole case. The Master cannot properly confine the cross-examination to the evidence given in chief. But in some cases, it may be proper to exercise his discretion, as to the party to pay the fees of the examination: *Crandell* v. *Moon*, 6 U. C. L. J. 143.

Not to be recalled.

The Master should not allow a witness who has been examined, to be recalled in order to supplement his testimony, except in such cases as the Court itself would allow him to be re-examined: see *Patterson* v. *Scott*, 1 Gr. 582. As to subpœnaing witnesses in the Master's office: see *Rule* 578.

Depositions in other actions.

DEPOSITIONS IN ANOTHER ACTION, OR BOOKS OF ACCOUNT, HOW FAR EVIDENCE.—As to how far evidence taken in another action, and books of account of third parties are receivable in evidence in the Master's office: see *Court* v. *Holland*, 8 P. R. 219.

Production of documents.

Production of Books and Papers.—When books are in constant use, and the party required to produce them offers to allow them to be inspected in his counting house, the Master should not require them to be left in his office, in the absence of any special ground for so doing: *Re Ross*, 8 P. R. 86; 5 Ont. App. 82; but the usual affidavit on production must be filed, though the deposit of the books in the Master's office be dispensed with: *Ib.*; *Darling* v. *Darling*, 19 C. L. J. 329.

Remedy for default in production.

DEFAULT.—Where default has been made in the production of documents, or the attendance of a witness to be examined, an application may be made to commit for contempt. The application should be made to a Judge, and not to the Master in Chambers, or to any County Court Judge, or Local Master: *Keefe* v. *Ward*, 18 C. L. J. 166; 2 C. L. T. 260. For form of certificate of default: see Leggo's Forms, 2nd ed., Nos. 669, 966; *Sutherland* v. *Rogers*, 2 Chy. Ch. 191.

Master may advertise for creditors, heirs, or next of kin, etc.

60. The Master may cause advertisements for creditors and if he thinks it necessary, but not otherwise, for heirs or next of kin, or other unascertained persons, and the representatives of such as are dead, to be published as the circumstances of the case require; and in such advertisements he is to appoint a time within which such persons are to come in and prove their claims, and within which time, unless they so come in, they are to be excluded from the benefit of the judgment or order. Chy. O. 223.

Time to be limited for coming in.

Advts. for creditors where dispensed with.

The Master may dispense with an advertisement for creditors in an administration action, where the personal representative had, before action, duly advertised under R. S. O. c. 110, s. 36: *Cuthbert* v. *Wharmby*, W. N. 1869, 12; but he should state in his report that he has done so, and the reason for so doing. But mere lapse of time, even of twenty years, from the death of the deceased person, whose estate is being administered, is not sufficient to warrant the Master in dispensing with an advertisement for creditors, and the Court has referred causes back to the Master to advertise for creditors, where the Master has omitted to do so, merely in consequence of the lapse of time.

Forms of advertisements.

See further as to advertisement for creditors of a deceased person, *Rule* 976, and for form of advertisements for creditors in an administration action, see

Form 36; and for heirs or next of kin, see Leggo's Forms, 2nd ed., No. 893; a month at least should be allowed for creditors to file claims, three weeks was considered too short a time: see *Wood* v. *Weightman*, L. R. 13 Eq. 434. **Rule 61. Time for sending in claims.**

Where the action has been constituted as provided by *Rule* 320, heirs, and other persons interested, whose presence as original parties is dispensed with by that *Rule*, are nevertheless to be served with a copy of the judgment, as provided by *Rule* 322, unless the Master dispenses with service. Where any of such persons cannot be found to be served with the judgment, the Master may require an advertisement to be published as a condition of dispensing with service on them. **Persons interested to be served with copy of judgment.**

61. The Master is to proceed on the claims brought in before him pursuant to such advertisement, without further notice, and may examine witnesses in relation thereto at the time appointed in the advertisement, or thereafter as he sees fit; and he is to allow or disallow, or adjourn the claims as to him seems just. Chy. O. 224. **Master to proceed on claims brought in.**

In actions for the administration of a deceased person's estate, the mode of proving claims of creditors is regulated by *Rule* 976 *et seq.* **Mode of proving claims of creditors.**

In other actions the creditor, or claimant, is required to file his claim with an affidavit verifying it. If the claim be disputed, the claimant may be required, at the instance of an opposing party, to establish his claim by oral evidence. When the claim is evidenced by some written document, the production of the document and proof of its due execution, if disputed, and the claimant's affidavit of the amount due, is usually a sufficient *prima facie* case, and the onus then rests with the party opposing the claim to adduce evidence: see *Court* v. *Holland*, 8 P. R. 213; and see *Rule* 130 and notes. A claimant may be cross-examined on his affidavit: *Cast* v. *Poyser*, 3 Sm. & G. 369; 3 Jur. N. S. 38; 26 L. J. Ch. 353; and see *Rule* 577.

Parties residing out of the jurisdiction coming into the Master's office to prove claims, may be ordered to give security for costs: *Re Rees, Urquhart* v. *Toronto General Trusts Co.*, 21 C. L. J. 59; and in the event of their failing to substantiate their claims, may be ordered to pay costs occasioned thereby: see *Rule* 1178.

In actions for the administration of a deceased person's estate, no party other than the personal representative, unless by leave of the Master, can appear on the claim of any person, not a party to the cause, against the estate of the deceased in respect of a debt or liability. But the Master may direct any other party to the cause to appear, in addition to, or in place of, the personal representative, upon such terms as to costs as he shall think fit; see *Rule* 334: and see *Rules* 49, 55, 1188. **Parties entitled to attend on proof of claims.**

In a creditor's action, the plaintiff must prove his claim in the Master's office, even though he may have proved it at the trial, and any creditor may dispute the claim of any other creditor: *Field* v. *Titmuss*, 1 Sim. N. S. 218; *Owens* v. *Dickinson*, Cr. & Ph. 48, subject to *Rule* 334; and the Master has power to adjudicate upon all questions arising between creditors *inter se*: *Merchants Bank* v. *Monteith*, 10 P. R. 458. The mere fact that a plaintiff claiming to be a creditor has obtained a judgment directing the taking of accounts and making of inquiries, does not preclude the defendants upon such reference from taking the objection that the plaintiff is not a creditor, and has consequently no *locus standi*, and insisting on the hearing on further directions that his action should on that ground be dismissed: *Bank of Toronto* v. *Beaver Mutual*, 28 Gr. 87. **In creditors' actions, plaintiff must prove claim, and any creditor may dispute any other creditor's claim.**

Creditors who have omitted to file their claims within the time limited, may be allowed to come in and prove their claims, before report, by leave of the Master; and after report, on application in Chambers, so long as the fund **Creditors coming in, after time**

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Rule 62. has expired.

remains in Court: *Lashley* v. *Hogg*, 11 Ves. 602; *Angell* v. *Haddon*, 1 Mad. 529; *Re Metcalfe*, W. N. 1879, 166; *Cotton* v. *Vansittart*, 9 C. L. J. 312; *Andrews* v. *Maulson*, 1 Chy. Ch. 316. But a creditor coming in after a dividend has been paid, is only entitled to prove against the residue of the fund for a similar proportion of his debt, he is not permitted to disturb any prior dividend: *Gillespie* v. *Alexander*, 3 Russ. 130; *Greig* v. *Somerville*, 1 R. & M. 338; *Todd* v. *Studholme*, 3 K. & J. 324.

Creditor objecting to form of decree might rehear.

A creditor proving a claim, and objecting to the form of the decree, could, under the former practice, only obtain relief by rehearing the cause: *Mulholland* v. *Hamilton*, 12 Gr. 413; *Willis* v. *Willis*, 20 Gr. 396. And a petition of a creditor to vary a decree was refused with costs: *Mulholland* v. *Hamilton*, *supra*.

Creditor, appeal by.

A creditor whose claim is disallowed, may appeal at once on a certificate of disallowance, without waiting for a general report: *Re Clagett, Fordham* v. *Clagett*, 20 Ch. D. 637; 46 L. T. N. S. 70.

Interest on claims, when allowed.

Interest cannot be allowed on merchants' accounts unless a demand of interest under the Statute R. S. O., c. 40, s. 86, is proved: *Inglis* v. *Wellington Hotel Co.*, 29 C. P. 387. But in *Michie* v. *Reynolds*, 24 U. C. Q. B. 303, 310, Draper, C.J., said: "It has been the practice for a very long time to leave to the discretion of the jury to give interest where the payment of a just debt has been withheld, and we can find no good reason to depart from that practice." And in *Spence* v. *Hector*, *Ib.* 277, 281, the same learned Judge remarked that "interest is in practice much more frequently allowed by our juries than English authorities would seem to warrant;" and see R. S. O., c. 40, s. 85. As regards the rule followed by Courts of Equity in the allowance of interest, Bacon, V.C., said, in *Spatali* v. *Constantinidi*, 20 W. R. 823, "I take the law of this Court to be perfectly clear and distinct, and to have prevailed for centuries, that upon the wrongful withholding of a debt, the party who wrongfully withholds it is liable to pay interest upon that debt. A jury might always have given it, I do not say it did, but it might always have given it at law. But without reference to what a jury might do, this Court has given it in numberless instances": see *Rodger* v. *Comptoir d' Escompte de Paris*, L. R. 3 P. C. 465.

Interest on claims, at what rate allowed.

After judgment has been recovered for a sum of money, payable "with interest until paid," it is doubtful whether the rate reserved by the contract can be recovered after judgment: see *Hutton* v. *Federal Bank*, 9 P. R. 568. In *Rykert* v. *St. John*, 4 Ont. App. 213; 10 S. C. R. 278, it was held that the contract became merged in the judgment, and only the interest payable under the judgment could be recovered. But in *Popple* v. *Sylvester*, 22 Ch. D. 98; 47 L. T. N. S. 329, it was held that the difference between the rate payable by the contract, and the rate recovered on the judgment, for the period between the recovering of judgment and payment, might be recovered in a subsequent action; and see 19 C. L. J. 21; but see *Ex p. Fewings*, 25 Ch. D. 338; 50 L. T. N. S. 109. In England the Crown has a prerogative right to be paid in priority to other creditors: *In re West London Commercial Bank*, 38 Ch. D. 364; *Attorney-General* v. *Leonard*, 38 Ch. D. 622; *Rex* v. *Ward*, 2 Ex. 301 n.; but see *Clarkson* v. *Attorney-General*, 15 Ont. 632; 16 Ont. App. 202; and see R. S. O., c. 110, s. 32, which in effect repeals 9 Hen. VIII. c. 18.

Master's power as to settlement of conveyances.

62. Under every order whereby the delivery of deeds or execution of conveyances is directed, the Master is to give directions as to delivery of such deeds, and to settle conveyances where the parties differ, and to give directions as to the parties to the conveyances, and as to the execution thereof. Chy. O. 226.

Additional powers of Master as

In every judgment, or order, directing a sale, the Master to whom the action is referred may, without any special directions, settle all necessary conveyances in case the parties differ, or in case there be any parties interested in the

sale who are under any disability except coverture; see *Rule* 107; and see further as to sales, *Rules* 91-115. Under this *Rule* the Master has power to deal with questions arising on the conveyance as to the payment off of incumbrances; and when a party applied to the Court instead of to the Master, no costs were given: *Stammers* v. *O'Donohoe*, 29 Gr. 64. Rules 61, 62. to settlement of conveyances.

63. Where any account is to be taken, the accounting party is, unless the Master otherwise directs, to bring in the same in the form of debtor and creditor, verified by affidavit. The items on each side of the account are to be numbered consecutively, and the account is to be referred to by the affidavit as an exhibit, and not to be annexed thereto. Chy. O. 227. Form of account; to be brought in by accounting party.

When a personal representative of a deceased person is required to account in respect of the dealings of the deceased, he is bound to make up the accounts of such dealings, from the books in his possession: *Strathy* v. *Crooks*, 6 Gr. 162. Personal rep. bound to make up accounts.

A party may be estopped by acquiescence from moving to set aside accounts brought in, in an improper form: *Weale* v. *Rice*, C. P. Coo. 438. Objection to accounts.

The deponent may be cross-examined on an affidavit verifying accounts. A party who is to be cross-examined on an affidavit verifying accounts, is entitled to detailed notice of the points in respect to which he is to be examined: *Re Lord*, *Lord* v. *Lord*, L. R. 2 Eq. 605. A notice that all the items but one are objected to, is insufficient: *McArthur* v. *Dudgeon*, L. R. 15 Eq. 102; and see *Rule* 70 *post*. Such cross-examination may take place before the account is vouched: *Meacham* v. *Cooper*, L. R. 16 Eq. 102. Cross-examination.

64. The Master, if he thinks fit, may direct that in taking accounts, the books of account, in which the accounts required to be taken have been kept, or any of them, be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objection thereto as they may be advised. Chy. O. 228. Master may direct books of account to be taken as *prima facie* evidence.

The Chy. Ord. 228, from which this *Rule* was taken, was adapted from Imp. Stat, 15 & 16 Vict. c. 86. s. 54. Every sum of $8 and under, is allowed without a voucher, upon the oath of the accounting party: see *Everard* v. *Warren*, 2 Ch. Ca. 249; but this oath must be positive, and not on belief only: *Robinson* v. *Cumming*, 2 Atk. 410; and it would seem that the aggregate of such items should not exceed $400 in amount: Bennett's M. O. 86. Greater latitude in proving other items is also allowed when the account is of long standing: *Ib.* Sums of $8 and under allowed without voucher.

Receipts, or other vouchers, must be produced, but when they are lost, or accidentally destroyed, secondary evidence will be let in: *Ib.*; and it is to such cases, or when, for any other reason, it is impossible to vouch the account in any other way, that this *Rule* is intended to apply: *Lodge* v. *Prichard*, 3 D. M. & G. 906; and see *Ewart* v. *Williams*, 7 D. M. & G. 67. Vouchers to be produced.

In partnership cases, however, the books of account of the firm are admissible by virtue of the general law, without any special direction: *Gething* v. *Keighley*, 9 Ch. D. 547, 551. Books of trustees of a will were allowed to be taken as *prima facie* evidence for a period of 21 years, as against a *cestui que trust* who had access to them, but had not actually inspected them: *Banks* v. *Cartwright*, 15 W. R. 417; and see *Sleight* v. *Lawson*, 3 K. & J. 292; *Ogden* v. *Battams*, 1 Jur. N. S. 791; *Hardwick* v. *Wright*, 15 W. R. 953. Books of accounts, when admissible.

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Rules 65-69.

No state of facts, etc., to be brought in.

65. No state of fact, charges, or discharges are to be brought into the Master's office; and where original deeds or documents can be brought in, no copies are to be made without special direction. Chy. O. 229.

Copies, abstracts, etc., to be supplied as Master directs.

66. Where directed, copies, abstracts of, or extracts from accounts, deeds, or other documents and pedigrees, and concise statements, are to be supplied; and where so directed, copies are to be delivered as the Master may direct. Chy. O. 230.

The party having the conduct of the reference, is usually required to furnish copies, abstracts, etc., which relate to the general inquiries, and the other parties only such as relates exclusively to themselves; see *ante* note to *Rule* 45.

Parties bound by Master's direction without warrant.

67. A party directed by the Master to bring in an account, or do any other act, is to be held bound to do the same in pursuance of the direction of the Master, without any warrant or written direction being served for that purpose. Chy. O. 231.

This *Rule* of course implies that the party directed to do the act, or his solicitor, has actual notice of the direction, otherwise a warrant must be taken out and served.

Warrant to appoint a day to ascertain what is admitted and what contested.

68. Before proceeding to the hearing and determining of a reference, the Master may appoint a day in the meantime, if he thinks fit, for the purpose of entering into the accounts and inquiries, with a view to ascertaining what is admitted and what is contested between the parties. Chy. O. 232.

Admissions before the Master should be entered in his book (see *Rule* 71), and subscribed by the parties or their solicitors: *Foster* v. *Allison*, 11 P. R. 233; 21 C. L. J. 418. Admissions made by a solicitor without the authority of his client have been allowed to be withdrawn on the terms of the items admitted being taken to be *prima facie* correct, and the onus being cast on the party withdrawing the admission, showing that they are wrong: *McBean* v. *McBean*, 11 P. R. 429; 22 C. L. J. 348.

When day not previously appointed, warrant may issue to ascertain what admitted.

69. Where the Master has omitted to appoint a day for the purposes mentioned in Rule 68, he may grant to the party bringing in accounts a warrant to proceed on the same, for the purposes aforesaid; such warrant to be underwritten, as follows: "On leaving the accounts of, etc., and take notice that you are required to admit the same, or such parts thereof as you can properly admit." Chy. O. 233.

As to the costs occasioned by any party improperly refusing to admit facts see *Rule* 1189: *McIntyre* v. *Canada Co.*, 18 Gr. 370.

70. A party seeking to charge an accounting party beyond what he has in his account admitted to have received, is to give notice thereof to the accounting party, stating so far as he is able, the amount so sought to be charged, and the particulars thereof in a short and succinct manner. Chy. O. 237.

Rules 70-73.

Party seeking to charge accounting party must give notice of particulars.

An accounting party who is intended to be cross-examined on his affidavit verifying his accounts, is entitled to notice of the items on which he is to be cross-examined: *Re Lord, Lord* v. *Lord*, L. R. 2 Eq. 605; *Wormsley* v. *Sturt*, 22 Beav. 398; and it is not sufficient to inform him that all the items except one are objected to, but the notice must specify the points on which the cross-examination is to proceed: *McArthur* v. *Dudgeon*, L. R. 15 Eq. 102; and see *Glover* v. *Ellison*, 20 W. R. 408; and unless he be duly notified he may refuse to be sworn: *McArthur* v. *Dudgeon, supra*; see Eng. Chy. Ord. 30, of 16th Oct., 1852.

Accounting party entitled to notice of items, he is to be cross-examined on.

71. The Master is to keep in his office a book, to be called the "Master's Book," in which, upon the bringing in of a judgment or order of reference, are to be entered, the style of the cause, the name of the solicitor prosecuting the reference, the date of the judgment or order being brought in, and the proceedings then taken; and the Master is also to enter therein, from time to time, the proceedings taken before him, and the directions which he gives in relation to the prosecution of the reference, or otherwise. Chy. O. 238.

Master's Book, how to be kept.

In this Book referred to in this *Rule* any admissions which are made during the proceedings before the Master, should be entered and signed by the parties or their solicitors making the same: see *Rule* 68 note.

72. Upon the application of any person, the Master is to certify, as shortly as he conveniently can, the several proceedings had in his office in any cause or matter, and the dates thereof. Chy. O. 239.

Master to certify proceedings in his office.

After a Master has made his report, he should not certify as to any matters before him in the course of the inquiry upon which he has made his report, unless required by the Court so to do: *Rosebatch* v. *Parry*, 27 Gr. 193.

For forms of certificates, see Leggo's Forms 2nd ed., Nos. 669, 966. As to appealing from a certificate: see *Rule* 848.

73. In giving directions, and in regulating the manner of proceeding before him, the Master is to devise and adopt the simplest, most speedy, and least expensive method of prosecuting the reference, and every part thereof; and with that view, to dispense with any proceedings ordinarily taken, but which he conceives to be unnecessary and to shorten the periods for taking any proceedings; or to substitute a different course of proceedings for that ordinarily taken. Chy. O. 240.

Master to devise simplest and speediest method of prosecuting references.

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Rules 74-77.

The Master is not authorized under this *Rule* to employ the services of experts: *Re Robertson, Robertson* v. *Robertson*, 24 Gr. 555. But he may appoint experts to examine into matters referred to him so as to enable them to give evidence before him, on which to act; and the costs of persons so appointed are taxable between party and party: *McKay* v. *Keefer*, 12 P. R. 256.

The Master should allow amendments of accounts, when such amendments would be allowed before judgment: *Court* v. *Holland*, 4 Ont. 688.

Appointments for several days may be included in one warrant.

74. Where the Master directs parties not in attendance before him to be notified to attend at some future day, or for different purposes at different future days it shall not be necessary to issue separate warrants, but the parties shall be notified by one appointment, signed, by the Master, of the proceedings to be taken, and of the times by him appointed for the taking of the same. Chy. O. 241.

The words "warrant" and "appointment," though apparently used in this and the two following *Rules* as distinct things, appear nevertheless to be in effect convertible terms: see Bennett's M. O., p. 6 *et seq.*, and see form of warrant: Bennett's M. O. App. i.

Parties notified by Master not to be served with warrant.

75. Where parties are notified by appointment from the Master, of proceedings to be taken before him, no warrants are to be issued as to such parties, in relation to the same proceedings. Chy. O. 242.

Parties notified, liable for default, as if served with warrant.

76. Parties making default upon such appointments, are to be subject to the same consequences as if warrants had been served upon them. Chy. O. 243.

Master to notify parties when hearing concluded, and to note it in his book. Thereafter no evidence to be given except by leave.

77. As soon as the hearing of any matter pending before the Master is completed, he shall so inform the parties to the reference then in attendance, and make a note to that effect in his book; and after such entry no further evidence is to be received, or proceedings had, without the special permission of the Master; and the Master may proceed to prepare his report or certificate without further warrant, except the warrant to settle which is to be served on the parties as the Master directs. Chy. O. 247.

Master's report and certificate.

There is no difference between a report and a certificate of a Master, "though we apply the term 'report' to the more lengthened productions of a Master, and the term 'certificate' to his shorter statements. It is, I think, clear that all his reports are certificates, and all his certificates are reports," *per* Shadwell, V.C., *Chennel* v. *Martin*, 4 Sim. 344.

Parties served with judgment, when entitled to notice.

Parties served with the judgment under *Rule* 322, who do not give notice to the plaintiff that they desire to attend the proceedings, need not be served with a warrant to settle the report: *Green* v. *Measures*, W. N. 1866, 122; *Lee* v. *Sturrock*, W. N. 1876, 226.

It would seem that a warrant to settle a report formerly required four days service: see Bennett's M. O. 20; Beames' Ord. in Chy. 259.

When the Master has closed the reference, an application to let in further evidence may be made to him at any time before the report is signed: *Re Ritchie, Sewery* v. *Ritchie*, 23 Gr. 66. After report, the application can only be made to the Court; *O'Donohoe* v. *Hembroff*, 9 C. L. J. 312: or a Judge: see note to *Rule* 848. But to warrant such application being granted, the applicant must in general make such a case as would entitle him to a new trial: *Waddell* v. *Smyth*, 3 Chy. Ch. 412; and see *Patterson* v. *Scott*, 1 Gr. 582; *Saunders* v. *Saunders*, 45 L. T. N. S. 628; *Carradice* v. *Currie*, 19 Gr. 108; *Mason* v. *Seney*, 12 Gr. 143; *Hosking* v. *Terry*, 8 Jur. N. S. 977. **Rule 77.** Application to open reference.

A Master is not *functus officio* until he has made his report on all the matters referred to him: *Rae* v. *Geddes*, 3 Chy. Ch. 404; but after he has made his report he should not certify as to any matters before him in the course of the inquiry upon which he has made his report, unless required by the Court so to do: *Rosebatch* v. *Parry*, 27 Gr. 193; the same rule applies to taxing officers: *Langtry* v. *Dumoulin*, 10 P. R. 444. Master not *functus officio* till he has fully reported.

Masters' Reports, are either General, Special, or Separate.

A GENERAL REPORT, is that which comprises the conclusion which the Master has come to, upon all the matters referred to him by the judgment, or order under which he has proceeded. General report.

A SEPARATE REPORT is that which embraces one or more separate matters of the reference, and the conclusion the Master has come to thereon; and is limited thereto, apart from the other matters referred. A report on sale is a familiar illustration of a *separate* report. Separate report.

A SPECIAL REPORT, is a report of special circumstances found by the Master, as a guide to the Court for some further direction upon the facts so reported. Special report.

Special reports on matters which the Master has power himself to adjudicate upon, and dispose of, are not to be made, unless specially directed by the judgment, or order, of reference: see Bennett's M. O. 18, 19; *Walmsley* v. *Bull*, 2 Chy. Ch. 344.

A report should not be dated before the costs included therein have been revised, when revision is necessary: *Waddell* v. *McColl*, 14 Gr. 211.

A report, like a judgment, should state results only, and should not set forth the evidence, arguments, or reasons on which the conclusions are arrived at: *Sovereign* v. *Sovereign*, 15 Gr. 559. Report, what it should state.

When the Master is specially directed to state his reasons, they should be stated briefly; *McCargár* v. *McKinnon*, 15 Gr. 361. All unnecessary prolixity in reports is to be avoided: *S. C.*, 17 Gr. 525.

The report should not go beyond the order, or judgment, of reference, or the Court will not respect it; see Beames' Orders 23; and see *Clouster* v. *McLean*, 10 Gr. 576. And matters should not be reported specially, or as special circumstances, which the Master has himself power to adjudicate upon: *e.g.*, whether or not an accounting party is chargeable on the footing of wilful default, etc.: *Walmsley* v. *Bull*, 2 Chy. Ch., 344; whether or not a particular debt is, or is not, an asset of an estate being administered: *Clouster* v. *McLean*, 10 Gr. at p. 578. Should not go beyond order of reference. Nor report specially unnecessarily.

But the Master should state in his report such matters as may be necessary for the information of the Court, on further directions, or to enable it to dispose of the question of costs: *e.g.*, the priorities of creditors: *Lavin* v. *O'Neill*, 13 Gr. 179; and of the legatees: *Clouster* v. *McLean*, 10 Gr. 576, should be stated; and when a separate solicitor is appointed to represent a class, which is *prima facie* sufficiently represented by the plaintiff, or some other party to the action, the reason for the appointment should be stated: *Gorham* v. *Gorham*, 17 Gr. 386: and where an advertisement for creditors has been dispensed with, the fact and the reason for it should be stated in the report: see *Rule* 60 note. When the Master dispensed with service of judgment on parties required to be served therewith by *Rule* 322, he was formerly required to state But should report matters necessary to dispose of costs.

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Rules 78-80.

his reasons therefor, in his report: see Chy. Ord. 587, Holmested's Rules and Orders 349, but that provision is not embodied in these *Rules*.

Sums charged against an accounting party, on the footing of wilful default, should be distinguished in the report from sums actually received: *Moodie* v. *Leslie*, 12 Gr. 537.

Final report, when to be made.

The Master should not make a final report in an action until he is in a position to deal with all the matters referred to him: *e.g.*, it is improper to make a final report in an action to wind up a partnership, finding a balance due from one partner to another, until all the assets are realised: *Smith* v. *Crooks*, 3 Gr. 321. But when the Master is not able to make a final report, he may, when necessary, make a *separate* report as to certain of the matters referred to him, and which he is able to report on.

Where a Master dies or becomes incapacitated pending the reference, an order may be obtained referring the cause to another Master with power to adopt the proceedings already taken: *Anon*, 4 Jur. 858.

For forms of reports on sales: see Form 44; and of reports in administration actions, Form 42.

Points intended to be raised on appeal to be taken before Master.

78. Parties are to raise before the Master, in respect of any matters presented in his office, for his decision, all points which may afterwards be raised upon appeal. Chy. O. 248.

Chy. Ord. 248, from which this *Rule* is taken, went on to provide that in case an appeal was allowed on any ground not distinctly taken before the Master, the Court might order the appellant to pay the costs of the appeal; but this provision has not been embodied in these *Rules*. Under the Chy. Ord. 248, it would seem that the Court might, in its discretion, entertain appeals on grounds not distinctly taken before the Master, but in such cases might order the appellant, even if successful, to pay the costs of the appeal. But under this *Rule* it would appear that the Court has no longer power to entertain appeals on any grounds not taken before the Master.

In order to avoid any question as to whether or not any point intended to be raised on appeal, has been taken before the Master, it is safer to deliver the objection in writing, or to have it noted in the Master's Book; but this is not absolutely necessary: see *Rule* 82.

Or Court may refuse to entertain it.

Although the Court might formerly allow an appeal on a ground not taken before the Master, it might refuse so to do. Thus, the Court refused to allow the Statute of Limitations to be raised on appeal, it not having been raised before the Master: *Brigham* v. *Smith*, 18 Gr. 224; and see *Clouster* v. *McLean*, 10 Gr. 576.

See further as to appeals from reports: *Rule* 82 and notes.

Accounts, charges, affidavits, etc., not to be set out in report.

79. In the Master's report no part of any account, charge, affidavit, deposition, examination, or answer, brought in or used in the Master's office, is to be stated or recited, but instead thereof the same may be referred to by date or otherwise, so as to inform the Court as to the paper or document so brought in or used. Chy. O. 249.

As to form of reports, see note to *Rule* 77.

Schedule to be attached as

80. Reports affecting money in Court, or to be paid into Court, are to set forth in figures in a schedule a brief

summary of the sums found by the report, and which may be paid or payable into or out of Court, and the funds or shares to which the sums of money are respectively chargeable. Chy. O. 250. Rules 81-82. to moneys in Court, or payable into Court.

81. As soon as the Master's report or certificate is prepared, it is to be delivered out to the party prosecuting the reference, or in case he declines to take the same, then, in the discretion of the Master, to any other party applying therefor; and a common attendance is to be allowed to the party taking the same. Chy. O. 251. Report to be issued to party prosecuting reference, or if he decline it, then to any other party.

82. No written objections or exceptions need be taken before the Master previously to an appeal. See Chy. O. 253. Without previous exceptions before Master.

Appeal, When Necessary.—Ordinarily, where the objection to the report is not manifest on its face, an appeal must be brought, unless the report be a nullity, as, *e.g.*, where made without notice in vacation: *Fuller* v. *McLean*, 8 P. R. 549; or under an invalid order: *Queen* v. *Smith*, 7 P. R. 429; *Brown* v. *Dollard*, 6 P. R. 113; where the report goes beyond the judgment, or order, of reference, the report as to such matters will "not be respected" by the Court: Beames' Ord. 23, and therefore no appeal as to such matters would seem necessary; an incumbrancer claiming priority to the plaintiff, who is made a party as a subsequent incumbrancer, may either move to set aside the order making him a party (which appears to be the preferable practice), or appeal from the report on the question of priority: *McDonald* v. *Rodger*, 9 Gr. 75, and see *Montgomery* v. *Shortis*, 3 Chy. Ch. 69. Appeal when necessary.

Mere clerical errors in a report may be corrected, even after confirmation, without appeal by order in Chambers: see *Rule* 848 note; and when the Master who has made the report has also jurisdiction in Chambers, it would appear to be competent for him to make the order; but he has no jurisdiction to make any material alteration or amendment of the report, not being a clerical error; that can only be properly done on appeal: see *Skead* v. *Holland*, 9 C. L. T. 50.

Time For Appealing.—An appeal from any report, ruling, or other determination, of any Master, must now be brought on for argument, before a Judge in Court, within one month from the date of such report, ruling, or other determination: *Rule* 849,—or within such further time as a Judge may think proper; the long vacation is excluded from the computation of the month: *Rule* 484, but not the Christmas vacation. An appeal from a ruling of a Master, must be brought within the same time as is allowed for appealing from a report: *Mitchell* v. *Mitchell*, 22 Gr. 23. Time for appealing.

In *Markle* v. *Ross*, 13 P. R. 135, it was held under the Consolidated *Rules* there could be no appeal from a *ruling* of a Master because the provision of Chy. Ord. 642, had not been included in the Consolidated *Rules*; and that an appeal, now only his from a report, by which was possibly meant a general report. It is however to be observed that unless a new meaning is to be given to the words "report" and "certificate" from that which they possessed under the former practice, there is nothing in the Consolidated *Rules* which prevents an appeal from a Master ruling, because, as we have already seen, a certificate of a Master is a report: see *Rule* 77 note; and a Master's certificate of his ruling is therefor a "separate report," and as such it would seem to be appealable in the same way as any other report.

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Rule 82. Notice of appeal, and setting down for argument.

Notice of Appeal and Setting Down for Argument.—Seven clear days' notice of the appeal must be given to the opposite party: *Rule* 849; *Hayes* v. *Hayes*, 8 P. R. 546; and such notice must be returnable within one calendar month from the date of the report: *Rule* 4, 849; R. S. O. c. 1, s. 8, ss. 15; and the appeal must be set down for argument on the day on which the notice is returnable: *Rule* 850.

Such appeals are to be heard on Tuesday: see *Rule* 211; but the operation of that *Rule* is at present suspended, and the present practice is to set down such appeals in the Chancery Division for a Thursday, and in the other Division for either Tuesday or Friday.

Where an appeal was set down for a *dies non*, but was placed by the Clerk in the paper for the next regular sitting of the Court, it was held not to be irregularly set down: *McCaw* v. *Ponton*, 11 P. R. 328. Appeals have hitherto usually been brought before a Judge of the Division in which the action was pending, but any Judge of the High Court has jurisdiction to entertain such appeals: *Laidlaw* v. *Miller*, 11 P. R. 335.

Report must be first filed.

Before notice of an appeal is given the report must be filed: *Hayes* v. *Hayes*, 8 P. R. 546.

Notice of appeal should set out grounds.

The notice of appeal should set out *seriatim* the grounds upon which the appeal is brought, and should include all the grounds of objection intended to be urged: *Rule* 849; objections cannot be raised on an appeal from a further report, made in pursuance of an order to the Master to review his report, which might have been taken, but were not, on the appeal from the original report: *Ross* v. *Perrault*, 13 Gr. 206.

Who entitled to appeal.

Who Entitled to Appeal.—Any person having a substantial interest in the question involved in an appeal, is entitled to appeal; but persons having no interest in the subject of appeal, cannot appeal, even though the report be erroneous; *Thompson* v. *Luke*, 10 Gr. 281; *McCargar* v. *McKinnon*, 17 Gr. 525; neither will an appeal lie from a Master's ruling, or direction, by a party who has complied with it, even though it be to escape commitment for disobedience: *Mitchell* v. *Mitchell*, 22 Gr. at p. 24; neither will an appeal lie, where the amount involved is of trifling amount, *e. g.*, where not more than $10 was in question, an appeal was dismissed: *McQueen* v. *McQueen*, 2 Chy. Ch. 344.

And from Master's ruling as to evidence; or principle on which accounts to be taken; or on disallowance of a claim.

An appeal may also be brought, before the Master has made his report, from his ruling as to the admissibility of evidence: *McDonald* v. *Wright*, 12 Gr. 552; or upon his finding as to the principle upon which an account should be taken: see *Court* v. *Holland*, 29 Gr. 19; or by a creditor from the Master's ruling, disallowing his claim: *Wood* v. *Brett*, 9 Gr. 452; and he need not wait for a general report, but may at once obtain a certificate of disallowance and appeal therefrom: *Re Clagett*, *Fordham* v. *Clagett*, 20 Ch. D. 637; 46 L. T. N. S. 70.

Appeals from taxing officers.

Appeals might formerly be brought from a Master's certificate of taxation: *Grahame* v. *Anderson*, 2 Chy. Ch. 303; *Re Ponton*, 15 Gr. 355; from a Master's ruling a to any point, raised on a taxation of costs: *Stinson* v. *Martin*, 2 Chy. Ch. 86; under the former *Judicature Rules* there was no appeal to a Judge direct from a local officer's taxation, but his taxation must have been first revised by one of the Taxing Officers in Toronto, from whom an appeal lay to a Judge: *Crowe* v. *Steeper*, 2 C. L. T. 88; *McGannon* v. *Clarke*, 19 C. L. J. 236; *Gage* v. *Canada Publishing Co.*, 19 C. L. J. 175; 3 C. L. T. 267; *Torrance* v. *Torrance*, 9 P. R. 271; but see *contra*, *Grant* v. *Grant*, 10 P. R. 40. Under these *Rules* an appeal lies to a Judge in Chambers; see *Rules* 196, 851-3; and there may be also an appeal from the Taxing Officers in Toronto to the Master in Chambers, or Master in Ordinary: see *Rule* 854.

No appeal from an award.

Where a cause had been referred to a Master as an arbitrator, by a consent decree, which provided that "either party should be at liberty to appeal against the award in the same manner and to the same extent that a report may be appealed from," it was held nevertheless, that an appeal from the award could not be entertained: *Burns* v. *Chamberlin*, 25 Gr. 148: but see R. S. O. c. 53, ss. 4, 7. Where the order directing the reference

was made without jurisdiction, the Court refused to entertain any appeal from a report made thereunder: *Queen* v. *Smith*, 7 P. R. 429; *Brown* v. *Dollard*, 6 P. R. 113. Rule 83.

When on an appeal from a Master's report a reference back to review the report is ordered, the appellant cannot appeal from the further report as to matters disposed of by the first report, and not objected to on the first appeal: *Ross* v. *Perrault*, 13 Gr. 206. Matters not objected to on first appeal.

Hearing of Appeal.—Appeals from the Master's ruling as to the regularity of proceedings in his office, in point of form, will not be readily allowed, even though the Court be of opinion that he might have properly taken an opposite view: *Sculthorpe* v. *Burn*, 12 Gr. 427. Hearing of appeal.

On matters of fact decided by the Master who has had the witnesses before him, the Judge will differ from the Master with great hesitation, and only when it is manifest that he has fallen into error: *Coldwell v. Hall*, 9 Gr. at p. 115; and the Judge will not in general interfere with the decision of the Master as to the weight of evidence, and as to the relative credibility of witnesses whose evidence has been taken before him, *viva voce*: *Day* v. *Brown*, 18 Gr. 681; *Waddell v. Smyth*, 3 Chy. Ch. 412; but see *McArthur* v. *Prittie*, 29 Gr. 500. But if it can be shown, that there is not only a balance of direct testimony, but also corroborative circumstances pointing strongly against the Master's conclusion, the Judge on appeal may review the evidence, and reverse his finding on a question of fact: *Chard* v. *Meyers*, 19 Gr. 358; *Armstrong* v. *Gaye*, 25 Gr. 1; *Morrison* v. *Robinson*, 19 Gr. 480. When the Master determines the question without seeing the witnesses, the Judge will, in such a case, be less trammelled by the Master's finding, and will dispose of the question upon his own judgment as to the weight of evidence: *Fawcett* v. *Burwell*, 27 Gr. 445. Appeals on questions of fact; credibility; or weight of evidence.

Order on Appeal.—The order on appeal should always recite the grounds of the appeal: *Downey* v. *Roaf*, 6 P. R. 89. Grounds of appeal to be recited in order.

Where the report is varied it would seem that it is not the proper practice to make any actual alteration in the original: *Fox* v. *Bearblock*, 45 L. T. N. S. 469; 17 Ch. D. 429; 46 L. T. N. S. 145; nor where the alteration is simple, need it be referred back to the Master to alter: *Teeter* v. *St. John*, 10 Gr. 85, the order on the appeal specifying the alteration made, being sufficient: *Ib.* Variation of report.

Where the report is referred back, and it is not intended that further evidence should be received, the order must contain a direction to that effect: *Morley v. Matthews*, 12 Gr. 453; 3 C. L. J. 21.

Reference Back.—When a report is referred back, the Master is at liberty, as of course, to receive further evidence, unless the Judge otherwise orders, or the reference back is expressed to be for a purpose on which further evidence could not be material: *Morley* v. *Matthews*, 12 Gr. 453. Where the reference back is to ascertain a particular fact, the Master cannot open other matters in his report not objected to on appeal: *Williams* v. *Haun*, 10 Gr. 553. Nor on a reference back can the Master entertain a claim not previously made before him, unless specially ordered so to do: *Romanes* v. *Herns*, 22 Gr. 469. Reference back, further evidence on when receivable.

Costs.—See *Rule* 1170, and notes. Costs of Appeal.

83. Any party affected by a report may file the same, or a duplicate thereof, and the filing of a duplicate shall have the same effect as the filing of the report. Chy. O. 254. Any party may file report, or duplicate.

The report, or certificate, of a Master, or Taxing officers, must be filed before an appeal can be had therefrom: *Hayes* v. *Hayes*, 8 P. R. 546; *Langtry* v. *Dumoulin*, 10 P. R. 444; or before any process can issue thereon: *Jellett* v. *Anderson*, 8 P. R. 387. And where it appoints a time for the payment of money it should be filed before the day of payment: *Milis* v. *Dixon*, 2 Chy. Ch. 53; and be confirmed where necessary: *Mountain* v. *Porter*, 1 Chy. Ch. 207. Report must be filed before appeal, and before it can be enforced.

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Rules 84-85.

As to delay in filing a duplicate report by a party intending to appeal: see *Caisse* v. *Burnham*, 6 P. R. 201.

A party cannot, by neglecting to file a report, extend the time for bringing on the appeal to be heard beyond a calendar month from its date: see *Rule* 849.

Reports where to be filed.

84. In cases of references to Local Masters the report shall be filed in the office of such Local Master, but may, at the request of any party to the proceedings, after having been so filed, be forwarded to the office of the Clerk of Records and Writs. In all other cases the report shall be filed in the proper office in Toronto of the Division to which the action or proceeding is assigned. See J. A. Rule 599.

Payment of money into bank, how to be directed in report.

85. Where the Master is directed to appoint money to be paid at some time and place, he is to appoint the same to be paid into some Bank at its head office, or at some branch or agency office of such Bank, to the joint credit of the party to whom the same is made payable, and of the Accountant; the party to whom the same is made payable to name the Bank into which he desires the same to be paid, and the Master to name the place for such payment. Chy. O. 255.

Reason for *Rule*.

This *Rule* does not relate to the payment of money into Court (as to that, see *Rule* 164, *et seq.*), but is intended to provide for the payment of money in cases where the payee is required to do some act, as a condition of his receiving the money; *e.g.*, in specific performance actions where the vendor is required to execute a conveyance; or in mortgage actions, where the mortgagee, or incumbrancers, are required to release and discharge their incumbrances, etc.

How paid out.

Money paid into a bank under this *Rule*, is paid out on a joint cheque of the officer of the Court and of the party to whose credit it is paid in. The cheque will be signed by the officer either upon an order, obtained for that purpose, being produced, or without order, upon filing the written consent of the solicitor of the party paying the money in.

If the money be paid into the sole credit of the party entitled under *Rule* 86, he may draw it out at his pleasure.

Order for, when necessary.

Where the party paying money in, refuses to consent to its payment out to the party entitled, the latter may move in Chambers for an order to the officer to sign the cheque: *Bernard* v. *Alley*, 2 Chy. Ch. 91; *Weeks* v. *Stourton*, 11 Jur. N. S. 278. Although the refusal to consent appears to have been without reason, the applicant in *Bernard* v. *Alley* was refused his costs. The application must be made on notice: *Totten* v. *McIntyre*, 2 Chy. Ch. 462.

Report should be filed before day appointed for payment.

A report appointing the payment of money, should be filed before the day named for the payment: *Mills* v. *Dixon*, 2 Chy. Ch. 53; and confirmed, where the report is one requiring confirmation: *Mountain* v. *Porter*, 1 Chy. Ch. 207.

If the bank closes its office on or before the day named for payment, and default be made, an application must be made in Chambers to appoint a new day and to name another bank, and the order must be served: *King* v. *Connor*, 1 Chy. Ch. 274.

86. Where money is paid into a bank, in pursuance of such appointment, the party paying may pay the same either to the credit of the party to whom the same is made payable, or to the joint credit of the party and the Accountant; and if the same be paid to the sole credit of the party, such party shall be entitled to receive the same without the order of the Court. Chy. O. 256. Rules 86-89. Party may pay money in to the sole credit of the party entitled thereto or to the joint credit of such party and the Accountant.

87. In administration suits reports are, as far as possible, to be in the form No. 42 in the Appendix. Chy. O. 589. Reports in administration suits.

The Master should not, in an administration action, attach to his report a copy of the will of the testator whose estate is administered: *McCargar* v. *McKinnon*, 15 Gr. 361.

88. The Master in Ordinary shall have the same power, authority, and jurisdiction, as the Master in Chambers, in respect of all causes and matters referred to him, or which may arise in his office. J. A. Rule 541 (*a*). Master in Ordinary, jurisdiction of, in Chambers.

(*a*) Where he acts as Master in Chambers in a matter within his jurisdiction as Master in Ordinary, the fees payable in stamps shall be the same as if he were acting as Master in Ordinary. Fees.

(*b*) Any Official Referee, upon the request of the Master in Ordinary, or of a Judge of the High Court, may sit with or for the Master; and while sitting for him shall have all the authority and power of such Master, but shall not be entitled to any fees. J. A. Rule 541 (*b*). Official Referee may sit for Master and have like powers.

It will be observed that s.s. (*b*) of this *Rule* only applies where the Official Referee is sitting "for the Master," it does not apply to cases where a reference is made to an Official Referee direct: in the latter cases he has, however, certain powers of the Master in Ordinary under *Rule* 43 *et seq.* A report of an Official Referee, whether made upon a reference to him direct, or when sitting for the Master, is to be appealed from, or confirmed, in the same manner as a Master's report: *Rules* 43, 848, 50. Practice as to appealing from, or acting on, report of an Official Referee.

(ii) *Sales.*

89. Where a sale is ordered, the Master may cause the property, or a competent part thereof, to be sold either by public auction, private contract, or tender, or part by one mode and part by another, as he may think best for the interest of all parties. J. A. Rule 331. General provisions were a sale is ordered.

This and the following *Rules* 90-115, apply to sales by official Referees, as well as by Masters: see *Rule* 43.

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Rules 90, 91.

Conduct of sale under trusts of will or settlement.

90. Where the trusts of any will or settlement are being administered, and a sale is ordered of any property vested in the trustees of such will or settlement upon trust for sale or with power of sale by the trustees, the conduct of the sale shall be given to the trustees, unless the Court or a Judge otherwise directs. J. A. Rule 408.

Identical with Eng. R., March 1879, r. 7. Formerly the plaintiff would have had the conduct: *Re Marshall*, W. N. 1879, 12.

Under this *Rule* the conduct of the sale was given to a defendant in an action by one trustee who was also tenant for life, against the three other trustees: *Re Gardner, Gardner* v. *Beaumont*, 48 L. J. Chy. 644.

Copy of order directing sale, is not to be brought into M. O. unless required by the Master.

91. Where a sale is to take place under a judgment or order of the Court, no copy of the judgment or order, or any part thereof, is to be brought into Chambers, or the Master's office, but the original judgment or order is to be used, unless the Judge or Master requires a copy. Chy. O. 374.

Conduct of sale. Who entitled to.

Conduct of the Sale.—The party having the carriage of the order, or judgment, directing a sale, is the party usually entitled to the conduct of the sale.

The mere extent of the interest of any party in the property, or the possession by him of title deeds, do not give any right to conduct the sale. Usually the plaintiff having the carriage of the judgment, or order, will also have the conduct of the sale: *Dale* v. *Hamilton*, 10 Ha. App. vii. But where it is for the benefit of all parties, the conduct of the sale may be given to a defendant: *Hewitt* v. *Nanson*, 7 W. R. 5; *Dixon* v. *Pyner*, 7 Ha. 331; or where all parties to the action wish to bid, it may be given to an independent solicitor: *Ramsay* v *McDonald*, 8 P. R. 283.

Trustees entitled to, in certain cases.

But "where the trusts of any will, or settlement, are being administered, and a sale is ordered of any property vested in the trustees of such will, or settlement, upon trust for sale, or with power of sale by such trustees, the conduct of such sale shall be given to such trustees, unless the Judge shall otherwise direct," *Rule* 90 *supra*.

Duty of solicitor having conduct of sale.

It is the duty of the solicitor of the party having the conduct of the sale, to prepare the advertisement, to procure its settlement by the Master, and to see to its publication, pursuant to the Master's direction, to make the necessary arrangements with the auctioneer, to attend the sale, to see that the contracts are duly signed by the purchasers, to prepare the necessary affidavits proving the sale, and procure the report on sale to be settled and filed, to deliver abstracts and answer requisitions, and objections, and to attend any reference as to the title; to attend the settlement of the conveyances, and procure their execution by all necessary parties to the action; and to enforce, if necessary, by motion the due performance by the purchasers of their contracts. He is usually styled "the vendors' solicitor," and as such he acts for the purpose of the sale, and as regards the purchaser, for all the parties to the action who are interested in the land directed to be sold: *Dalby* v. *Pullen*, 1 R. & M. 296; *Street* v. *Hallett*, 6 P. R. 312; but his own client must bear any loss occasioned by such solicitor's malfeasance, such as the misappropriation of the purchase money: *Mulkins* v. *Clarke*, 11 P. R. 350.

Duty of parties.

Every party to the action is bound to facilitate the sale: *Knott* v. *Cottee*, 27 Beav. 33. Interference by other parties, with the party having the conduct of the sale, may be restrained by injunction: *Dean* v. *Wilson*, 10 Ch. D. 136.

The party having the conduct of the sale, is not at liberty to bid, except leave be granted specially: see *Rule* 98. **Rules 92-94.**

Where a sale has proved abortive for want of bidders, the property may be advertised and put up again for sale without further order: *Sherwood* v. *Campbell*, 1 Chy. Ch. 299. Abortive sale.

92. An appointment or warrant in respect of the sale is to be obtained from the Judge or Master, and served upon all necessary parties. Chy. O. 375. Appointment to settle advertisement.

93. At the time appointed thereby, the party having the conduct of the sale, is to bring into Chambers, or the Master's office, a draft advertisement, but no particulars or conditions of the sale, or any draft or copy thereof. Chy. O. 376. Draft advertisement to be brought in, but no particulars or conditions.

It will be seen from the next *Rule*, that any particulars in which the proposed conditions of sale differ from the standing conditions, are to be set out in the advertisement. This *Rule*, therefore, renders it unnecessary to bring in any particulars and conditions of sale, apart from those necessarily required to be embodied in the advertisement.

94. The advertisement is to contain the following particulars:— Advertisements of sale to contain.

(1) The short style of cause; Style of cause.

(2) That the sale is in pursuance of a judgment or order of the Court; Recital of order.

(3) The time and place of sale; Time and place of sale.

(4) A short and true description of the property to be sold; Description of property.

(5) The manner in which the property is to be sold, whether in one lot or in several, and if in several, how many, and what lots; Manner of sale.

(6) What proportion of the purchase money is to be paid down by way of deposit, and at what time or times, and whether the residue of such purchase money is to be paid with, or without interest; Terms of payment of purchase money.

(7) Any particulars, in which the proposed conditions of sale differ from the standing conditions. Chy. O. 377. Any special conditions.

Advertisements of sale should be framed as concisely as possible, and all matter which conveys no necessary information to intending purchasers should be excluded. The introduction of "puffing" is to be avoided: *Baxter* v. *Finlay*, 1 Chy. Ch. 230; *Buchan* v. *Wilkes*, *Ib.* 231. The advertisement should set out the improvements: *Heward* v. *Ridout*, 1 Chy. Ch. 244; and the existence of a favorable lease, if any: *McAlpine* v. *Young*, 2 Chy. Ch. 171. But any omissions of this kind, must, as a general rule, be objected Advertisements of sale, how to be framed.

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Rule 94.

Defects in advertisements, how corrected.

to at the time of settling the advertisement, or before the sale has taken place: *Creswick* v. *Thompson*, 6 P. R. 52. But, where a material fact was omitted from the advertisement, *e.g.*, that a lease was subject to a ground rent, the purchaser was discharged from his purchase: *Jones* v. *Rummer*, 14 Ch. D. 588; 43 L. T. N. S. 111; 49 L. J. Ch. 775; 20 Ch. D. 1.

Misrepresentation in, effect of.

Misdescription in the advertisement, where it amounts to a material misrepresentation, is also a ground for compensation to the purchaser: *Stammers* v. *O'Donohoe*, 28 Gr. 207; even after conveyance: *Bull* v. *Harper*, 6 P. R. 36; or may entitle the purchaser, at his option, to be relieved from his purchase: *Mathias* v. *Yetts*, 46 L. T. N. S. 497; *Redgrave* v. *Hurd*, 20 Ch. D. 1; 45 L. T. N. S. 485; 51 L. J. Ch. 113.

Special conditions of sale, not to be resorted to without cause.

Special Conditions.—Unnecessarily stringent conditions of sale ought not to be sanctioned by the Master; thus where the title, or the proof of it, was involved in no difficulty, a condition of sale that "The vendor is not to be bound to give any evidence of title, or any title deeds, or copies thereof, other than such as are in his possession, or prove any abstract," was condemned by the Court: *McDonald* v. *Gordon*, 2 Chy. Ch. 125; and see *Dance* v. *Goldingham*, L. R. 8 Chy. 902; *Dunn* v. *Flood*, 25 Ch. D. 629; 49 L. T. N. S. 670; 28 Ch. D. 586; 52 L. T. N. S. 699; *Re Rayner*, 53 L. T. N. S. 495. Trustees selling without a reserve bid were restrained: *Downey* v. *Dennis*, 14 Ont. 219.

In sales by the Court, if a good title can be made, the parties are not at liberty to relieve themselves by special conditions from the obligation to make such a title, and the Court will not provide by conditions for imaginary defects, *per* Mowat, V.C., *McDonald* v. *Gordon*, 2 Chy. Ch. 126: *Piers* v. *Piers*, Sau. & Sc., 414. "It is the uniform practice of a Court of Equity, not to set up for sale a title knowing it to be bad": *Bennett* v. *Wheeler*, 1 Ir. Eq. 16; *Lahey* v. *Bell*, 6 Ir. Eq. 122; Sugden, V. & P., 14th ed., 100, and see *Hume* v. *Bentley*, 5 D. G. & S. 527.

Condition requiring purchaser to assume as true, what is false, is bad.

A condition of sale is bad, as misleading, if it require the purchaser to assume as true, what the vendor knows to be false; or if it state that the state of the title is not accurately known, when in fact it is known to the vendor: see *Nash* v. *Wooderson*, 78 L. T. Jour. 59. And a purchaser purchasing at a sale by the Court under such conditions, is entitled to have a good title made, notwithstanding the conditions; but where the conditions on the face of them purport to give only a good holding title, that is all the purchaser, even though relieved from the conditions, can insist on: *Re Banister*, *Broad* v. *Munton*, 12 Ch. D. 131.

Effect of special conditions as to title.

And where a sale was had, under a condition that precluded the purchaser from objecting to the title prior to the document chosen as the root of the title, but the purchaser inquired into the prior title and refused to complete, on the ground that the prior title was bad, the Court, being of opinion that the objection was well founded, refused to enforce the sale against the purchaser, and discharged him from his purchase: *Else* v. *Else*, L. R. 13 Eq. 196; *Williams* v. *Wood*, 16 W. R. 1005: *Bennett* v. *Wheeler*, 1 Ir. Eq. 16; *Hume* v. *Bentley*, 5 D. G. & S. 527; and see *Dunn* v. *Flood*, *supra*.

Where a sale was had upon condition that in case the vendor should be unable or unwilling to remove or comply with any objection or requisition made by the purchaser, he might rescind the sale, and the purchaser delivered requisitions which the vendor answered, but the purchaser considered the answer insufficient, and the vendor then gave notice that he rescinded the contract, it was held that the purchaser could not by subsequently waiving his objections prevent the rescission taking effect: *Dames* v. *Wood*, 51 L. T. N. S. 109. Where a sale was had under a condition that no objection or requisition should be made by the purchaser by reason of the non-acknowledgment of a deed dated 18 Dec., 1841, by a married woman, who was a party to it, and it turned out that the deed in question was the conveyance to the vendor, and that the married woman had one-fifth interest in the estate, and that the vendor, though in possession, had not acquired a title under the Statute of Limitations, the Court refused to enforce the contract against the purchasers: *Re Cuming to Goldbolt*, 78 L. T. Jour. 31.

The standing conditions of sale are those referred to in *Rule* 96. **Rule 95.**

Where an advertisement is not settled in proper form, it may on motion in Chambers be referred back to the Master to be re-settled, and if necessary to appoint a new day for the sale: *Heward* v. *Ridout*, 1 Chy. Ch. 244; such an application being in the nature of an appeal from the Master, would seem to be beyond the jurisdiction of the Master in Chambers, and to be proper to be made to a Judge in Chambers. Advertisement may be ordered to be re-settled.

95. At the time named in the appointment or warrant, the Judge or Master is to settle the advertisement; to fix the time and place of sale; to name an auctioneer, where one is to be employed; and to make every other necessary arrangement preparatory to the sale, so that nothing may remain to be done but to insert the advertisement; and all the before mentioned matters must be done at one meeting, namely, upon the return of the appointment or warrant where it is practicable, and no adjournment of such meeting is to take place, and no new meeting is to be appointed for the aforesaid purposes, unless it is unavoidable. Chy. O. 378. Master on return of warrant, to settle advertisement to appoint auctioneer, and fix time, and place of sale, etc.

Formerly all sales directed by the Court of Chancery had to be by auction, unless the order, or decree, expressly authorized a sale in some other way. Even after an abortive attempt to sell by auction, a sale in any other way could not be had except by express order: *Berry* v. *Gibbons*, L. R. 15 Eq. 150. Now, where a sale is ordered, the Master may cause the property, or a competent part thereof to be sold either by public auction, private contract, or tender, or part by one mode, and part by another, as he may think best for the interest of all parties; and he may fix an upset price, or reserved bidding, but such price, or bidding, must be so fixed at the meeting held by him for the settling of the advertisement, and making the other arrangements preparatory to the sale, and must be notified in the conditions of sale: *Rule* 89. The Master is not justified in accepting a tender from the person having the conduct of the sale: *Ramsay* v. *McDonald*, 8 P. R. 283. Formerly, sale must be by auction, unless otherwise ordered. But now Master may direct sale by tender, etc.

When land is offered for sale by auction, unless in the particulars or conditions of sale it is stated that the land will be sold subject to a reserved price, or a right of the seller to bid, the sale is to be deemed, and taken, to be without reserve; and upon any sale without reserve, it is unlawful for the seller, or a puffer, to bid, or for the auctioneer knowingly to take any bidding from a seller, or puffer: see R. S. O. c. 100, ss. 22, 23; *Herron* v. *Moffatt*, 22 Gr. at pp. 375-6. Upon a sale without reserve it is not open to the vendor to refuse a bid, however small: *O'Connor* v. *Woodward*, 6 P. R. 223; *McAlpine* v. *Young*, 2 Chy. Ch. 171. The offer of property subject to a reserved bidding, does not involve also a right for the seller to bid, or to employ a puffer; thus, where a sale was advertised under a decree subject to a reserved bid, but no right on the part of the seller to bid was reserved, but a puffer was employed whose bids did not exceed the reserved bid, the sale was on the application of the purchaser set aside: *Gilliat* v. *Gilliat*, 18 W. R. 203; L. R. 9 Eq. 60, and if a limited right to bid be reserved, and the limit be exceeded, the sale is voidable: *Parfitt* v. *Jepson*, 46 L. J. C. P. 529. Sales by auction, highest bidder, right of. Limited right of vendor to bid cannot be exceeded.

The Master, or his clerk, may conduct the sale if no auctioneer is employed: see *Rule* 100. No license for the Master, or his clerk, to act as auctioneer under R. S. O. c. 184, s. 495, ss. 2, is necessary: *Regina* v. *Chapman*, 1 Ont. 582. Master, or his clerk, acting as auctioneer.

Under a judgment for sale in a mortgage suit, it is the mortgagor's duty to see to the parcelling out of the land directed to be sold, and if he consider too Mortgage suits, mortgagor's

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Rule 96-98. duty as to advertisement.

much is offered for sale he should urge the objection at the time of settling the advertisement, and it should be stated in the advertisement that so soon as sufficient has been realized by the sale to pay off the plaintiff's and other claims, the remaining lots, if any, will be withdrawn, if that course is intended to be pursued : *Beaty* v. *Radenhurst*, 3 Chy. Ch. 344.

Standing conditions of sale.

96. The standing conditions of sale are to be those set forth in Form No. 43 in the Appendix. Chy. O. 379.

Any conditions varying from, or in addition to, the special conditions must be stated at length in the advertisement : *Rule* 94.

Where the owner of the equity of redemption is dead, and his heirs are out of the jurisdiction, or unknown, a sale may be directed in an action against a subsequent mortgagee, and the Provincial Attorney-General as representing the deceased mortgagor, but the circumstances under which the sale is directed, must be stated in the particulars of sale : *Smith* v. *Good*, 14 Gr. 444.

As to special conditions see note to *Rule* 94.

Even without the standing condition for a re-sale in case of default by the purchaser, and payment by him of any deficiency, the law implies such a contract : *Re Hornibrook*, 12 P. R. 591.

Where, as the standing condition provides, the deposit is payable to the vendor's solicitor ; if he makes away with it, it cannot be recovered from the auctioneer : *Brown* v. *Farebrother*, 59 L. T. N. S. 822 ; but the client of the solicitor is responsible to the other parties interested, to make good the loss : *Mulkins* v. *Clarke*, 11 P. R. 350.

Master may fix upset price, or reserved bidding.

97. The Judge or Master may, without further order, fix an upset price, or reserved bidding, where it is thought expedient ; but this must be done at the meeting held for the purpose of settling the advertisement and making the other arrangements preparatory to the sale, and it must be notified in the conditions of sale. Chy. O. 380 ; J. A. Rule 331 *part*.

Reserved bid, how fixed.

In order to enable the Master to fix a reserved bid, an affidavit made by some competent surveyor must be filed. See Leggo's Forms, 2nd ed., No. 940.

According to the English practice affidavits for the purpose of enabling the Judge to fix reserved biddings are to state the value of the property by reference to an exhibit, so that the value may not be disclosed by the affidavit when filed. Judge's Regulations, Aug. 1857, xiii : Snow & Winstanley Ann. Pr. 575 ; and see English Rule, Ord. 51 r. 4, founded therein.

Where the Master omitted on the settling of the advertisement to fix a reserved bid, on motion in Chambers leave to fix reserved bid, and re-advertise was granted : *Fraser* v. *Bens*, 1 Chy. Ch. 71.

How communicated to auctioneer.

Where the sale takes place elsewhere than before the Master, a note of the amount of the reserved bid under a sealed cover is to be delivered to the auctioneer, or person selling the estate, with instructions not to open it until the biddings are closed, and not to make the amount of it known even then.

All parties may bid, except party having conduct

98. All parties may bid, without taking out an order for the purpose, except the party having the conduct of the sale, and except any trustees, agents, and other persons

in a fiduciary situation; and where any parties are to be at liberty to bid, it must be notified in the conditions of sale. Chy. O. 381. Rule 99. of sale. trustees, etc.

Leave to bid will not usually be granted to the party having the conduct of the sale: *Phillips* v. *Conger*, 1 O. S. 231; *Domville* v. *Berrington*, 2 Y. & C. 723; *Sidney* v. *Ranger*, 12 Sim. 118, nor to his servants, or agents: see *Martinson* v. *Clowes*, 46 L. T. N. S. 882; 51 L. J. Ch. 594. Except upon the terms of transferring the conduct of the sale to an independent solicitor, if none of the other parties will take it: *Ramsay* v. *McDonald*, 8 P. R. 283. Leave to bid has also been refused to an executor, in an administration action: *Geldard* v. *Randall*, 9 Jur. 1085; to a receiver: *Alven* v. *Bond*, 1 Flan. & K. 196; to a guardian *ad litem*; see Seton 1396; *Crawford* v. *Boyd*, 6 P. R. 278. Leave will not, in general, be granted to trustees to bid, unless all the *cestuis que trustent* who are *sui juris* consent, and no other purchaser at an adequate price can be found: *Tennant* v. *Trenchard*, L. R. 4 Chy. 537, 547; *Farmer* v. *Dean*, 32 Beav. 327, and see *Ricker* v. *Ricker*, 27 Gr. 576; *S. C.* 7 Ont. App. 28; 18 C. L. J. 274; 2 C. L. T. 399, and a trustee who has obtained leave to bid, is not exonerated from his duty of protecting the interest of his *cestui que trust*: *Ib.*: but see *Boswell* v. *Coaks*, 48 L. T. N. S. 929: 51 L. T. N. S. 242; 55 L. T. N. S. 32; 23 Ch. D. 302; 27 Ch. D. 424; 11 App. Cas. 232. Although a vendor cannot himself become the purchaser unless he has obtained special leave to bid, yet it would seem that there is no objection to a Joint Stock Company in which he is a shareholder becoming the purchaser: see *Farrar* v. *Farrars*, 40 Ch. D. 395; 59 L. T. N. S. 619. But where a trustee for sale, or the vendor, has a secret understanding not amounting to a contract, that the purchaser will re-sell the property to him, the sale will be set aside though no actual fraudulent intent be proved: *Re Postlewaite, Postlewaite* v. *Rickman*, 59 L. T. N. S. 58; but this case was reversed on appeal owing to the great lapse of time: 60 L. T. N. S. 514. Leave to bid, not granted to party having conduct of sale. Nor to executor, receiver, guardian *ad lit.* nor trustee.

Leave for parties, not otherwise entitled, to bid, is sometimes contained in the order, or judgment, directing the sale, but an order for that purpose is usually obtained in Chambers on notice to the other parties interested. The Master formerly had no power to grant such leave: *Re Laycock, McGillivray* v. *Johnson*, 8 P. R. 548, but may now do so in the exercise of his jurisdiction in Chambers under *Rule* 88. Leave to bid, how obtained.

When a party not authorized to bid, has bid without leave and become the purchaser, the sale will not necessarily be set aside, but the property may, on the application of the other parties interested, be ordered to put up for sale again at the expense of the party so bidding, and if no more can be realized he may be held to his purchase: *Wilson* v. *Greenwood*, 10 Sim. 101; *Sidney* v. *Ranger*, 12 Sim. 118; *Crawford* v. *Boyd*, 6 P. R. 278; and see *Martinson* v. *Clowes*, 52 L. T. N. S. 706. Effect of party not authorized to bid becoming purchaser.

99. The advertisement is to be inserted by the party conducting the sale, at such times and in such manner as the Judge or Master appointed at the meeting before mentioned. Chy. O. 382. Party having conduct of sale to advertise it as directed.

When a sale is postponed, a note of such adjournment published at the foot of the original advertisement will suffice, without incurring the expense of an entirely fresh advertisement: *Thompson* v. *Milliken*, 15 Gr. 197. Postponement of sale.

Sales are not to be postponed except in extreme cases. Where pending the time appointed in a mortgage suit for redemption, the mortgagor made an assignment in insolvency, but the plaintiff proceeded with the suit without adding the assignee; a motion by the latter to stay the sale on the ground that he had no notice of settling the advertisement was refused: *Hoskins* v. *Johnston*, 6 P. R. 257.

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Rules 100-102. Master, clerk, or auctioneer may conduct sale.

100. The Master or his Clerk is to conduct the sale where no auctioneer is employed. Chy. O. 383.

An auctioneer selling land is not required to be licensed under the R. S. O. c. 184, s. 495, ss. 2: *Regina* v. *Chapman*, 1 Ont. 582.

Biddings.

101. Biddings need not be in writing, but a written agreement is to be signed by the purchaser at the time of sale. Chy. O. 384.

Sale without reserve

Where the sale is to be without reserve, the vendor is not at liberty to refuse any bid, however small: *O'Connor* v. *Woodward*, 6 P. R. 223; *McAlpine* v. *Young*, 2 Chy. Ch. 85. 171.

Vendor, or puffer may not bid.

Neither, when the sale is without reserve, can the vendor, or a puffer, bid, unless the right to bid is expressly reserved in the conditions of sale. And where the right to bid is limited to one or more bids, the vendor may not exceed it. And where the sale is subject to a reserved bid, a puffer cannot also be employed; see *Rule* 95; but where a stranger, at the instance of the mortgagor, made a fictitious bid at a sale of the mortgaged property under a judgment of the Court, it was held that a purchaser could not avoid the sale on the ground that he had been thereby induced to bid more than he otherwise would: *Union Bank* v. *Munster*, 37 Ch. D. 51; 57 L. T. N. S. s. 877.

Where the sale is without reserve, but the vendor, after a bid has been made, withdraws the property from sale, the highest bidder may, nevertheless, apply to be declared the purchaser: *McAlpine* v. *Young*, *supra*. It would seem that such an application should be made in the first place to the Master to report on the sale, and if he refuse to report the highest bidder the purchaser, an appeal would lie from him to the Court in the ordinary way, see *Rule* 850. In *McAlpine* v. *Young*, the application appears to have been made in Chambers in the first instance.

Acceptance of an invalid bid.

Where the auctioneer has accepted the bid of a vendor, or puffer, who had no right to bid, and declared him the purchaser, it would seem that the highest bidder lawfully bidding, would be entitled to set aside the sale, and have himself declared the purchaser.

Contract.

The agreement to be signed by the purchaser should identify the property purchased, by reference to the particulars and conditions of sale, and should in other respects be a sufficient agreement to satisfy the requirements of the Statute of Frauds; but it is possible that a contract upon a sale by the Court might be enforced though these formalities had not been complied with: see Daniel's Pr. 6th ed. 1104.

Contract, how to be signed.

The purchaser should sign his name, and his address and quality should also be stated. If his signature is not plain, or initials are used, it is desirable that a note of his full name should be written at the foot. Where any person purchases as agent for another, it should be so expressed in the signature, otherwise he will be treated as the purchaser, unless an affidavit showing the fact to be otherwise, is produced on the settlement of the report on sale. See Daniel Pr. 6th ed. 1083.

Deposit at sale how to be paid.

102. The deposit is to be paid to the vendor, if present, or if not, to his solicitor, at the time of sale, and is forthwith to be paid by him into Court. Chy. O. 385.

Solicitor neglecting to pay in deposit, liability of.

If the solicitor for the vendor neglects to pay the deposit into Court, he may be compelled to do so by order, on application of the purchaser: *Crooks* v. *Glenn*, 1 Chy. Ch. 354. And where he neglected to pay in the deposit, and in consequence of his not having done so the judgment was not in the hands of the Accountant, so that the purchaser could not obtain a direction to pay in

the balance of his purchase money, the solicitor was ordered to pay the interest which would have accrued on the whole purchase money, if the money had been duly paid into Court: *Smith* v. *Dunn*, 3 C. L. T. 217. **Rules 103, 104.**

Where the deposit was paid by the auctioneer to one of a firm of solicitors having the conduct of the sale, who misappropriated it, the other members of the firm were held liable for it: *Biggs* v. *Bree*, 45 L. T. N. S. 648; 46 L. T. N. S. 8; and see *Thompson* v. *Robinson*, 15 Ont. 662; 16 Ont. App. 175.

The client of the solicitor making default is responsible to the other parties to the action for his misfeasance: *Mulkins* v. *Clarke*, 11 P. R. 350; but an auctioneer who pays the deposit to the solicitor pursuant to the conditions of sale is discharged from liability: *Brown* v. *Fairbrother*, 59 L. T. N. S. 822. Where at a sale out of Court by a mortgagee he had accepted a cheque for the deposit which proved bad, and the sale fell through in consequence of the purchaser turning out to be worthless, it was held that the mortgagee was nevertheless entitled to add the costs of the auction sale to his debt: *Farrer* v. *Lacey*, 31 Ch. D. 42; 50 L. T. N. S. 121.

Where the sale is not completed through the default of the purchaser, he forfeits his deposit to the vendor: *Rosenberg* v. *Cooke*, 8 Q. B. D. 162; *Whelan* v. *Couch*, 26 Gr. 74; *Tilt* v. *Knapp*, 9 P. R. 314; *Re Hornibrook*, 12 P. R. 591; even though there be no stipulation to that effect: *Ex parte Barrell*, *Re Parnell*, L. R. 10 Chy. 512; *Dunn* v. *Vere*, 19 W. R. 151; and see *Howe* v. *Smith*, 50 L. T. N. S. 573; *Catton* v. *Bennett*, 26 Ch. D. 161; 51 L. T. N. S. 70. And this is so, even where the contract is invalid, and could not be legally enforced: *Thomas* v. *Brown*, 35 L. T. N. S. 247; but see *Casson* v. *Roberts*, 31 Beav. 613; or where there is a defect in the vendor's title, which the purchaser is precluded, by the conditions, from objecting to: *Rosenberg* v. *Cooke*, *supra*. If sale goes off for default of purchaser, deposit is forfeited.

A deposit which has been forfeited for default of the purchaser cannot be recovered back on the ground that upon a re-sale of the property a fatal defect in the title was discovered: *Soper* v. *Arnold*, 35 Ch. D. 384.

But where a sale has been improperly carried out and the purchaser has notice that such is the case, he may refuse to carry out the purchase and recover his deposit: *Locking* v. *Halstead*, 16 Ont. 32.

Though the vendor's solicitor is entitled to his costs of receiving the deposit on sale, and paying it into Court, out of the fund, he must look to the purchasers for his costs of receiving, and paying into Court any other instalments of the purchase-money, which it is their duty to pay into Court: *Re Robertson*, 24 Gr. 555. Costs of paying in purchase money.

In England the auctioneer, or solicitor, appointed to receive the deposits, is required to give security duly to account therefor: Danl. Pr. 6th ed., 1080. But this has not been customary in Ontario. Security for deposit.

103. After the sale is concluded, the auctioneer, where one is employed is to make the usual affidavit, and where no auctioneer is employed, the Master or his Clerk is to certify to the same effect. Chy. O. 386. Affidavit of auctioneer, or certificate of Master, of result of sale.

For form of affidavit of auctioneer see Leggo's Forms, 2nd ed. No. 947.

104. The report on sale is to be in the form No. 44 in the Appendix, or as near thereto as circumstances permit. Chy. O. 387. Report on sale form of.

The solicitor having the conduct of the sale usually takes the necessary steps to procure the report on sale; but it would seem that a purchaser may himself take out the report on sale, and get it confirmed where he is the sole purchaser: *Crooks* v. *Glenn*, 1 Chy. Ch. 354; or *semble*, he may take a separate report as to his own purchase where he is not the sole purchaser. Report on sale, by whom to be procured.

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Rule 105. The confirmation of a sale may be opposed before the Master, and the sale disallowed, on grounds which would justify a motion to set it aside: *Beaty* v. *Radenhurst*, 3 Chy. Ch. 344; *Rodgers* v. *Rodgers*, 13 Gr. 143.

Opposing sale before Master.

Opposing sale in Chambers.

A motion to confirm a sale will not be entertained in Chambers, where an irregularity has occurred, unless the sale has been approved of by the Master: *Thomas* v. *McCrae*, 2 Chy. Ch. 456; and see *Cayley* v. *Colbert*, *Ib.* 455. Where the Master's directions have not been observed, the party having the conduct of the sale will have to shew, at his own expense, that no person interested has been injured by the non-observance of the direction, otherwise the Master will not confirm the sale: *Royal Canadian Bank* v. *Dennis*, 4 Chy. Ch. 68.

Where a party bidding, and becoming the purchaser, had no right to bid.

Where some person not having authority to bid, has improperly bid and been declared at the auction the purchaser, the Master should not declare the sale void, but should report the sale, stating the facts as to the improper bid; and it is then open to the other parties to move to have the property again put up for sale, at the expense of the party so bidding improperly, and holding him to his purchase if no higher price is realised: *Crawford* v. *Boyd*, 6 P. R. 278, note p. 280; or the purchaser may, on notice to all parties interested, move to confirm the sale to him. When the person so bidding has also had the conduct of the sale, the sale will not as a general rule be confirmed, if any party object.

Until confirmation of report on sale, property at risk of vendor.

Until confirmation of the report on sale, the property is at the risk of the vendor, and in the event of fire, the loss occasioned thereby must fall on him: *Stephenson* v. *Bain*, 8 P. R. 166, 258; *S. C.* 16 C. L. J. 15, 115; but as to sales out of Court: see *Rayner* v. *Preston*, 43 L. T. N. S. 18; *S. C.* in Appeal 44 L. T. N. S. 787; 18 Ch. D. 1; *Gill* v. *Canada Fire and Marine Insurance Co.*, 1 Ont. 341; *Castellain* v. *Preston*, 8 Q. B. D. 614; 46 L. T. N. S. 569; 19 C. L. J. 143; 49 L. T. N. S. 29.

Sale may be objected to on motion.

105. A sale must be objected to by motion to the Court or a Judge to set aside the same; and notice of the motion must be served upon the purchaser, and on the other parties to the cause; but the biddings are only to be opened on special grounds, whether the application is made before or after the report stands confirmed. Chy. O. 388.

Motion to "open biddings," where made.

Grounds on which motion may be made.

The motion to set aside the sale, or open the biddings, must generally be made before the confirmation of the report, but see *Ricker* v. *Ricker*, 27 Gr. 576, and *S. C.* in appeal, 7 Ont. App. 282. Formerly, a mere offer to give an increased price was sufficient ground for opening the biddings, but this is no longer the case: *Roberts* v. *Duric*, 1 Chy. Ch. 211; now, special grounds affecting the validity of the sale, must be established: *Creswick* v. *Thompson*, 6 P. R. 52; and the fact that the purchaser is one of the parties to the suit makes no difference in the rule: *Mitchell* v. *Mitchell*, 6 P. R. 232; and it applies to sales by tender, or private contract: *Re Bartlett*, *Newman* v. *Hook*, 44 L. T. N. S. 17. Great delay, is an answer to such an application, unless misconduct is shown on the part of the purchaser: *Crooks* v. *Crooks*, 2 Chy. Ch. 29. The fact that property was suffered to be knocked down at an undervalue to a son of the testator, under the belief that he was bidding for himself, when in fact he had been employed by a third person to bid for him, was held sufficient to warrant a re-sale: *Rodgers* v. *Rodgers*, 13 Gr. 143; and see *Re Follis*, *Kilbourn* v. *Coulter*, 6 P. R. 160; and where a vendor has a secret understanding with the purchaser of the property that the purchaser is to re-sell it to the vendor, the sale will be set aside though no fraudulent intent be proved; see *Re Postlethwaite*, *Postlethwaite* v. *Rickman*, 59 L. T. N. S. 58; but this decision was subsequently reversed on appeal owing to the great lapse of time: *S. C.* 60 L. T. N. S. 514.

Purchaser as secret trustee.

But the fact that a defendant was prevented from bidding, by promises made by the purchaser to give him the benefit of the purchase, is no ground for opening the biddings, such fact, if established, would constitute the purchaser

a trustee, and the trust must be established by action: *Brock* v. *Saul*, 2 Chy. Ch. 145. **Rule 106.**

Where a next friend of a plaintiff who had the conduct of the sale, had bid without authority, a re-sale was ordered, the next friend being held to his purchase in case a greater price could not be obtained, and he was ordered to pay the costs: *Crawford* v. *Boyd*, 6 P. R. 278; and see *Ramsay* v. *McDonald*, 8 P. R. 283. Purchase by next friend of party having conduct.

The existence of mere irregularities in the proceedings prior to the sale, does not affect the validity of the sale as against a *bonâ fide* purchaser: *Dickey* v. *Heron*, 1 Chy. Ch. 149: *Gunn* v. *Doble*, 15 Gr. 655; *Shaw* v. *Crawford*, 4 Ont. App. 371; *McLean* v. *Grant*, 20 Gr. 76; *Collins* v. *Denison*, 2 Chy. Ch. 465. Mere irregularity not sufficient ground to set aside sale.

Where a sale took place after an order had been made staying it, but of which the auctioneer, and the purchaser, had no notice, the Court refused, after confirmation of the report, to set aside the sale: *Freehold Building Society* v. *Choate*, 3 Chy. Ch. 444.

But where through a mis-statement in the advertisement, the property was knocked down at an undervalue, and less than the purchaser himself would have otherwise given, a re-sale was ordered: *Jones* v. *Clarke*, 1 Gr. 368. But it would seem that if the purchaser without any misrepresentation, or undue concealment, by the vendor, got a less benefit from his purchase than he expected, that would be no ground for relieving him from his contract: *James* v. *Freeland*, 5 Gr. 302; *Commercial Bank* v. *McConnell*, 7 Gr. 323. Misrepresentations in the advertisement as to facts visible to the eye, amounting to mere exaggeration, do not warrant a release of the purchaser from his contract: *Crooks* v. *Davis*, 6 Gr. 317, but see *Stammers* v. *O'Donohue*, 28 Gr. 207; 8 Ont. App. 161; 11 S. C. R. 358: *Gale* v. *Hubert*, 6 Gr. 312; and see *post Rule* 106, notes. Mistatements in advertisement may be.

Where land was stated in the advertisement to be in the occupation of a tenant at a yearly tenancy, but before the sale the tenant had written intimating his intention of giving up the land, but the letter being written before the proper time for giving such notice the vendor had answered, "you will of course send me a formal notice at the right time, and after the sale the tenant gave the formal notice; it was held that the nondisclosure of the previous correspondence did not entitle the purchaser to rescind: *Davenport* v. *Charsley*, 54 L. T. N. S. 372.

106. At any time after the confirmation of the sale the purchaser may pay his purchase money and interest, if any, or the balance thereof, into Court without further order, upon notice to the party having the conduct of the sale; and when he is entitled to be let into possession of the estate, he may, if possession is wrongfully withheld from him, proceed at his own expense to obtain an order against the party in possession for the delivery thereof to him, or may call upon the vendor to cause possession to be delivered to him. Chy. O. 389. After confirmation of report purchaser may pay his purchase money into Court. How obtain possession

Payment of Purchase Money.—Where the purchaser makes default in paying his purchase money into Court pursuant to the conditions of sale, the vendors may move to compel him to pay in the amount overdue, and in default of payment, for a re-sale of the property. Default in payment of purchase money, effect of.

The deposit paid at the sale, is to be paid into Court: see *Rule* 102; if not paid in by the vendor, the purchaser must move to compel payment, before he can obtain a vesting order. Deposit at sale to be paid into Court.

When the plaintiff's solicitor makes default in paying in the deposit, the other parties interested in the purchase money will not suffer thereby, but the

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Rule 106. plaintiff's share will be charged with the amount of the defalcation: *Mulkins* v. *Clarke*, 22 C. L. J. 267; 11 P. R. 350.

Payment of purchase money to solicitor when not a discharge.

Where, by the conditions of sale, the purchase money is payable into Court, payment to the solicitor of the party entitled to it, is not a good payment, and is therefore no ground for dispensing with payment of it into Court: *Blackburn* v. *Sheriff*, 1 Chy. Ch. 208; except upon the production of the written consent of all parties beneficially interested, duly verified. Where the vendor's solicitor receives purchase money, which the purchasers are bound to pay in Court, the expense of payment in, must be borne by the purchasers, the estate, or fund, is not chargeable with such costs; *Re Robertson*, 24 Gr. 555.

Payment of purchase money not compelled until title accepted.

But the purchaser will not be compelled to pay in his purchase money unless he has accepted the title: *Crooks* v. *Street*, 1 Chy. Ch. 95; *Street* v. *Hallett*, 6 P. R. 312; *McDermid* v. *McDermid*, 8 P. R. 28; 15 C. L. J. 136; *Ellwood* v. *Pierce*, 7 P. R. 427; or, has waived the right to investigate the title, by delay: *Ontario Bank* v. *Sirr*, 6 P. R. 216; or by taking possession: *Patterson* v. *Robb*, 6 P. R. 114; and see *Crooks* v. *Glenn*, 8 Gr. 239; *O'Keefe* v. *Taylor*, 2 Gr. 305.

But possession may be taken in accordance with the contract, under circumstances not amounting to a waiver, or acceptance, of title: see *Micheltree* v. *Irvine*, 13 Gr. 537; *Darby* v. *Greenlees*, 11 Gr. 351; *Wardell* v. *Trenouth*, 24 Gr. 465. Merely obtaining the keys of a building for the purpose of viewing the premises, is not a taking possession: *Peoples Loan Co.* v. *Bacon*, 27 Gr. 294.

Deposit forfeited when.

If the purchaser make default a re-sale may be ordered and the defaulting purchaser may be ordered to pay any deficiency: *Re Hornibrook*, 12 P. R. 591; *Noble* v. *Edwards*, 5 Ch. D. 378. In the event of a re-sale being ordered by reason of the default of the purchaser, in the absence of any condition to the contrary, under the standing conditions of sale, Form N. 43, his deposit and all other payments on account are forfeited and cannot be recovered by him, even though the property should realise a larger price on the re-sale: *Tilt* v. *Knapp*, 9 P. R. 314; 2 C. L. T. 597; *Ex parte Barrell*, L. R. 10 Chy. 512; *Thomas* v. *Brown*, 35 L. T. N. S. 237; *Rosenberg* v. *Cook*, 8 Q. B. D. 162; and see *Whelan* v. *Couch*, 26 Gr. 74; *Collins* v. *Stinson*, 10 Q. B. D. 142; 48 L. T. N. S. 828; but see *Casson* v. *Roberts*, 31 Beav. 613; and a purchaser who has forfeited his deposit by default, is not entitled to recover it, in the event of the title proving bad on a subsequent re-sale of the property: *Soper* v. *Arnold*, 35 Ch. D. 384; 56 L. T. N. S. 330; 37 Ch. D. 96; 57 L. T. N. S. 747.

Costs of re-sale, and deficiency, how borne

The costs of the re-sale, and also any deficiency on the subsequent sale, are also usually ordered to be borne by the defaulting purchaser: *Re Hornibrook*, 12 P. R. 591; but when the land sold at an advance, and the profit was more than sufficient to cover the costs of the re-sale, the defaulting purchaser was relieved from the payment of the latter costs: *Tilt* v. *Knapp*, *supra*; *Ontario Bank* v. *Sirr*, 6 P. R. 277.

Interest on purchase money, from what time payable.

Interest on Purchase Money—Rents and Profits.—The liability of the purchaser for interest, depends on the terms of the contract of sale. In the absence of any special stipulation in the contract, it would seem that the liability to pay interest commences on the day fixed by the contract for completion of the contract, from which time the purchaser also becomes entitled to possession, and to all rents, and profits, subsequently accruing: *Esdaile* v. *Stephenson*, 1 S. & S. 122; *Peoples Loan Co.* v. *Bacon*, 27 Gr. at p. 301; *Vanzant* v. *Burke*, 38 U. C. Q. B. 104; but see *Harrison* v. *Joseph*, 8 P. R. 293. But where the contract provided for payment of the purchase money by instalments, but was silent as to the time when possession should be given, the purchaser was held entitled to the rents, and profits, from the date of the contract: *Brady* v. *Keenan*, 6 P. R. 262. A purchaser is entitled to a proper proportion of all rents paid to the vendor in advance: *Liscombe* v. *Gross*, 6 P. R. 271.

Where the contract provides for payment of interest in the event of any delay in completion not attributable to the vendor, the purchaser cannot relieve himself from liability to pay interest by depositing the money in a bank on notice to the vendor: *Riley* to *Streatfield*, 34 Ch. D. 386; 56 L. T. N. S. 48.

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Liability of purchaser qualified by delay of vendor in making title.

The liability of the purchaser to pay interest, may, in the absence of express stipulation as to the payment of interest: *Re Thompson, Biggar* v. *Dickson*, 2 Chy. Ch. 196, be qualified by delay on the part of the vendor, either in making title, or giving possession. In such a case interest will not begin to run until the purchaser could safely have taken possession, and a difficulty respecting the conveyance, may justify his not taking possession: *Rae* v. *Geddes*, 3 Chy. Ch. 404. Where there are several parcels included in the purchase, possession cannot be safely taken of any until the title is made to all: *Laird* v. *Paton*, 7 Ont. 137; 20 C. L. J. 385. Where the property is unproductive, the purchaser may, where the completion of the contract is delayed by the vendor, be exonerated from payment of interest; where it is productive, but the rents, and profits, are less than the interest, the vendor may be allowed to retain the rents, etc., and the purchaser may be relieved from paying interest; and where the rents exceed the interest, the purchaser may, notwithstanding the delay, be ordered to pay interest from the date fixed for completion, taking the rents and profits: *Bank of Montreal* v. *Fox*, 6 P. R. 217; *The Peoples Loan Co.* v. *Bacon*, 27 Gr. 294.

Growing crops, purchaser entitled to.

Growing crops on the land at the time of sale, pass to the purchaser, unless expressly excepted in the conditions of sale: *McDowall* v. *Phippen*, 1 Ont. 143; *Manson* v. *Manson*, 10 P. R. 155; 20 C. L. J. 33; and he is entitled to compensation if they be removed before he gets possession: *Ib.*

Rescission of contract.

Where the purchaser pays his purchase money, and is let into possession, but upon a reference it is found a good title cannot be made, and the contract is rescinded, the purchaser is bound to re-deliver possession on being repaid his purchase money, and if he insist on interest on the purchase money, he must submit to account for the rents, and profits: *Simmers* v. *Erb*, 21 Gr. 289; and see *Turley* v. *Evans*, 13 C. P. 214.

Interest on purchase money.

Where a purchaser is let into possession, pending an investigation of title, he is bound to pay interest, although the possession extend beyond six years: see *Birch* v. *Joy*, 3 H. L. C. 565, where the purchaser was in possession forty years before completion, and the agreement provided that interest should not run until the completion of the contract, see also *Toft* v. *Stevenson*, 5 D. M. & G. 735; but it would seem no more than six years arrears can be recovered as against the land: *Airey* v. *Mitchell*, 21 Gr. 510, overruling on this point, *Great Western Ry. Co.* v. *Jones*, 13 Gr. 355; but when the purchaser dies, and no intervening incumbrance exists, in order to prevent circuity of action, the full amount may be recovered even against the land: *Airey* v. *Mitchell*, *supra*; *Howeren* v. *Bradburn*, 22 Gr. 96.

Mortgage, parol evidence admitted to show terms of.

Where the contract provided for giving a mortgage to secure part of the purchase money, but omitted to state that the mortgage was to bear interest, parol evidence to show that that was the real understanding of the parties was admitted: *Gould* v. *Hamilton*, 5 Gr. 192.

Delivery of possession to purchaser, effect of.

Delivery of Possession.—Where the conditions of sale provide that possession may be taken by the purchaser without waiving his right to investigate the title, he may take possession without waiving his right: *Bolton* v. *School Board*, 7 Ch. D. 766; but in the absence of any such condition, if a purchaser at a sale under a judgment, enter into possession without the sanction of the Court, he may be held to have accepted the title; Danl. Pr. 6th ed. 1093, and at any rate may be ordered to pay his purchase money into Court, notwithstanding his objecting to the title: *Patterson* v. *Robb*, 6 P. R. 114; but where, after a purchaser had taken possession, the vendor's solicitor delivered an abstract of title and answered requisitions, it was held that the vendor had waived the right to treat the taking of possession as an acceptance of title: *Aldwell* v. *Aldwell*, 6 P. R. 183; and see *Gordon* v. *Harnden*, 18 Gr. 231. Where, under the conditions of sale, a purchaser is entitled to possession, the letting him into the receipt of the rents and profits, is not a sufficient delivery of possession: *The Peoples Loan Co.* v. *Bacon*, 27 Gr. 294.

Summary application for possession.

A summary application for delivery of possession under this *Rule* can only be made against parties to the action, or strangers who have obtained possession *pendente lite*: *Bank of Montreal* v. *Wallace*, 13 Gr. 184; *Trust & Loan Co.*

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v. *Start*, 6 P. R. 90; where a stranger is in possession who has not obtained possession *pendente lite* an action must be brought.

Purchaser accepting conveyance, effect of.

Where the purchaser accepts a conveyance, or vesting order, knowing that a stranger to the suit is in adverse possession, he cannot afterwards claim compensation for delay in recovering possession; *Bull* v. *Harper*, 6 P. R. 36; *Joliffe* v. *Baker*, 48 L. T. N. S. 966; 11 Q. B. D. 255; unless possession be withheld contrary to the express stipulation of the contract: *Barber* v. *Barber*, 11 P. R. 137; 21 C. L. J. 418.

Purchaser to see to discharge of incumbrances.

Incumbrances.—A purchaser before accepting a conveyance, or vesting order, or consenting to the payment out of his purchase money, should see that all incumbrances are paid off, which the vendors are bound to discharge. After conveyance, or vesting order, his right to have incumbrances discharged out of his purchase money is gone, and he must rely on his covenant if any: *Bull* v. *Harper*, 6 P. R. 26; *S. C.*, before Spragge, C., February 1, 1873; *Re Buck, Peck* v. *Buck*, 6 P. R. 98; *Kincaid* v. *Kincaid*, 6 P. R. 93; *Joliffe* v. *Baker*, 11 Q. B. D. 255; 48 L. T. N. S. 966; unless perhaps, where he was

Acceptance of conveyance, effect of.

ignorant of such incumbrances when he accepted the conveyance: see *Turner & Skelton*, 13 Ch. D. 130; *Henning* v. *McDougall*, 8 P. R. 200; but see L. T. Jour. 387; *Robson* v. *Robson*, 10 P. R. 324; or unless no title at all has been conveyed, as where the land had been sold for taxes: *Turrill* v. *Turrill*, 7 P. R. 142; and see *Jones* v. *Clifford*, 3 Ch. D. 779. But a conveyance by the vendor to a third party, even though made at the purchaser's request, will not prevent the latter, after the conveyance, from claiming to have incumbrances discharged, to which the covenants in the deed may not extend, but which, under the contract of sale, the vendor was bound to pay off: *McLennan* v. *Chegwin*, 37 U. C. Q. B. 301.

A vendor cannot be required to procure the discharge of a mortgage in fee made by a person who had only a life estate: *Re Ponton & Swanston*, 16 Ont. 669.

Outgoings, how payable.

Ground rent and other outgoings, accruing whilst the purchaser is kept out of possession through the default of the vendor, are held to be payable by the latter: *Peoples Loan Co.* v. *Bacon*, 27 Gr. 294; and see *Fisken* v. *Wride*, 11 Gr. 248; *sed quære*, if this is so, where the purchaser, on the completion of the contract, receives the rents, and profits, for the period during which such outgoings accrued.

A purchaser is entitled to have instruments registered against the title creating an apparently adverse claim, removed by the vendor, even though they be registered by persons having no apparent title: *Keefer* v. *McKay*, 10 P. R. 345.

Where a vendor contracts to sell only such right or interest (if any) as he has, he is nevertheless bound to convey such right or interest free from any existing incumbrances created by himself: *Goold* v. *Birmingham, Dudley & District Bank*, 58 L. T. N. S. 560.

Taxes, by whom payable.

Taxes.—The vendor is bound to pay a proportionate part of all taxes accruing up to the time fixed for the completion of the contract, even though not actually imposed at the time: *Bank of Montreal* v. *Fox*, 6 P. R. 217; *Peoples Loan Co.* v. *Bacon*, 27 Gr. 294; unless the by-law imposing the taxes, expressly provides that they shall not form a charge on the land until a day after that when the title is made out: *Harrison* v. *Joseph*, 8 P. R. 293.

Where the purchaser pays taxes accrued before the time he is let into possession, he is entitled to be refunded out of his purchase money: *Yourex* v. *Alcombrack*, 13 C. L. J. 226.

Compensation, when allowed, to purchaser.

Compensation.—Although a vendor is allowed great latitude in the statements, or exaggerations, he may make, as to the general qualities, and capabilities, of land he is about to offer for sale, still he will not be permitted to make misstatements, and misrepresentations, as to matters of fact, which would naturally have the effect of inducing parties resident at a distance to bid for the property. Therefore, where an advertisement of sale described the pro-

Misrepresentation

perty as being "a farm of eighty-four and a half acres, twenty acres cleared and fenced," on the faith of which the plaintiff purchased, when, in fact, there was not any clearing or fencing, compensation for the misrepresentation was allowed: *Stammers* v. *O'Donohoe*, 28 Gr. 207; 8 Ont. App. 161; 11 S. C. R. 358; and see *Re Murray & Kerr*, 13 Ont. 414; but see *Osborne* v. *Farmers & M. B. Soc'y.*, 5 Gr. 326. Where a material misrepresentation has been made by the vendors, it is not necessary for the purchaser to prove, that the representation was known by the vendors to be false, or was made recklessly; and in the absence of evidence to the contrary the purchaser will be presumed to have bought on the faith of such representation: *Redgrave* v. *Hurd*, 45 L. T. N. S. 486; 20 Ch. D. 1; *Jones* v. *Rimmer*, 43 L. T. N. S. 111; see however, *Joliffe* v. *Baker*, 11 Q. B. D. 255; 48 L. T. N. S. 966; *Smith* v. *Land & House Property Co.*, 49 L. T. N. S. 532; 51 L. T. N. S. 718; but where it is shewn that the purchaser bought with knowledge that the statement was untrue, compensation will be refused: *Carmichael* v. *Ferris*, 8 P. R. 289; and see *Curran* v. *Little*, 8 Gr. 250; but see *Lett* v. *Randall*, 49 L. T. N. S. 71. But the fact that the purchaser was in actual occupation of the property before the sale, does not disentitle him to compensation for a deficiency in the area represented to be sold by the particulars: *Re Aspinalle & Powell*, 60 L. T. N. S. 595.

Rule 106. In advertisements.

Evidence of misrepresentation.

The purchaser may be entitled to compensation for delay in making out the title: *Dudley* v. *Berczy*, 3 Chy. Ch. 81, or for delay in delivering possession: *Thomas* v. *Buxton*, L. R. 8 Eq. 120; *Manson* v. *Manson*, 10 P. R. 155; 20 C. L. J. 33; *Royal Bristol Co.* v. *Bomash*, 35 Ch. D. 390; or for destruction of the property by fire before the confirmation of sale; see *Stephenson* v. *Bain*, 8 P. R. 258; but see *Rayner* v. *Preston*, 14 Ch. D. 297; 43 L. T. N. S. 18; 18 Ch. D. 1; 44 L. T. N. S. 787; 50 L. J. Ch. 472. So, also, for deficiency of land; thus, where 300 acres "more or less," was advertised, and the land only contained 244 acres, compensation was awarded: *Wardell* v. *Trenouth*, 24 Gr. 465; *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603; and see *Canada Permanent L. & S. Co.* v. *Young*, 18 Gr. 566; *Re Fawcett & Holmes*, 61 L. T. N. S. 105. But a vendor who sells a parcel of land at so much per acre, which turns out to contain a greater number of acres than represented in the advertisement, is not, after conveyance, entitled to payment for the excess: *Cottingham* v. *Cottingham*, 5 Ont. 704; 11 Ont. App. 624; and see *Sea* v. *McLean*, 23 C. L. J. 352; 14 S. C. R. 632.

Compensation for delay in making title.

Or delivering possession.

Or losses by fire.

Or deficiency of land.

The right of a purchaser to compensation for deficiency in quantity may be excluded by the conditions of sale: *Re Terry & White*, 32 Ch. D. 14; 54 L. T. N. S. 353. Where, however, the purchaser, by the conditions of sale, is deprived of the right to compensation for deficiency, and such deficiency is material, specific performance of the contract would not be decreed at the suit of the vendor except on the terms of his making compensation for the deficiency: *Ib.*

A purchaser may also be entitled to compensation for failure to make title to part of the property sold, although he may be precluded by the conditions of sale, from objecting to carry out the sale on that ground: *English* v. *Murray*, 49 L. T. N. S. 35.

A purchaser is also entitled to compensation for dilapidations committed by parties in possession, after sale, and before completion: *Fisken* v. *Wride*, 11 Gr. 245; *Thomas* v. *Buxton*, *supra*; but he is entitled to compensation for the removal of growing crops: *Manson* v. *Manson*, 10 P. R. 155; 20 C. L. J. 33; *Royal Bristol Socy.* v. *Bornast*, 35 Ch. D. 390.

Compensation for dilapidation.

Compensation may also be awarded for the suppression of material facts; thus, when the property offered for sale was a mill site, and mill, and the vendor had previously sold the right to take water for the purpose of floating logs, which fact was not communicated to the purchaser, it was held that this was a subject for compensation: *Wardell* v. *Trenouth*, 24 Gr. 465; or the contract may be rescinded: see *Heywood* v. *Mallalieu*, 49 L. T. N. S. 658. Notwithstanding a condition of sale that misdescription should not avoid the sale, it was held that describing the vendor's title as a lease, whereas it was an underlease, entitled the purchaser to rescind the contract; *Re Beyfus & Masters*, 39 Ch. D. 110; 59 L. T. N. S. 740.

For suppression of material facts.

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Rule 106.

After conveyance, right to compensation for defects in title, is gone.

After conveyance, or vesting order, the purchaser's right to compensation for defects in title to which his covenants, if any, do not extend, is usually gone: *Allen* v. *Richardson*, 13 Ch. D. 524; *Manson* v. *Thacker*, 7 Ch. D. 620; *Egleson* v. *Howe*, 3 Ont. App. 566; *Re Bucke, Peck* v. *Bucke*, 6 P. R. 98; *Kincaid* v. *Kincaid*, 6 P. R. 93; *Follis* v. *Porter*, 11 Gr. 442; *McCall* v. *Faithorne*, 10 Gr. 324; *Joliffe* v. *Baker*, 11 Q. B. D. 255; 48 L. T. N. S. 966; *Besley* v. *Besley*, 9 Ch. D. 103; *Clayson* v. *Leech*, 61 L. T. N. S. 69; but where there is an express condition for compensation: see *Bos* v. *Helsham*, 2 L. R. Ex. 72; *Re Turner & Skelton*, 13 Chy. D. 130; 41 L. T. N. S. 668; *Palmer* v. *Johnson*, 12 Q. B. D. 32; 13 Q. B. D. 351; 51 L. T. N. S. 211; where the conveyance has been made to a third party: and see *McLennan* v. *Cheguin*, 37 U. C. Q. B. 301.

Exception, where misstatements in advertisement.

But misstatements, or suppression, in the advertisement of a sale by the Court, of material facts, may form the ground for compensation even after conveyance, so long as the fund remains in Court: *Cann* v. *Cann*, 3 Sim. 447; *Bull* v. *Harper*, 6 P. R. 36; *Turrill* v. *Turrill*, 7 P. R. 142; and see *Horner* v. *Williams*, Jo. & Ca. 274; *Re Perriam, Perriam* v. *Perriam*, 49 L. T. N. S. 710, and see *Palmer* v. *Johnson*, 13 Q. B. D. 351; or the sale, may, after or before, conveyance, be set aside: *Nash* v. *Wooderson*, 52 L. T. N. S. 49; *Brewer* v. *Brown*, 78 L. T. Jour. 79, and so also stipulations in the advertisement for the delivery of possession, if not carried out, may be the subject of compensation even after a vesting order has been taken, so long as the purchase money remains in Court: *Barber* v. *Barber*, 11 P. R. 137; and where a purchaser has by mistake or inadvertence taken a vesting order before an incumbrance has been discharged which he is entitled to have discharged, so long as the purchase money remains under the control of the Court it may be ordered to be applied in discharge of the incumbrance: *Fleming* v. *McDougall*, 8 P. R. 200.

Specific performance when not enforced.

The Court will not enforce specific performance of a contract, with compensation for misdescription, where the sale was made by a vendor in a fiduciary capacity, and any *cestui que trust* would have a right to complain of the sale, if so enforced, as a breach of trust: *Osborne* v. *Farmers & M. B. Socy.*, 5 Gr. 326; *Mortlock* v. *Buller*, 10 Ves. 292; *Goodwin* v. *Fielding*, 4 D. G. M. & G. 104; *Sneizely* v. *Thorn*, 1 Jur. N. S. 125; *Dunn* v. *Flood*, 28 Ch. D. 586; 49 L. T. N. S. 670; and it is immaterial whether the trustees are plaintiffs or defendants: *Ib.*; *sed vide Sea* v. *McLean*, 23 C. L. J. 352, 14 S. C. R. 632.

Misrepresentations, ground for rescission.

The misrepresentation of material facts may entitle the purchaser to have the contract rescinded: *Gale* v. *Hubert*, 6 Gr. 312; *Redgrave* v. *Hurd*, 20 Ch. D. 1.

Dower, purchaser entitled to release of.

The purchaser is entitled to a conveyance with bar of dower by vendor's wife; if she refuse to bar dower, the purchaser is entitled to an abatement, or to rescind the contract: *Kendrew* v. *Shewan*, 4 Gr. 578; *VanNorman* v. *Beaupré*, 5 Gr. 599; or to have a portion of the purchase money, sufficient to answer the dower, set apart until the wife's death, and the interest thereon paid to the vendor during his wife's life: see *Skinner* v. *Ainsworth*, 24 Gr. 148; and *Loughead* v. *Stubbs*, 27 Gr. 387. As to the mode of computing dower in an equity of redemption where the dower has not been assigned, but the widow has been in possession of the land: see *Re Percy, Stewart* v. *Percy*, 11 Ont. 374.

Reference as to title, when ordered.

Reference as to Title.—The inclination of the Court is in favor of giving the purchaser a reference as to title, if he desire it. And it is only when the evidence is clear that the purchaser intended to waive, and has actually waived his right of examining the title, that a reference will be denied: *Micheltree* v. *Irwin*, 13 Gr. at p. 543; and see *Jackson* v. *Jessup*, 6 Gr. 157.

On an application by the vendor to compel the purchaser to pay his purchase money into Court, a reference as to title may be ordered, if the purchaser have neither accepted, nor waived his right to examine, the title: *Crooks* v. *Street*, 1 Chy. Ch. 95; *Street* v. *Hallett*, 6 P. R. 312: *McDermid* v. *McDermid*, 8 P. R. 28; 15 C. L. J. 136; *Ellwood* v. *Pierce*, 7 P. R. 427.

Waiver of right to reference,

Waiver.—The right to a reference may be waived by long delay, in either demanding an abstract, or making any objection to the title: *Ontario Bank* v. *Sirr*, 6 P. R. 216; and see *Rae* v. *Geddes*, 18 Gr. 217; or by taking possession:

Denison v. *Fuller*, 10 Gr. 498; *Commercial Bank* v. *McConnell*, 7 Gr. 323; *Patterson* v. *Robb*, 6 P. R. 114; *O'Connor* v. *Beatty*, 2 Ont. App. 497; but see *Wardell* v. *Trenouth*, 24 Gr. 465; *Darby* v *Greenlees*, 11 Gr. 351; *Micheltree* v. *Irwin*, 13 Gr. 537; *Crooks* v *Glenn*, 8 Gr. 239; *Morin* v. *Wilkinson*, 2 Gr. 157; *O'Keefe* v. *Taylor*, *Ib.* 305; *Jackson* v. *Jessup*, 6 Gr. 156. But it after possession taken, the vendor proceed with the investigation of title, and answer requisitions, the taking of possession will be no waiver: *Burroughs* v. *Oakley*, 3 Sw. 159; *Aldwell* v. *Aldwell*, 6 P. R. 183; *Gordon* v. *Harnden*, 18 Gr. 231. **Rules 107, 108. what constitutes.**

The right of a purchaser to investigate the title may be also waived by his accepting a conveyance, or vesting order: *Bull* v. *Harper*, 6 P. R. 36. So also writing a letter apologising for non-payment of the purchase money, although making no reference to the title; or accepting a release of dower from a person interested in the estate; or the giving of a mortgage to secure the purchase money, are circumstances from which an acceptance of title may be inferred: *McDonald* v. *Garrett*, 8 Gr. 290; but see *Jackson* v. *Jessup*, 6 Gr. 157. But though the purchaser by taking possession and dealing with the property may waive his right to compel the vendor to make out a good title, he may yet be relieved from payment of his purchase money before completion, on showing that the vendor has no title at all: *Denison* v. *Fuller*, 10 Gr. 498. **Circumstances from which a waiver may be inferred.**

In applying the doctrine of waiver, a distinction is to be observed between the case of a contract, providing that a good title shall be shown, and that possession may be taken before completion; and the case of a purchaser taking possession before completion without any express stipulation in that behalf. There is also a broad distinction between a purchaser going into, or remaining in, possession, and making structural alterations, knowing of the existence of an incurable objection; and one entering with knowledge of objections which are curable. In the former case he may, although entitled to have the title otherwise made out, be held to have waived the particular incurable objection: *Re Gloag & Miller*, 23 Ch. D. 320; 48 L. T. N. S. 629. **Possession taken with knowledge of incurable defects; effect of.**

107. The Master is to settle all necessary conveyances for the purpose of carrying out the sale in case the parties differ, or in case there are any persons under any disability (other than coverture) interested in such sale. J. A. Rule 331. **Settlement of conveyance.**

See *Rule* 62.

No conveyance of the lands of infants is to be settled until evidence is produced to the officer settling the same of the purchase money having been paid into Court, or of the payment into Court having been dispensed with; and in cases where there is a mortgage for a part of the purchase money until evidence is given to the officer settling the conveyance that such mortgage has been registered and deposited with the Accountant: *Rule* 1004. The proper evidence of the payment of the purchase money into Court and of the deposit of the mortgage is the certificate of the Accountant or of his Chief Clerk. The order for dispensing with payment into Court can only be made by a Judge in Chambers, or the Master in Chambers, or Master in Ordinary; the Local Judges of the High Court and Local Masters have no power to make such orders: *Rule* 41.

108. After a sale under an order is confirmed, the vendor is, forthwith upon demand, to deliver an abstract of title to the purchaser; and if the purchaser does not serve objections within seven days, he is to be deemed to have accepted the abstract as sufficient. If objections are served, the vendor is to answer them within fourteen days; and if the **Delivery of abstract. If no objection served, abstract to be deemed sufficient. Objections**

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Rule 108. purchaser is still dissatisfied, and if the parties cannot otherwise agree, either party may obtain from the Master a warrant to consider the abstract. Chy. O. 390.

to abstract how disposed of.

This and the six following *Rules* apply to all cases where a reference as to title is made to a Master or Official Referee, as well as to sales by the Court: *Rule* 115. But where a sale is made out of Court, subject to certain conditions as to the delivery of objections to title within a specified time, and before action objections are delivered, the purchaser on an action for specific performance being subsequently brought, cannot in the Master's office deliver any further objections: *Imperial Bank* v. *Metcalfe*, 11 Ont. 467; except by leave of the Court; the Master has no power to grant such leave: *Clarke v. Langley*, 10 P. R. 208.

Abstract, delivery of.

In sales by the Court, the solicitor of the party conducting the sale, is considered the vendor's solicitor, and it is from him the abstract must be demanded, and it is his duty to prepare, and deliver it.

Demand of abstract.

The vendor is only required to deliver an abstract on demand. The demand should be in writing: see R. S. C. c. 164, s. 91.

Neglect of purchaser to demand, effect of.

The purchaser may, if he please, investigate the title, without making the demand. And where he made no demand of an abstract, and made no objection to the title, for twenty-three months, he was held to have waived his right to object to the title: *Ontario Bank* v. *Sirr*, 6 P. R. 276; and see *Rae* v. *Geddes*, 18 Gr. 217.

Where a purchaser neglects to demand an abstract of title, but brings a suit for specific performance in which the usual reference as to title is directed and an inquiry when the title was first shown, although the Master found the title was first shown in his office, yet as no demand of abstract had been made previous to the suit, the purchaser was ordered to to pay the costs of it: *London & Canadian L. & A. Co.* v. *Graham*, 12 P. R. 651.

Neglect of vendor to deliver abstract.

When the vendor neglects, on demand, to deliver an abstract, the purchaser may move to compel him to do so. Or it would seem if the delay is unreasonable, he may apply to be discharged: see *Walton* v. *Armstrong*, 11 Gr. 379. The purchaser is entitled to a solicitor's abstract, and not merely a registrar's abstract, unless there be an express condition of sale to the contrary.

Although the taking of possession by the purchaser, may amount to a waiver of title, yet if the vendor afterwards deliver an abstract, or proceeds with the investigation of the title, he cannot set up the waiver: *Aldwell* v. *Aldwell*, 6 P. R. 183; *Gordon* v. *Harnden*, 18 Gr. 231.

Abstract, nature of.

An abstract may be defined to be a brief statement of all material deeds, and facts, necessary to be proved, in order to establish a good title in a vendor.

Objection to abstract, how made.

After the receipt of the abstract, the purchaser may deliver objections to the abstract; *e.g.*, that assuming the chain of title therein set out to be proved, it does not show a good, or any title, in the vendors; or that the effect of any instrument is not sufficiently abstracted. This class of objections is confined to the sufficiency of the abstract *per se*. The objections should be specific, and point out clearly the alleged defect.

Determination of.

As to the determination of questions thus raised, see *Rule* 109, *infra*: *McManus* v. *Little*, 3 Chy. Ch. 263. After the abstract has been made perfect, or accepted as sufficient, the next step is its verification, and any defects in the proofs form the subject of objections to, or requisitions on, the title, as provided by *Rules* 112-114.

Objection to title, delivery of.

The purchaser should not deliver objections, and requisitions, on title, until all objections to the abstract are disposed of, or he will be held to have waived all objections to the abstract: *McManus* v. *Little*, 3 Chy. Ch. 263.

109. The Master is to determine all questions upon the abstract and the sufficiency thereof; and, if desired by the purchaser, may require the vendor to make the same as perfect as he can; and if the vendor neglects or refuses to do so, he may permit the purchaser to supply defects therein, at the vendor's expense. Chy. O. 391.

Rules 109-111. Master to determine question as to sufficiency of abstract.

Where the objections to the abstract are not removed within fourteen days after service of the objections, it is not necessary to obtain any order of reference, in order to obtain the Master's decision; but the vendor, or purchaser, may carry the abstract and objections, into the Master's office, and obtain a warrant to consider the abstract.

Objections to abstract may be referred to Master.

If the Master hold the abstract to be insufficient, and the vendor neglect, or refuse, to supply the defects, the purchaser may be permitted to do so. This, of course, will not always be in the power of a purchaser; but where deeds are registered, the purchaser may frequently obtain the necessary information to perfect the abstract from the Registry office.

Vendor may supply defects in abstract.

A condition of sale that "the examination of title is to be at the expense of the purchaser, who is to call for only those deeds and papers in my possession and under my control," does not relieve the vendor from delivering an abstract of title, even though such an abstract be not among the papers in his possession or control: *Re Banstead & Warwick*, 12 Ont. 488.

The vendor is usually bound to verify the abstract, by the production of all documents abstracted, or by proper secondary evidence, where the non-production of the originals is sufficiently accounted for; and by producing affidavits of all facts necessary to be proved in order to make out title: see *Rule* 112.

Verification of abstract.

A good title is not shown until it is both exhibited by the abstract, and the vendor is able and willing to verify it: *Granger* v. *Latham*, 14 Gr. 209; *Parr* v. *Lovegrove*, 6 Jur. N. S. 600; but see *Laird* v. *Paton*, 7 Ont. 137; 20 C. L. J. 385; *London & Canadian L. & A. Co.* v. *Graham*, 12 P. R. 651.

Good title, when shown.

110. The Master is not to make a report on the abstract, but is to mark the objections as allowed or disallowed, as the case may be; and when he finds the abstract perfect, or as perfect as the vendor can make it, he is to certify to that effect at the foot or on the back; and such finding is to be final without filing, unless appealed from in the same manner as from a Master's report. Chy. O. 392.

Master is not to make a report, but is to mark objections allowed, or disallowed.

Where the Master made a report on the title, instead of marking the objections "allowed," or "disallowed," the Court refused to entertain an appeal from his report, but referred the matter back to the Master, to be dealt with as provided by this *Rule*: *Cockenour* v. *Bullock*, 12 Gr. 73.

As to the time for appealing from a Master's report, see *Rules* 848, 850.

111. After an abstract is confirmed, or is accepted by the purchaser as sufficient, no objection to the abstract is to be allowed. Chy. O. 393.

After abstract confirmed, no further objection allowed.

The abstract is accepted as sufficient, if the purchaser does not serve any objection within seven days after its delivery: *Rule* 108. It is confirmed, if the Master disallow the objections, and no appeal is had from his finding within the time limited by *Rules* 848, 850.

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Rule 112. Verification of abstract.

112. After acceptance or confirmation of the abstract, the verification is to be proceeded with, and the vendor is with all diligence to afford the purchaser all the means of verification in his power, in the manner, and according to the practice usual with conveyancers; and after having done so, he may serve a notice on the purchaser to make the objections or requisitions, if any, within seven days, or that otherwise he will be deemed to have accepted the title. Chy. O. 394.

Notice to deliver objections and requisitions.

Verification of abstract.

Verification of Abstract.—The practice of conveyancers, is for the vendor's solicitor to give notice of a time and place, (usually his own office), where the abstract will be verified. Sometimes the deeds, and evidences of title, are sent to the purchaser's solicitor. So far as the title deeds are concerned, the abstract is verified by the production of the originals, or such of them as are in the vendor's possession, and by producing certified copies of the deeds, or registered memorials, where the originals are not in the vendor's possession. Sometimes, however, notarial copies are furnished, *e.g.*, where a deed covering other lands is in the hands of some third party. In verifying the abstract the production of the title deeds is sufficient proof of their due execution, unless evidence is adduced casting doubt upon their authenticity: see Coventry 41. As to how far registered memorials are evidence, and as to how far recitals in deeds are evidence of the facts recited, see R. S. O. c. 112, ss. 1, 2; *Sanders* v. *Reg.* 1. Ont. 178; 18 C. L. J. 206; *Allan* v. *McTavish*, 28 Gr. 539; *Reg.* v. *Guthrie*, 41 U. C. Q. B. 148; *Canada Permanent Loan & Savings Co.* v. *Ross*, 7 P. R. 79; for cases before the Statute, see *Wishart* v. *Cook*, 15 Gr. 237; *Gough* v. *McBride*, 10 C. P. 166; *Re Higgins*, 19 Gr. 303; *S. C.* 4 Chy. Ch. 128; *Russell* v. *Fraser*, 15 C. P. 375.

Title deeds, how proved.

Where the vendor relies on a possessory title, the possession must be proved by affidavits and the purchaser is entitled to cross-examine the deponents: *Re Boustead & Warwick*, 12 Ont. 49; *McIntosh* v. *Rogers*, 12 P. R. 389.

Other facts, how proved.

Facts necessary to be proved in order to make out the title, *e.g.*, death, intestacy, heirship, etc., are required to be proved by affidavit; but statutory declarations of such facts, taken on a former devolution of the title, are usually accepted as evidence, and need not be corroborated by affidavits made in the action. By R. S. O. c. 112, s. 1, recitals and descriptions of facts, matters, and parties contained in deeds, instruments Acts of Parliament, or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they are proved to be inaccurate, be taken to be sufficient proof of such facts, matters and descriptions; and see *Re Ponton & Swanston*, 16 Ont. 669; *Re Marsh & Granville*, 24 Ch. D. 11; 48 L. T. N. S. 947.

Deeds must be registered at vendor's expense.

Where the title is a registered title, all instruments in the chain of title must be registered, and any unregistered deeds in the chain of title, must be registered at the expense of the vendor: *Kitchen* v. *Murray*, 16 C. P. 69; *Brady* v *Walls*, 17 Gr. 699; *Fahner* v. *Ran*, 1 Chy. Ch. 246; *Sweetnam* v. *Sweetnam*, 6 P. R. 83; *Laird* v. *Paton*, 7 Ont. 137; 20 C. L. J. 385. Where a registered deed appears on the abstract it is not sufficient verification of the abstract to produce a deed apparently between the same parties as the registered deed, but bearing no certificate of registration, without in some way establishing the identity of the deed produced with that registered: *McIntosh* v. *Rogers*, 12 P. R. 389.

Copies, when to be furnished by vendor.

In the absence of any express condition of sale to the contrary, the vendor is bound to furnish, at his own expense, to the purchaser, copies of all instruments relating to the title which are not of record: *Re Charles*, 4 Chy. Ch. 19. He is also bound to furnish copies of all deeds registered by memorial, but it was

held not of deeds registered in full: *Ib.*; but see *Harrison* v. *Joseph*, 8 P. R. 293; but in a later case it was held by Street, J., that the vendor is bound to produce and deliver to the purchaser certified copies of all deeds, of which he cannot produce the originals, whether registered in full or not: *McIntosh* v. *Rogers*, 12 P. R. 289; and see *Bobier & Ontario Invt. Assoc.* 16 Ont. 259. **Rule 112.**

Liability of vendor to furnish deeds qualified by conditions.

The ordinary liability of a purchaser to produce all necessary evidence to make out a good title, and to deliver on completion the original deeds, or copies of such as are not in his possession, may be qualified by special conditions of sale. Where special conditions are imposed, they have to be set out in full in the advertisement: see *Rule* 94. Special conditions of this kind should not be unnecessarily stringent, as they are calculated to damp the sale. Thus where the proof of title was involved in no difficulty a condition of sale that "the vendor is not to be bound to give any evidence of title, or any title deeds or copies thereof, other than such as are in his possession, or produce any abstract," was held to be very objectionable, and one that should not be sanctioned by the Master, even by consent: *McDonald* v. *Gordon*, 2 Chy. Ch. 125.

Vendor may be bound, notwithstanding such conditions, to prove title.

But it seems that even such a condition would not exempt a vendor from otherwise showing a good title: *Canada Permanent Building Society* v. *Wallis*, 8 Gr. 368; *McIntosh* v. *Rogers*, 12 P. R. 389; 14 Ont. 97; *Secus*, where the vendor purports to sell only such title as he has, but even then, if it can be shown by the purchaser that the vendor has no title at all, the contract will not be specifically enforced against the purchaser: *Leslie* v. *Preston*, 7 Gr. 434; *Jones* v. *Clifford*, 3 Ch. D. 779; *Darlington* v. *Hamilton*, Kay 550; but see *Hume* v. *Pocock*, L. R. 1 Chy. 379; *Hume* v. *Bentley*, 5 D. G. & S. 520; even where a vendor advertises to sell only such title as he has, he is bound to convey that title free from any subsisting incumbrance: *Goold* v. *Birmingham, Dudley & District Bank*, 58 L. T. N. S. 560. The Court will not knowingly pass off a bad title, by the aid of special, or misleading conditions: *Else* v. *Else*, L. R. 13 Eq. 196; Seton 1300, 1395.

Court will not pass off a bad title, knowingly.

Crown bonds.

The vendor is bound to procure the discharge of Crown Bonds affecting the land: *Re Charles*, 4 Chy. Ch. 19. Crown Bonds of the Province of Ontario, are no longer a charge on land of the obligor, unless registered against it: R. S. O. c. 94; *Re Franklin*, 8 P. R. 470; nor are Crown Bonds of the Dominion: 51 Vict. c. 36 (D). The vendor is also bound to remove certificates of *lis pendens* registered against the land: *Bobier & Ontario Invt. Assoc.*, 16 Ont. 259.

Taxes, and incumbrances.

The vendor is not bound to give evidence, negativing the existence of arrears of taxes, or other incumbrances: *Thompson* v. *Milliken*, 9 Gr. 359. As to punishment for concealing incumbrances, or falsifying pedigree, etc., after written demand of abstract: see R. S. C. c. 164, s. 91. But he is bound to have removed from the register or otherwise nullified any registered instrument, appearing to create an adverse interest in the land, even though such instruments purport to be made by parties having no apparent title: *Keefer* v *McKay*, 10 P. R. 345.

Deeds by T. & L. Co. & Canada Co.

As to execution of deeds, by the *Trust & Loan Co.*: see 25 Vict., c. 72; *Trust & Loan Co.* v. *Monk*, 14 Gr. 385; by Canada Company; *Woodhill* v. *Sullivan*, 14 C. P. 255; *Fell* v. *South*, 24 U. C. Q. B. 196.

Covenants by Canada Co.

The Canada Company is not exempted from giving ordinary covenants for title: see *Scarlett* v. *Canada Co.*, 1 Chy. Ch. 90.

Notice to deliver objections, service of.

As soon as the vendor's solicitor considers the verification of the abstract is complete, he should serve notice on the purchaser to deliver objections, and requisitions.

The Master has no jurisdiction to permit further objections to be delivered after the time limited by this *Rule*, but the Court on special application for that purpose may permit further objections to be delivered: *Clarke* v. *Langley*, 10 P. R. 208. And where under the conditions of sale, the time for putting in objections has expired before the reference to the Master takes place, no further objections can be delivered in the Master's office: *Imperial Bank* v. *Metcalfe*, 11 Ont. 467.

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Rule 113. Objections, and requisitions, to whom to be delivered.

113. Upon being served with such notice, the purchaser, if dissatisfied, is to serve his objections or requisitions within the time thereby limited; and the like course is to be followed upon such objections or requisitions as is prescribed by Rules 108, 109, and 110, in relation to the abstract. Chy. O. 395.

Requisitions on title.

Requisitions on, and Objections to, Title.—If the purchaser is dissatisfied with the proofs of title adduced by the vendor, he must deliver his objections, and requisitions, within seven days after receipt of notice so to do, or he will be deemed to have accepted the title.

Objections to title:

The existence of an easement undisclosed by the particulars was held a valid objection, although the property was offered "subject to any existing public and private rights of way, and other rights and easements of whatever nature": *Heywood* v. *Mallalieu*, 49 L. T. N. S. 658. The existence of registered deeds by parties apparently having no title is a valid objection: *McKay* v. *Keefer*, 10 P. R. 345; the fact that the sale was by trustees under unnecessarily depreciative conditions is also a valid objection: *Re Rayner*, 53 L. T. N.S. 495.

The existence of a public road across the land was held a valid objection to the title, although a resolution of the Municipal Council to close it, had been passed: *Kronsbien* v. *Gage*, 10 Gr. 572. So also is an outstanding claim to dower: *Gamble* v. *Gummerson*, 9 Gr. 193. So also is the lunacy of a previous owner of the land: *Francis* v. *St. Germain*, 6 Gr. 636. So also is the fact that the vendor, an attorney, claimed through a will prepared by himself: *Grove* v. *Bastard*, 2 Phil. 621. So also is the fact that the title came through a will, whereby the testator purported only to devise a moiety: *Stapylton* v. *Scott*, 16 Ves. 273; and where the validity of the vendor's title depended on the fact of his having purchased without notice: *Freer* v. *Hesse*, 4 D. M. & G. 495; but a supposed equity in a person who died upwards of fifty years ago, where the possession since that time had been in another, and the vendor had a good legal title, was held no objection: *Dewitt* v. *Thomas*, 10 Gr. 21; *McIntosh* v. *Rogers*, 12 P. R. 389; *Imperial Bank* v. *Metcalfe*, 11 Ont. 467; *Re Shortt & Howard*, before Boyd, C., 21 Mar. 1888.

Possession, inquiry should be made as to.

Inquiry should always be made as to the possession. If a stranger be in possession, the purchaser should insist on his being ejected by the vendor. Although it would seem that possession is no longer constructive notice of the title of the person in possession as against a party claiming under a registered title: *Bell* v. *Walker*, 20 Gr. 569; *Gray* v. *Ball*, 23 Gr. 390; *Sherboneau* v. *Jeffs*, 15 Gr. 574; not even though there be actual notice of the possession: *Cooley* v. *Smith*, 40 U. C. Q. B. 543; *Roe* v. *Braden*, 24 Gr. 589.

No longer constructive notice of title.

but where the person in possession is tenant under a lease for a term not exceeding seven years, his interest is protected though his lease be not registered: R. S. O. c. 114, s. 35; *Latch* v. *Bright*, 16 Gr. 653. As to effect of possession. see *Attorney-General* v. *McNulty*, 11 Gr. 281, 581; *Gray* v. *Coucher*, 15 Gr. 419.

Purchaser need not inquire as to regularity of proceedings. But must see that all necessary parties are bound, etc.

In investigating the title, the purchaser at a sale by the Court, is not bound to inquire into the regularity of the proceedings in the action; if the judgment appear to be regular on its face, he will be protected: *Shaw* v. *Crawford*, 4 Ont. App. 371; *Gunn* v. *Doble*, 15 Gr. 655; *McLean* v. *Grant*, 20 Gr. 76. He must, however, ascertain that all proper necessary parties are bound by the judgment: *Lechmere* v. *Brasier*, 2 J. & W. 287; *Calvert Godfrey*, 6 Beav. 97; *Bennett* v. *Hamill*, 2 Sch. & Lef. 577; and that the sale was in accordance with the judgment: *Colclough* v. *Sterum*, 3 Bli. 181; *Talbott* v. *Minnett*, 6 Ir. Eq. 83. An order of the Court is not invalidated as against a *bonâ fide* purchaser under it on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service: R. S. O., c. 44, s. 10.

Requisitions, how adjudicated on.

Where the requisitions, and objections, or any of them, are not answered, either party may carry in the objections, or such of them as are not answered, before the Master, as provided by *Rule* 108, and get his decision thereon.

There are some objections which are not strictly objections to the title, but are considered "matters of conveyance." Thus, the existence of outstanding incumbrances, or satisfied mortgages—where the vendor is entitled to require the party appearing entitled thereto, to join in the conveyance to the purchaser, or to release or discharge his incumbrance—are not objections to the title. But where the vendor is unable to procure such conveyance, or release, such incumbrances then constitute an objection to the title: see *Re Great Northern Ry. Co.* v. *Sanderson*, 25 Ch. D. 788; 50 L. T. N. S. 87. **Rule 114. Matters of conveyance, what are.**

114. In case of the refusal or neglect of the vendor to verify any portion of the abstract to the best of his ability, or to furnish any necessary proof or documents in his power, the Master may authorize the purchaser to do so at the vendor's expense. Chy. O. 396. **On refusal of vendor to verify abstract, Master may authorize purchaser to do so.**

Costs of Reference as to Title.—In sales by the Court, the purchaser is entitled to his costs of the reference, where the title proves good, on grounds not appearing on the abstract: *Fielder* v. *Higginson*, 3 V. & B. 142; and will not be ordered to pay the vendor's costs though the title is proved according to the abstract: *Flower* v. *Hartop*, 8 Beav. 200; *Holland* v. *King*, 1 W. R. 80; Dart. V. & P. 1210; unless the objections are frivolous and vexatious: *Thorpe* v. *Freer*, 4 Mad. 466; *Peers* v. *Sneyd*, 17 Beav. 151; Seton, 1312, 1313; *Platt* v. *Blizzard*, 29 Gr. 46; *Hurd* v. *Robertson*, 7 Gr. 42; *Laird* v. *Paton*, 7 Ont. 137. A special application is necessary for an order for such costs: *Flower* v. *Hartop*, *supra*. **Costs of reference as to title, how borne.**

A purchaser will be ordered to pay the costs of an unsuccessful application to be relieved from his purchase: *Osborne* v. *Osborne*, 18 W. R. 421.

Where a good title cannot be made, the purchaser is entitled to a lien on the land sold, for the deposit and costs: *Hurd* v. *Robertson*, 7 Gr. 142. **Purchaser's lien for costs.**

Conveyance.—In all sales by the Court since *The Judicature Act*, the Master to whom the action is referred, may settle the conveyance in case the parties differ, or there be any parties not *sui juris* interested, other than married women, without any special reference: see *Rule* 89; and see *Rules* 62, 107. But when infants are interested, the Master is not to settle the conveyance, until the evidence is produced, of the purchase money having been paid into Court, or of its payment having been dispensed with; and where the purchaser is required to give a mortgage, not until evidence is given that the mortgage has been registered, and deposited, with the Accountant: *Rule* 1004. **Conveyance, settlement of, by Master.**

It is the purchaser's duty to prepare, and tender, the conveyance for execution: *Stephens* v. *DeMedina*, 4 Q. B. 422; *Bolton* v. *Hugel*, 35 U. C. Q. B. 407; *Watt* v. *Parker*, 2 Chy. Ch. 33; *Mooney* v. *Prevost*, 20 Gr. 418; *Burns* v. *Boyd*, 19 U. C. Q. B. 547; but see *Parker* v. *Watt*, 25 U. C. Q. B. 115; *Harrison* v. *Livingston*, T. T. 1 & 2 Vict.; *Monck* v. *Stuart*, 4 U. C. Q. B. 203; *Prindle* v. *McCan*, *Ib.* 228; *Scott* v. *Reikie*, 15 C. P. 200; *McDonald* v. *Snitsinger*, 5 U. C. Q. B. 312; *Rogers* v. *Lake*, 9 U. C. Q. B. 264; *Smith* v. *Doan*, 15 U. C. Q. B. 634; *Thayer* v. *Street*, 11 C. P. 243; *Koster* v. *Holden*, 16 C. P. 331; and in the event of the parties differing, or in case of infants, or lunatics, being interested, it must be settled by the Master, before engrossment, or of tender for execution. The purchaser cannot require a covenant by *cestui que trust* for title: *Cottrell* v. *Cottrell*, L. R. 2 Eq. 330; nor where the legal estate is conveyed can he require parties to the action, having merely equitable estates to join in the conveyance. Therefore, upon a sale of mortgaged premises, he cannot require the mortgagor to join in the deed: *Ross* v. *Steele*, 1 Chy. Ch. 94; nor the wife of the mortgagor: *Moore* v. *Shinners*, 1 Chy. Ch. 59; nor the wife of the mortgagee: *Simpson* v. *Simpson*, 1 Chy. Ch. 265. Where, in consequence of the infancy of some of the vendors, a settlement of the conveyance by the Master is rendered necessary, the purchaser's costs will be ordered to be paid out of his purchase money: *Re McMorris*, 3 Chy. Ch. 430. **Purchaser's duty to prepare and tender conveyance. Settlement of, by Master when necessary. Covenants. Equitable interests. Costs.**

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Rules 115, 116.

Purchaser may take vesting order in lieu of conveyance.

The purchaser is entitled to a conveyance with ordinary covenants, but he may, if he choose, take a vesting order. Wherever the Court has authority to order the execution of a conveyance, it may make a vesting order: R. S. O. c. 44, s. 31. The vesting order is granted in Chambers on production of the report on sale duly confirmed, and proof that the purchase money has been duly paid, or secured, according to the report. Where the purchase money is to be paid into Court, its payment must be proved by the production of the certificate of the Accountant, or his chief clerk. The vendor's solicitor is entitled to notice of the application: *Boulton* v. *Stegman*, 1 Chy. Ch. 199; and where infants are interested, the guardian *ad litem* is usually notified also: *Thorne* v. *Chute*, 2 Chy. Ch. 221; but see *Boulton* v. *Stegman*, *supra*. Where the owner of the legal estate became the purchaser, a vesting order was refused: *Bowen* v. *Fox*, 1 Chy. Ch. 387; and see Jud. Act, s. 31, and notes *ante* p. 24.

Application for, how made.

A purchaser cannot be compelled to take a vesting order instead of a conveyance: *Laplante* v. *Seamen*, 8 Ont. App. 557.

Costs of vesting order.

Where, in consequence of the absence of one of the vendors from the jurisdiction, the execution of the conveyance prepared, and tendered by the purchaser, could not be procured, and a vesting order was then obtained, the purchaser was held entitled to the extra costs so occasioned: *Re McMorris*, 3 Chy. Ch. 430; and see *Lawrason* v. *Buckley*, 3 Chy. Ch. 270.

Tender of conveyance.

The purchaser sufficiently tenders the conveyance for execution under the standing conditions of sale, by delivering the same to the vendor's solicitor: *Weiss* v. *Crafts*, 6 P. R. 151.

Rules 108-114 apply to all references as to title.

115. The foregoing Rules 108 to 114 inclusive, are to apply to all cases of reference to the Master as to title, as well as to sales by the Court. Chy. O. 397.

(iii) *Receivers, Committees, etc.*

Warrant for appointment of receiver, to name receiver and sureties.

116. The party prosecuting the order for a receiver is to obtain an appointment or a warrant from the Master, and to serve the same on all the necessary parties, naming in the copy thereof served, the proposed receiver and his sureties. *See* Chy. O. 278.

Receivers, how appointed.

The appointment of receivers, which was formerly exclusively within the jurisdiction of the Court of Chancery, may now be made by any Division of the High Court, in any case in which it shall appear to the Court to be just, or convenient: R. S. O. c. 44. s. 53. s.-s. 8; see *ante* p. 52.

Duty of Receiver.

A receiver is an indifferent person between the parties, appointed by the Court to collect and receive the rents, and profits, of land, or the produce of personal estate, or to take the care and custody of any other property which it does not seem proper to the Court that either of the litigants should do, either by reason of the controversy existing between them, or by reason of personal disability on the part of the party legally entitled, *e.g.*, infancy, or lunacy.

Claim for, to be indorsed on writ.

Where the appointment of a receiver is a substantial part of the relief sought by a plaintiff, he should indorse a claim to that effect on his writ: *Colebourne* v. *Colebourne*, 1 Ch. D. 690.

Appointment operates as injunction.

The appointment of a receiver operates as an injunction, and neither of the litigants can receive the money, or property, committed to a receiver, without a contempt of Court, and it is not necessary in the order appointing a receiver to grant an injunction in terms: Kerr on Receivers, 8.

Rule 116. As to whether interim Receiver superseded by judgment *quære.*

It has been said that an interim receiver is superseded by the judgment subsequently given in the action, unless he be expressly continued by it: Kerr on receivers, 2nd ed. 186, *Reeves* v. *Neville*, 10 W. R. 335; Taylor's Ord. 3rd ed. 274; *Gibson* v. *Montfort*, 1 Ves. Sr. 485; but the authorities cited do not appear to bear out the proposition: see Seton, 412. The question would appear to depend on the terms of the order appointing the receiver: if appointed "until the trial," then it would seem clear, that unless continued by the judgment pronounced at the trial, he would be superseded by it; but if appointed generally without any limitation as to time, or "until the Court make order to the contrary," then it would seem that he would not necessarily be superseded by the judgment subsequently pronounced, even though not expressly continued by it.

When a receiver has been appointed by the judgment in the action generally, it is not necessary that the judgment on further directions should continue him: *Re Underwood*, 60 L. T. N. S. 384.

Receiver; when Appointed:—

Receiver, when appointed.

Infants' estate.

Infants.—A receiver will be appointed of an infant's estate in a proper case, as where the father is of bad character or insolvent, and there is danger of loss: *Kiffin* v. *Kiffin*, cited 1 P. W. 704; *Ex parte Mountfort*, 15 Ves. 449 *n.*; *Re Cormicks*, 2 Ir. Eq. 264, or there is no testamentary guardian, or one who declines to act: *Hicks* v. *Hicks*, 3 Atk. 273; *Bridges* v. *Hales*, Mos. 111; or the guardian is misconducting himself: *Beaufort* v. *Berty*, 1 P. W. 704, and see *Dillon* v. *Lord Mountcashel*, 4 Bro. P. C. 306.

Lunatics' estates.

Lunatics.—A receiver will be appointed over a lunatic's estate, where no person will act as committee, or where the committee is infirm, or the management of the estate onerous: Kerr on Receivers, 78.

As against executors and trustees.

Executors, and Trustees.—The Court will in a proper case appoint a receiver to act in place of an executor, or trustee, but it will not do so on slight grounds. Where fraud is charged a receiver will be appointed: *Vernon* v. *Kinzie*, 2 O. S. 40, and see *Meacham* v. *Draper*, 2 Gr. 316: or in case of misconduct or improper management, or where there is danger of loss of the trust property: *Middleton* v. *Dodswell*, 13 Ves. 266; *H.* v. *H.*, 1 Ch. D. 276; *Colebourne* v. *Colebourne*. *Ib.* 690; or is wasting the assets: *Keene* v. *Riley*, 3 Mer. 436; or that being a sole executor, or trustee, he is insolvent: *Harrold* v. *Wallis*, 9 Gr. 443; *Re Johnson*, L. R. 1 Chy. 325; *Gawthorpe* v. *Gawthorpe*, W. N. 1878, 91; although mere poverty is no ground for the appointment: *Anon*, 12 Ves. 4; but if coupled with bad character it may be: *Everett* v. *Prythergh*, 12 Sim. 368; or if being a female, she has married a man in necessitous circumstances, the *cestuis que trust* being infants: *Dillon* v. *Lord Mountcashel*, 4 Bro. P. C. 306. A receiver may also be granted before probate, or administration, to prevent waste or spoilation, and to provide for the collection of assets pending litigation as to the right to administration: *Atkinson* v. *Henshaw*, 2 V. & B. 85; *Ball* v. *Oliver*, *Ib.* 96; *Jones* v. *Godrich*, 4 Jur. 98; *Wood* v. *Hitchings*, 2 Beav. 289; 4 Jur. 858; *King* v. *King*, 6 Ves. 172; *Re Moore*, *Ker* v. *Moore*, 13 P. D. 36; 58 L. T. N. S. 386; but see *Knight* v. *Duplessis*, 1 Ves. Sr. 324; but to warrant the appointment there must in general be shown to be litigation pending, or threatened, in the Surrogate Court: *Jones* v. *Jones*, 3 Mer. 174; *Jones* v. *Frost*, 3 Mad. 1; Jac. 466; *Marr* v. *Littlewood*, 2 My. & Cr. 458; *Parkin* v. *Seddons*, L. R. 16 Eq. 36; or that there is some difficulty in obtaining administration: *Overington* v. *Ward*, 34 Beav. 175. Pending litigation respecting the grant of probate or administration, the Surrogate has power to grant administration *pendente lite*: R. S. O. c. 50, s. 53.

Receiver, when granted on application of, or against, mortgagee of legal estate.

Mortgagee.—Formerly a receiver would not be granted at the instance of a mortgagee entitled to the legal estate: *Berney* v. *Sewell*, 1 J. & W. 648; except under special circumstances; see Kerr on Receivers, 29-30, 34; nor against a prior mortgagee in possession at the instance of a subsequent incumbrancer, so long as anything remained due on the prior mortgage. And the Court would only act on the prior mortgagee's own admission that he has been paid off, or his refusal to accept what was due to him: *Berney* v. *Sewell*, 1 J. & W. 649; *Hiles* v. *Moore*, 15 Beav. 180. But where the prior mort-

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Rule 116.

gagee in possession had himself acquired the equity of redemption, and it appeared he had received rents and profits more than sufficient to pay off his mortgage, a receiver might be granted: *Steinhoff* v. *Brown*, 11 Gr. 114. And now a receiver may be appointed at the instance of mortgagee of the legal estate, if it shall seem to the Court to be just or convenient so to do: *Pease* v. *Fletcher*, 1 Ch. D. 273; but see *North London Railway Co.* v. *Great Northern Railway Co.*, 48 L. T. N. S. 695. Where the mortgagor is in possession and a receiver is appointed at the instance of the mortgagee, the usual direction for the tenants to attorn is not sufficient to compel the mortgagor to pay a rent to the receiver: but he will from the date of the demand of rent by the receiver be compelled to pay an occupation rent if he continue to retain possession: *Yorkshire Banking Co.* v. *Mallon*, 35 Ch. D. 125; 56 L. T. N. S. 399; see Jud. Act, s. 53 (8), and notes.

When on application of equitable mortgagee.

An equitable mortgagee may, after default, have a receiver as against a mortgagor in possession "without prejudice" to the rights of any prior mortgagee: *Aikins* v. *Blain*, 13 Gr. 646; Kerr on Receivers, 35. The Court will not try, on an interlocutory motion, the question whether a prior mortgagee in possession has been paid off, when he himself distinctly swears that there is something due; but his affidavit as to the amount due is required to be specific; if vague, or his accounts are so negligently kept that he cannot speak positively, a receiver may be appointed: *Rowe* v. *Wood*, 2 J. & W. 558; *Hiles* v. *Moore*, 15 Beav. 180; *Codrington* v. *Parker*, 16 Ves. 469.

Interim Receiver, when granted on application of creditors.

CREDITORS.—An injunction to restrain a debtor from alienating his property *pendente lite*, cannot in general be obtained by a simple contract creditor suing to recover his debt, where the debtor is *in esse*; nor under such circumstances could a receiver be granted: *National Provincial Bank of England* v. *Thomas*, 24 W. R. 1013; *Owen* v. *Homan*, 4 H. L. C. 1036; *Robinson* v. *Pickering*, 50 L. J. C. A. 527; *Hepburn* v. *Patton*, 26 Gr. 587; not even though the debtor be a public company: *McCall* v. *Canada Farmers' Mutual Insurance Co.*, 18 C. L. J. 117; *Mills* v. *Northern Railway of Buenos Ayres Co.*, L. R. 5 Chy. 621; nor though the creditor be an unpaid vendor, and the company admit their liability: *Latimer* v. *Aylesbury & Bedford Railway Co.*, 9 Ch. D. 385.

But when the debtor is dead, a receiver may be obtained by a simple contract creditor against the personal representative, or devisee, wasting the assets of the deceased: see *Keene* v. *Riley*, 3 Mer. 436; and of the realty when it appears the personal estate is insufficient: *Jones* v. *Pugh*, 8 Ves. 71; *Chalk* v. *Raine*, 13 Jur. 981: Kerr on Receivers, 40. Since *The Devolution of Estates Act* (R. S. O. c. 108), the realty and personalty of a deceased person constitute a common fund for the payment of his debts, and it would seem no longer necessary to establish that the personalty is insufficient as a condition of obtaining a receiver of the realty.

After judgment, Receiver may be appointed.

And a creditor who has obtained judgment may apply for a receiver by way of equitable execution, as against property of the debtor, which could not be reached by a writ of execution: *Anglo-Italian Bank* v. *Davies*, 9 Chy. D. 275; *Smith* v. *Hurst*, 1 Coll. 705; 10 Ha. 48; *Wells* v. *Kilpin*, L. R. 18 Eq. 208; *Tillet* v. *Pearson*, 43 L. J. Chy. 93; *Fuggle* v. *Bland*, 11 Q. B. D. 711; *Westhead* v. *Riley*, 49 L. T. N. S. 776; *Perks* v. *Mybred*, 76 L. T. Jour. 336; *Kincaid* v. *Reed*, 21 C. L. J. 144; *Kincaid* v. *Kincaid*, 12 P. R. 462; *Book* v. *Ruth*, 20 C. L. J. 193. Formerly, in such cases it was necessary, before applying for a receiver, to sue out a writ of execution; but it would seem now that if the property cannot be reached by the writ, such a preliminary is not necessary: *Ex parte Evans*, 13 Chy. D. 259; and see *ante* p. 60.

Against Railway Company.

Although an *interim* receiver cannot, in general, be granted in favour of a creditor against a debtor company: *McCall* v. *Canada Farmer's Mutual Insurance Co.*, 18 C. L. J. 117, it is sometimes the only relief that can be awarded, after judgment has been obtained. Thus, neither an execution creditor, nor a mortgagee, of a railway company, can enforce payment of his demand, by sale, or foreclosure, of the railway; he can only do so by procuring a receiver and manager of the undertaking to be appointed: *Galt* v. *Erie &*

Niagara Railway Co., 14 Gr. 499; *Peto* v. *Welland Railway Co.*, 9 Gr. 455, affirmed on re-hearing, 16th Feb. 1864; *Brantford* v. *Grand River Navigation Co.*, 8 Gr. 246; and see *Breeze* v. *Midland Railway Co.*, 26 Gr. 225 (where the plaintiff claimed a mechanic's lien): Kerr on Receivers, 46-7, 50. But where a railway company had been ordered to be wound up, and an unpaid vendor brought a suit to enforce his lien for purchase money, it was held that he was entitled to an injunction restraining the company from using the land until payment of the purchase money: *Allgood Merrybent & Darlington Ry. Co.* 33 Ch. D. 571; and see *Williams* v. *Aylesbury & Buckingham Ry. Co.*, 28 L. T. N. S. 547. **Rule 116.**

Where a receiver is appointed at the instance of a judgment creditor, it is without prejudice to the claims of prior mortgagees, if any; *Legg* v. *Mathieson*, 2 Giff. 71; *Wildy* v. *Mid-Hants Railway Co.*, 16 W. R. 409; *Potts* v. *Warwick & B. C. Co.*, Kay 145. Appointment not to prejudice prior mortgagees.

PARTNERS.—The Court in granting a receiver of partnership property, thereby takes the affairs of the partnership out of the hands of all the partners, and entrusts them to a receiver or manager of its own appointment; and while an injunction only restrains one or more of the partners from doing what may be complained of, the appointment of a receiver excludes all alike from taking part in the management of the concern: *Hall* v. *Hall*, 3 Mac. & G. 86. It, therefore, does not follow that the Court will grant a receiver *pendente lite*, in every case where it would grant an injunction. Receiver, when appointed in partnership cases.

When a dissolution is neither sought, nor is absolutely necessary, a receiver *pendente lite* will not in general be granted of a "going concern": *Goodman* v. *Whitcomb*, 1 J. & W. 589; *Roberts* v. *Eberhardt*, Kay 148; *Hall* v. *Hall*, *supra*; unless there is danger of the business being destroyed, or the assets misapplied in the meantime; or unless one partner is misconducting himself; *e.g.*, by colluding with debtors of the firm: *Estwick* v. *Conningsby*, 1 Vern. 118; or carrying on a separate trade with the partnership property: *Harding* v. *Glover*, 18 Ves. 281; or is wrongfully excluding the plaintiff from the management: *Wilson* v. *Greenwood*, 1 Sw. 481; *Goodman* v. *Whitcomb*, 1 J. & W. 592; *Rowe* v. *Wood*, 2 J. & W. 558; *Const* v. *Harris*, T. & R. 525; *Prentiss* v. *Brennan*, 1 Gr. 371; *Bilton* v. *Blakely*, 6 Gr. 575; *Steele* v. *Grossmith*, 19 Gr. 141. Not appointed *pendente lite* of going concern.

Where a partnership is alleged on one side and denied on the other, usually a receiver is appointed until that question has been determined: *Peacock* v. *Peacock*, 16 Ves. 49; *Chapman* v. *Beach*, 1 J. & W. 504 *n*; *Fairburn* v. *Pearson*, 2 Mc. & G. 144. Exceptions to rule.

TENANTS IN COMMON.—A receiver has been appointed in a partition action *pendente lite*, although there has been no exclusion by any of the co-owners: *Porter* v. *Lopes*, 7 Ch. D. 358. Formerly a case of destructive waste, or gross exclusion, was necessary to be made to warrant the appointment of a receiver in such a case: Kerr on Receivers, 79; but see *Gaskin* v. *Balls*, 13 Ch. D. 313, *per* Thesiger, L.J.; and *North London R. W. Co.* v. *Great Northern R. W. Co.*, 11 Q. B. D. 30; 48 L. T. N. S. 695, where it was held the jurisdiction to grant injunctions, has not been extended by *The Judicature Act*; see *Phillips* v. *Jones*, 76 L. T. Jour. 373. Receiver, when appointed as against cotenant in common.

VENDOR AND PURCHASER.—In actions for specific performance, a receiver *pendente lite* may, in a proper case, be appointed: *Kennedy* v. *Lee*, 3 Mer. 448; *Hall* v. *Jenkinson*, 2 V. & B. 125; *McLeod* v. *Phelps*, 2 Jur. 962; and see *Taylor* v. *Eckersley*, 2 Ch. D. 302; 5 Ch. D. 740, a case of chattels; or in actions to set aside conveyances as obtained by fraud: *Stillwell* v. *Wilkins*, Jac. 282; *Huguenin* v. *Baseley*, 13 Ves. 107; 2 White & Tud. Lg. Cases, 547. Or between vendor and purchaser.

LEGAL TITLE.—Formerly the Court would not, except under special circumstances, or in cases covered by R. S. O. (1877) c. 40, s. 39, appoint a receiver against a person in possession of lands claiming under a legal title; but since *The Judicature Act*, it has been held that the jurisdiction is extended, and that a receiver may be appointed even as against a person claiming a legal title, Receiver, when appointed against holder of legal title.

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Rule 117. wherever the Court may think it "just or convenient": *Real and Personal Advance Co.* v. *McCarthy*, 27 W. R. 706; but see *North London R. W. Co.* v. *Great Northern R. W. Co.*, 11 Q. B. D. 30; 48 L. T. N. S. 695; *Phillips* v. *Jones*, 76 L. T. Jour. 373.

Application for, to be made in Court.

Application for Appointment.—The application for the appointment of a receiver, must in the first instance be made in Court, upon motion for that purpose where the appointment is required to be made *pendente lite*, or else at the trial, or on motion for judgment in the action; but after a receiver has been appointed, applications to fill vacancies, subsequently occurring in the office may be made in Chambers: *Grote* v. *Bing*, 9 Ha. App. *l*, but the order for a receiver has been granted in Chambers, by consent: *Blackborough* v. *Ravenhill*, 16 Jur. 1085; and see 22 Sol. Jour. 914.

Under *Rule* 1134, a defendant may, before judgment, apply for an interim injunction and receiver. He may do so, notwithstanding the plaintiff has already served notice of motion for the like purpose. In such case, one order will be made on the two motions, but the conduct of it will, in general, be given to the plaintiff: *Sargant* v. *Read*, 1 Ch. D. 600.

If the receiver is named by the Court, "on his giving security," no other person can be named in the warrant, and if the person named in the order fail to give the security, a further order would be necessary to enable the Master to appoint some one else.

Receiver, an Officer of the Court.

A receiver when appointed is an officer of the Court, and stands in the position of trustee, to all who are interested in the estate or fund. In making the appointment the Master should endeavour to select a person acceptable to all parties, as well as otherwise fit and competent for the duties he will be called on to perform: *Simpson* v. *Prescott & R. W. Co.*, 1 Chy. Ch. 99; and see *Brant* v. *Willoughby*, 17 Gr. 627.

Should be disinterested, unless Court appoint one of the parties.

A receiver should in general be wholly disinterested, unless the parties otherwise consent, or the Court is of opinion that the appointment of one of the parties would be beneficial to the estate: *Sargant* v. *Read*, 1 Ch. D. 600. When a party to the action is appointed it is only on his undertaking to act without salary: *Ib.*; *Wilson* v. *Greenwood*, 1 Sw. 471, 483; *Blakeney* v. *Dufaur*, 15 Beav. 40, 44; Kerr on Receivers, 95. Where a receiver is appointed of trust property, the *cestui que trust* is entitled to have the superintendence of the trustee, as a check upon the receiver; the trustee should not therefore be himself appointed, except under special circumstances: Kerr 95, 96; and where a receiver is appointed of the property of any person not *sui juris* the guardian or committee of such person, should not be appointed for that reason, nor yet any person connected with him, nor the solicitor in the action: *Re Lloyd*, 12 Ch. D. 447; nor a Master of the Court: *Ex parte Fletcher*, 6 Ves. 427.

Who should be appointed, of trust estate.

Parties not eligible.

A party to the action cannot propose himself as receiver unless leave to do so be embodied in the order: *Davis* v. *Duke of Marlborough*, 2 Sw. 118.

Security.

The giving of security for the due performance of his duty by the Receiver will not be dispensed with, where infants or other persons not *sui juris* are interested: *Tylee* v. *Tylee*, 17 Beav. 583; nor even where all the parties are *sui juris* and consent, if it is referred to the Master to appoint the Receiver: *Manners* v. *Furze*, 11 Beav. 30; but it may be, if the parties themselves nominate the Receiver: *Ib.*

On return of warrant, bond to be brought in.

117. At the time appointed, the party prosecuting the order is to bring into the Master's office the bond or recognizance proposed as security. *See* Chy. O. 279; J. A. Rule 510.

The recognizance, or bond, here referred to, is intended to be brought in as a draft, and should not be executed until it has been approved by the Master, see *Rule* 119, otherwise its re-execution may be necessary.

The bond, or recognizance, must now be made to the "Accountant of the Supreme Court of Judicature for Ontario, his successors and assigns": *Rule* 156; R. S. O. c. 44 s. 133, s.s. 2: see *ante*, p. . **Rules 118-121.**

Where a guarantee company has been approved by the Lieutenant-Governor in Council, its bond may be accepted as security: R. S. O. c. 181, s. 3; and see *Carpenter* v. *Solicitor to the Treasury*, 46 L. T. N. S. 821; R. S. O. c. 15, s. 24. Bond, how to be given.

118. Any other party desirous of proposing another person as receiver, is to serve notice of his intention so to do upon the other parties, naming in the notice the person proposed by him as receiver, and his sureties, and is then in like manner to bring into the Master's office the bond or recognizance proposed by him as security. *See* Chy. O. 280. Party desiring to propose another person as receiver, to give notice.

119. At the time named in the appointment or warrant the Master is, in the presence of the parties, or those who attend, to consider the appointment of the receiver, and to determine respecting the same; and to settle and approve of the proposed security. *See* Chy. O. 281. Master to appoint receiver and settle, and approve security.

In order to enable the Master to settle the security to be given, affidavits must be filed proving the amount of property likely to come to the receiver's hands. The amount of the security required, will vary according to the circumstances; usually security will be required to be given by the receiver and at least two sureties in double the amount of the probable annual rents of reality, and double the probable amount of personal estate, likely to come to his hands. Evidence to be produced on settling security.

When a receiver has passed his final accounts, and paid his balances as directed by the Court, an application may be made to discharge the bond; all parties interested are entitled to notice of the application: *Brown* v. *Perry*, 1 Chy. Ch. 253. Discharge of bond.

120. The Master is to make no report approving of or appointing the receiver, but is to appoint such receiver by signing a written appointment to the following effect, viz.: "IN THE HIGH COURT OF JUSTICE, DIVISION, [*style of cause*]—I hereby appoint [*receiver's name*] receiver in this action, [*signature of Master*];" which appointment is to be signed without any warrant or attendance for that purpose. *See* Chy. O. 282. Master not to make report appointing a receiver; but to sign appointment.

Committees of lunatics, and guardian of the person and estate of infants, are to be appointed in the same manner as receivers: *Rule* 122.

121. After the execution and filing of the securities settled and approved by the Master, the appointment is to be filed by the party who has procured the person named by him as receiver to be appointed, and may be moved against within seven days by any party interested. *See* Chy. O. 283. Master's appointment of receiver to be filed.

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Rules 122, 123. Receiver's appointment, when effectual.

A receiver appointed "upon his giving security," is not effectually constituted receiver as against third parties until he has given the security: *Edwards* v. *Edwards*, 1 Ch. D. 454; 2 Ch. D. 291; but if no security be required, he is legally clothed with the character of receiver from the date of his appointment: *Taylor* v. *Eckersley*, 2 Ch. D. 302; 5 Ch. D. 740.

Interference by third parties with the property in question, before the appointment is completed, is not a contempt of Court: *Ib.*; and see *Fox* v. *Nipissing R. W. Co.*, 29 Gr. 11.

Interference with Receiver, a contempt of Court.

After the appointment of the receiver is complete, any interference with the property committed to his charge and in his possession, either by parties to the action, or third parties having notice of his appointment, is a contempt of Court, unless the leave of the Court have been first obtained: *Angel* v. *Smith*, 9 Ves. 335; *Russell* v. *East Anglian R. W. Co.*, 3 Mc. & G. 104; *Ames* v. *Birkenhead Docks*, 20 Beav. 353; even though such interference be by persons claiming by title paramount to that of the parties to the action in which the receiver is appointed: *Ib.*; *Evelyn* v. *Lewis*, 3 Ha. 475; *Hawkins* v. *Gathercole*, 1 Drew 17; *Randfield* v. *Randfield*, 1 Dr. & Sm. 314; and the Court will not permit any one, without its sanction, to intercept, or prevent payment, or delivery to the receiver, of any money or property which he has been appointed to receive: *Ames* v. *Birkenhead Docks*, 20 Beav. 353; but where goods in the possession of a receiver were sold for taxes, and neither the bailiff, nor purchaser, had notice of the receiver's rights, the Court refused to hold the sale void: *Gibson* v. *Lovell*, 18 Gr. 197. As to payments which a receiver of a going concern may properly make: see *Gooderham* v. *Toronto & Nipissing Ry. Co.*, 8 Ont. App. 685.

Receiver to obtain leave to sue, or defend, or distrain.

When it is necessary for the receiver to bring, or defend, an action, or take other legal proceedings, to recover, or maintain, his right to property committed to him, he should first obtain the sanction of the Court: *Thomas* v. *Torrance*, 1 Chy. Ch. 9. He cannot sue in his own name, but he must get the leave of the Court to bring the action in the name of the party in whom the legal cause of action is vested: *McGuin* v. *Fretts*, 13 Ont. 699; *Stuart* v. *Grough*, 14 Ont. 255. The receiver should not himself initiate proceedings, but he should apply to the party having the conduct of the cause to take any proceedings that may be necessary: *Third National Bank* v. *Queen City Refining Co.*, 20 C. L. J. 151. After attornment by a tenant to the receiver, the receiver may distrain in his own name; before attornment leave must be obtained to distrain in the name of the person having the legal estate: Kerr 142, 143. The application for leave to sue, defend, or distrain, may be made in Chambers: *Thomas* v. *Torrance*, 1 Chy. Ch. 9; notice to the tenants is not necessary: *Paxton* v. *Dryden*, 6 P. R. 41.

Proceedings against, restrained.

Proceedings instituted against a receiver for acts done by him in the execution of his office, will be restrained: *Simpson* v. *Hutchison*, 7 Gr. 308; and see *Searle* v. *Choat*, 25 Chy. D. 723; 50 L. T. N. S. 470. After his discharge a receiver will not be restrained from soliciting customers, unless he was appointed on the terms that he would not do so after he ceased to be receiver: *Re Irish, Irish* v. *Irish*, 40 Ch. D. 49; 60 L. T. N. S. 224.

Accounts of.

ACCOUNTS OF RECEIVER.—See *Rule* 123.

Committees of lunatics to be appointed in same manner as receivers.

122. Committees of the persons and estates of lunatics, idiots, and persons of unsound mind, and guardians, excepting guardians *ad litem*, are to be appointed in the same manner as receivers as nearly as circumstances will permit. Chy. O. 537.

Master to appoint time for Receivers, and Com-

123. Where an order directs the appointment of a receiver, committee of the person and estate of a lunatic, idiot, or person of unsound mind, or a guardian other than

a guardian *ad litem*, and does not regulate the matter herein provided for, the Master is to fix the time or times in each year when the person appointed is to pass his accounts and pay his balances into Court; and in default of compliance with such direction, the person appointed may, on the passing of his accounts, be disallowed any salary or compensation for his services, and may be charged with interest upon his balances. Chy. O. 588.

Rules 124, 125. mittees, to pass accounts where not fixed by Court.

(iv) *Foreclosure, Sale and Redemption.*

124. Upon a reference under a judgment for foreclosure or sale the Master is to inquire and state, whether any person or persons, and who other than the plaintiff, has or have any lien, charge, or incumbrance upon the land and premises embraced in the mortgage security of the plaintiff, in the writ or pleadings mentioned, subsequent thereto. Chy. O. 442.

Master to inquire as to incumbrances.

This *Rule* in its terms applied only to the case of mortgages of lands, but a similar procedure is followed upon a judgment for the sale, or foreclosure of chattels.

The inquiry is confined to subsequent incumbrancers; persons against whom relief is sought, whose claims, if any, are *prima facie* prior to the plaintiff's must be made parties to the writ: *Glass* v. *Freckleton*, 10 Gr. 470; *Lally* v. *Longhurst*, 12 P. R. 510; and see *White* v. *Beasley*, 2 Gr. 662. Where, however, the plaintiff has sought to attack in the Master's office, the priority of an incumbrancer who is *prima facie* entitled to priority over him, he has been allowed to vacate his judgment and to add the incumbrancer as an original defendant to the writ, and proceed *de novo* as against him: *Lally* v. *Longhurst*, *supra*. Where the mortgagor was the only defendant, and a decree, by consent, for immediate foreclosure was taken against him, a reference as to incumbrances was refused: *Taylor* v. *Ward*, 13 Gr. 590; but it seems doubtful whether the rule laid down in that case would be followed under the present practice. Where there are no incumbrances, the plaintiff should not take a judgment with a reference as to incumbrances: see *Rule* 776, and notes.

Master to inquire as to incumbrancers subsequent to plaintiff.

The incumbrancers are ascertained by the production of the certificates mentioned in the following *Rule*.

125. The plaintiff is to bring into the Master's Office certificates from the Registrar and Sheriff of the County wherein the lands lie, setting forth all the incumbrances which affect the property in the writ or pleadings mentioned, and such other evidence as he may be advised. Chy. O. 443.

Plaintiff to bring into M. O. Sheriff's and Registrar's certificates.

The certificates should be brought down to, at least, the day subsequent to the issue of the writ in the action.

It is not necessary to add as parties, those who acquire title *pendente lite*: *Robson* v. *Argue*, 25 Gr. 407; *Walbridge* v. *Martin*, 2 Chy. Ch. 275; *Bellamy* v. *Sabine*, 1 D. & J. 566, 578, 580, 584; 3 Jur. N. S. 943; *Tyler* v. *Thomas*, 25 Beav.

Parties acquiring title *pendente lite*

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Rule 126. need not be added.

47; and see 1 Ric. 2, c. 9; an order adding parties who had acquired interests *pendente lite* was set aside: *Abell* v. *Parr*, 9 P. R. 564; but see *Lindsay* v. *Bank of Montreal*, 13 Gr. 86. As to the doctrine of *lis pendens* see C. L. T. September 87, Bennett on *Lis Pendens*, c. 1; *Price* v. *Price*, 35 Ch. D. 297. The doctrine of *Lis Pendens* does not affect third persons acquiring title under tax sales *pendent lite*, Bennett c. 5 s. 88, nor *bonâ fide* transfers of negotiable paper, *Ib.* ss. 86, 87; nor rights required under statutes authorizing expropriation, *Ib.* s. 89.

Sheriff's certificate, form of.

Sheriff's Certificate.—Where the mortgage is of freehold lands, the certificate of the Sheriff must relate to executions against lands, but where the property mortgaged is leasehold, or chattels, it should relate to executions against goods: *Sparrow* v. *Champagne*, 5 C. P. 394. The certificates are usually confined to executions against the mortgagor, or other owner of the equity of redemption. But when the practice of registration of judgments was in force, it was held to be necessary to make the judgment creditors of the mortgagee parties also: *Sanderson* v. *Ince*, 7 Gr. 383; but in a later case it was held that a creditor of the mortgagee who had obtained an order attaching the mortgage debt, but not an order to pay over, was not an incumbrancer, and ought not to be made a party: *Crosbie* v. *Fenn*, 26 Gr. 283. The Sheriff's certificate should be so worded as to include writs which have been withdrawn for renewal, this may be done by making the certificate cover any writs which have been in the Sheriff's hands within thirty days preceding its date: see form of such a certificate, Taylor on Titles, 2nd ed. 197.

Withdrawal of writ for renewal is not an abandonment.

The withdrawal of a writ for renewal is not an abandonment of its priority, but on being returned to the Sheriff renewed, it retains the same position it held prior to its withdrawal for renewal: *Rowe* v. *Jarvis*, 13 C. P. 495; *Muir* v. *Munroe*, 23 U. C. Q. B. 139. The day of the teste of a *fi. fa.* is inclusive, so that a writ issued on the 15th day of a month expires on the 14th day of the same month in the following year: *Bank of Montreal* v. *Taylor*, 15 C. P. 107. A writ withdrawn for renewal, and not returned for fifteen days thereafter, when a year from the teste had expired, was held, nevertheless, to be re-delivered in sufficient time: *Meneilly* v. *McKenzie*, 3 E. & A. 209; but a writ not returned to the Sheriff until six months after its renewal,—owing to mistake,—was held to have lost its priority: *Re Hime & Ledley*, 13 P. R. 1. A direction by the execution creditor to the Sheriff to stay proceedings, is tantamount to a withdrawal of the writ, and any subsequent execution then in the Sheriff's hands, or thereafter, and during the stay, coming to his hands, will take priority: *Trust & Loan Co.* v. *Cuthbert*, 13 Gr. 412.

But a direction to the sheriff to stay, is.

Registrar's certificate.

Registrar's Certificate.—The Registrar's certificate is usually confined to registrations on the particular parcel of land included in the plaintiff's mortgage. But it is well to bear in mind, that judgments for alimony registered against a defendant, bind *all* his lands situate within the county, or counties, in which the registration is made, without any local description: see R. S. O. c. 44, s. 30, *ante* p. 23.

C.C. Clerk's certificate, when necessary.

Where the mortgaged property consists of chattels, the certificate of the clerk of the proper County Court should be produced, as to subsequent mortgages.

It is to the interest of the plaintiff to take care that all persons, having any claim as subsequent incumbrancers, are made parties; as the omission to make them parties at the proper time, may lead to difficulty in carrying out any subsequent sale which may be had in the action; and possibly render another action necessary.

Master is to add parties.

126. The Master is to direct all such persons as appear to him to have any lien, charge or incumbrance upon the estate in question, to be made parties to the action, and to be served with a notice in the form No. 34 in the Appendix. Chy. O. 444.

Where it is doubtful whether persons, appearing to have claims, have any valid right, the question should not be determined against them in their absence, but they should be added as parties, and an opportunity given them to maintain their claims: *Canada Landed Credit Co.* v. *McAllister*, 21 Gr. 593. Persons whose claims, if any, would be prior to the plaintiff, should be made parties to the writ, and not added in the Master's office: *Glass* v. *Freckleton*, 10 Gr. 470; *Lally* v. *Longhurst*, 12 P. R. 510; and see *Rule* 124. Persons having mechanic's liens subsequent to the plaintiff, should be added under this *Rule*, and not made parties by the writ: *Jackson* v. *Hammond*, 8 P. R. 157. An execution creditor whose writ is placed in the Sheriff's hands subsequent to the registration of a mechanic's lien, but prior to the institution of an action to enforce it is a subsequent incumbrancer and may be made a party to the action in the Master's office notwithstanding the 90 days limited by R. S. O. c. 126, s. 23, have expired: *Cole* v. *Hall*, 12 P. R. 584, affirmed by C. A., 13 P. R. 100. A creditor of a mortgagee who has obtained an attaching order against the mortgage debt, but who has not obtained an order to pay over, is not an incumbrancer within the meaning of the *Rule*: *Crosbie* v. *Fenn*, 26 Gr. 283; neither is a simple contract creditor of the mortgagor, nor has he any right of redemption: *Nichol* v. *Allenby*, 17 Ont. 275; and where a tenant in common mortgages his share, his co-tenants have no equity to redeem that share: *Ib.*

Rule 127.
Rights of parties, whose claims appear doubtful, not to be decided in their absence.
Mechanics' liens,
Attaching creditor of mortgagee.

Where a subsequent mortgagee is dead his real representatives should not be made parties, it is only necessary to add his personal representatives: *Whitla* v. *Halliday*, 4 D. & W. 267; *Taylor* v. *Stead*, 1 Chy. Ch. 74; *Grimshawe* v. *Parks*, 6 U. C. L. J. 142; *Lawrence* v. *Humphries*, 11 Gr. 209; R. S. O. c. 110, s. 16; *Dilk* v. *Douglas*, 26 Gr. 99; *Robinson* v. *Byers*, 9 Gr. 572; and see now R. S. O. c. 108 ss. 3, 4. And where a mortgage is taken in the name of one partner to secure a partnership debt, it is not necessary to add the real, or personal, representative of a deceased partner: *Stephens* v. *Simpson*, 12 Gr. 493.

Deceased mortgagee, representatives to be added.

Subsequent incumbrancers should not be made defendants by writ, even in an action to enforce an annuity: *Nelson* v. *Cochrane*, 13 P. R. 76.

Where a person is entitled to rights in two different capacities, if he be made a party to an action distinctly as regards his right in one capacity, he may not be bound as to his rights in the other capacity; *e.g.*, a person made a defendant as a judgment creditor, was held not to be bound in his character of mortgagee: *Crooks* v. *Watkins*, 8 Gr. 340.

Person filling two capacities should be added in both, or may not be bound.

Where an execution creditor is made a party in the Master's office as a subsequent incumbrancer, service of the notice (Form 34) upon his solicitor in the action in which the execution was recovered is sufficient: see *Rule* 465. Where it is brought to the notice of the Master that there are parties having subsequent unregistered claims against the lands, they should be made parties in his office: *Canadian Bank of Commerce* v. *Forbes*, 10 P. R. 442.

A mortgagor's tenant for years is entitled to redeem, if the mortgagee refuse to concur in the lease: *Tarn* v. *Turner*, 39 Ch. D. 456; 58 L. T. N. S. 558; and should be added as a party: and see *Anderson* v. *Stevenson*, 15 Ont. 563.

Persons added as parties under this *Rule* become parties from the date of the notice, (Form No. 34) not merely from the date of its service: *Sterling* v. *Campbell*, 1 Chy. Ch. 147.

127. Any party served with a notice under Rule 126 may apply to the Court at any time within 14 days from the date of the service, to discharge the order making him a party, or to add to, vary, or set aside the judgment. Chy. O. 445.

Parties added may move against order.

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Rule 128.

Where a party added by the Master, claims to be prior to the plaintiff, he should move to discharge the Master's order: *McDougall* v. *Lindsay Paper Mills Co.*, 10 P. R. 247; 20 C. L. J. 133.

Motion to discharge order adding parties in M. O. how made.

In *Montgomery* v. *Shortis*, 3 Chy. Ch. 69, the motion to discharge an order adding a party, appears to have been entertained in Chambers; and in *McDonald* v. *Rodgers*, 9 Gr. 75, the question was raised on an appeal from the Master's report; and in *Kline* v. *Kline*, 3 Chy. Ch. 161, an application was made to the Master himself, to discharge his order adding a party under *Rule* 46, on grounds disclosed subsequent to the making of the order.

Motions to discharge the order adding the applicant as a party, must be brought on to be heard within fourteen days from the service of the notice, Form No. 34.

Motion to vary judgment must be made to the Court.

Where the party added, desires to move to vary, or set aside the judgment, the motion must be made to the Court—and in the Chancery Division it must be set down to be heard on a Wednesday, and the motion must be returnable within the fourteen days from service of the notice on the party moving: *Miller* v. *Brown*, before Proudfoot, V.C., 23rd November, 1880; *Wright* v. *Wright*, before Blake, V.C., 29th March, 1881; and see *McIlroy* v. *Hawke*, 3 Chy. Ch. 66; *Harris* v. *Meyers*, 16 Gr. 117; *Jackson* v. *Gardiner*, 2 Chy. Ch. 385. In the other Divisions, the motion should be made before the Judge in Court, on a Tuesday, or Friday.

Leave to move when necessary.

Where the fourteen days is suffered to elapse, before the motion is made returnable to discharge the order, or to vary, or set aside, the judgment, the party added must first obtain leave to move, before he can move to vary, or set aside, the judgment, or set aside the order adding him as party: *Roe* v. *Stanton*, 15 Gr. 137; *McIlroy* v. *Hawke*, 3 Chy. Ch. 66. This leave, in a proper case, may be obtained on motion in Chambers, but where the applicant failed to show a *prima facie* case, leave was refused: *Box* v. *Bridyman*, 6 P. R. 234.

Incumbrancers to be served with appointment.

128. The Master, before he proceeds to hear and determine, is to require an appointment to the effect set forth in form No. 35 in the Appendix, to be served upon incumbrancers made parties before the judgment. Chy. O. 446.

Defendant who has not appeared, when entitled to notice of proceedings in M. O.

Under the former practice in Chancery, it was held that notwithstanding a bill might have been taken *pro confesso* against a defendant, he was, nevertheless, entitled under certain circumstances, to notice of proceedings in the Master's office: *Robinson* v. *Whitcomb*, 20 Gr. 415; *McCormick* v. *McCormick*, 6 P. R. 208; *Buchanan* v. *Tiffany*, 1 Gr. 98; *Walsh* v. *Bourke*, *Ib.* 105; *Hawkins* v. *Jarvis*, *Ib.* 257; 1 E. & A. 246; *Strachan* v. *Murney*, 6 Gr. 284; but see *Perrin* v. *Davis*, 3 Gr. 161. In mortgage cases it was customary to notify not only subsequent incumbrancers who were parties to the bill as required by this *Rule*; but also the mortgagor, whenever the plaintiff proved any other claim in addition to that alleged in his bill, or where subsequent incumbrancers were added, even though the bill had been taken *pro confesso*: see *McCormick* v. *McCormick*, *supra*; but see *Baby* v. *Woodbridge*, 5 U. C. L. J. 67. But a defendant cannot, in the Master's office, rely on any defence which if sustained would have the effect of determining that the Court had made a nugatory order or judgment: *McDougall* v. *Lindsay Paper Mills Co.*, 10 P. R. 247; *Wiley* v. *Ledyard*, *Ib.* 182.

Under the new practice there is no equivalent proceeding to an order or note *pro confesso*; nor any *Rule* expressly authorizing all subsequent proceedings to be taken *ex parte* against defendants who do not defend; formerly by *Rule* 131, it was provided that if no appearance be entered for a defendant "every pleading or document," required to be delivered to such party, may be delivered, by being posted up in the office from which the writ or summons issued; but that *Rule* has not been embodied in the Consolidated *Rules*.

Rules 129, 130.

129. Where any person who has been duly served with a notice under Rule 126 or with an appointment under Rule 128, neglects to attend at the time appointed; the Master is to treat such non-attendance as a disclaimer by the party so making default; and the claim of such party is to be thereby foreclosed, unless the Court orders otherwise, upon application duly made for that purpose. Chy. O. 447.

Parties not attending, who have been duly served to be foreclosed.

Notwithstanding a subsequent incumbrancer has been foreclosed under this *Rule*, he may in some cases obtain leave to prove his claim. Applications for leave to be let in, after the time has expired must be obtained from the Master, if no report has been made, and where the report has issued, then upon motion in Chambers. After a Master has made his (*a*) general report, he is then *functus officio*, and there would therefor be no jurisdiction for the Master in Ordinary to entertain such an application under *Rule* 88; but a Local Master having a general jurisdiction in Chambers under *Rule* 138 would appear to be entitled to entertain such an application. In *Becher* v. *Webb*, 7 P. R. 445, relief was given on the terms of postponing the applicant to a subsequent incumbrancer, who had duly proved his claim: and see *Catell* v. *Simons*, 8 Beav. 243; *Hull* v. *Falconer*, 11 Jur. N. S. 151; *Cameron* v. *Wolfe Island R. W. Co.*, 6 P. R. 91; but in *Ross* v. *Stevenson*, 7 P. R. 126; *Sterling* v. *Campbell*, 1 Chy. Ch. 147, relief was granted, without postponing the applicant.

Application of incumbrancer to be let in to prove after foreclosure.

Terms on which motion granted.

Where an incumbrancer had proved his claim on one mortgage, he was afterwards let in after report, on payment of costs, to prove a claim on another mortgage with a view to consolidating them: *Ross* v. *Stevenson*, *supra*.

Where a person added as a subsequent incumbrancer, appears and disclaims he is not entitled to costs: *Hatt* v. *Park*, 6 Gr. 553; *Lewin* v. *Jones*, 51 L. T. N. S. 59.

Incumbrancer disclaiming, costs.

130. When all parties have been duly served, the Master is to take an account of what is due to the plaintiff, and to such other incumbrancer or incumbrancers (if any), for principal money and interest; and to tax to them their costs, and settle their priorities: and also to appoint a time and place, or times and places, for payment according to the practice of the Court. Chy. O. 448.

Master to take accounts of plaintiff and incumbrancers.

Proof of Service.—It is the duty of the Master, before proceeding to take the accounts, to require due proof to be adduced of service of the necessary proceedings on all parties not attending before him who are entitled to notice. All subsequent incumbrancers, are entitled to attend the taking of the account, and it would seem also necessary that the defendants named in the writ, should also be notified, even though they have not appeared: see note to *Rule* 128.

Proof of service of notice.

Taking Account.—The production of the mortgage, and affidavit of the incumbrancer proving his claim is *prima facie* sufficient proof of the claim: *Court* v. *Holland*, 8 P. R. 213; *Elliott* v. *Hunter*, 24 Gr. 430; *Pollock* v. *Perry*, 5 Gr 591; *Hancock* v. *Maulson*, 10 Gr. 483; *Warren* v. *Taylor*, 9 Gr. 59; he need not go into evidence to prove that the amount is unpaid: *Markle* v. *Ross*, 13 P. R. 135; where the bill was *pro confesso*, the mortgagee was bound to state the amount actually advanced: *Sterling* v. *Riley*, 9 Gr. 343; and in every case it is competent for the parties, if the mortgage has not been made for the purpose apparent on the face of it, to shew in the Master's office, the real purpose for which it was executed: *Ib*; *Penn* v. *Lockwood*, 1 Gr. 547;

Taking accounts. *prima facie* proof, what is.

Affidavit of claimant.

(*a*) In *The Queen City Refining Co.*, before the Master in Ordinary, 7th May, 1885, the learned Master was of opinion that he was not *functus* until his report was filed.

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Rule 130. *Brownlee* v. *Cunningham*, 13 Gr. 586; *Morrison* v. *Robinson*, 19 Gr. 480; or for which it is held as security: *Inglis* v. *Gilchrist*, 10 Gr. 301; *McIntyre* v. *Thompson*, 6 Ont. 710; 19 C. L. J. 393. But to reduce the amount below the amount apparently secured, the evidence must be clear: *Fraser* v. *Locie*, 10 Gr. 207.

But where a mortgagor had received only a part of the mortgage money but gave a receipt for the full amount, and the mortgagee thereupon, and before any payment had fallen due under the mortgage, assigned it to a third person who took it *bonâ fide* without notice that the full amount had not been advanced, it was held that the mortgagor could not as against the assignee dispute that the mortgage was security for the amount it purported to secure, and for which he had given the receipt: *Bickerton* v. *Walker*, 31 Ch. D. 151; 53 L. T. N. S. 731.

Collateral advantages stipulated for by a mortgagee over and above his principal and interest; *e.g.* a bonus, cannot be recovered: *James* v. *Kerr*, 40 Ch. D. 449; 60 L. T. N. S. 212.

A mortgagee in possession by an agent may be compelled to give a detailed account of the receipts by the agent; an account merely of the lump sums received from the agent is insufficient: *Noyes* v. *Pollock*, 30 Ch. D. 336; 53 L. T. N. S. 430.

Where the secretary of a building society had given the society a mortgage to secure a loan payable by instalments "and other moneys becoming due from the mortgagor to the society," it was held that the mortgagees could not hold the mortgage as security for moneys embezzled from them by the mortgagor after he had assigned the equity of redemption, as against the assignee: *Banks* v. *Sunderland, Eq. Industrial Society*, 55 L. T. N. S. 808.

A derivative mortgagee is bound to account to his mortgagor for all profits made by him: thus where a derivative mortgagee by representing himself to be the mortgagee obtained an assignment of the equity of redemption which he subsequently resold at a profit, he was held bound to account for the profit so made: *Wilkins* v. *McLean*, 10 Ont.; 13 Ont. App. 467; 14 S. C. R. 22.

Stated account may be relied on in M. O. when.

The plaintiff or defendant may rely in the Master's office, on a stated account set up in the pleadings, although no evidence was given of it on the trial: *Edinburg Life Assurance Co.* v. *Allen*, 23 Gr. 238; and see *Inglis* v. *Gilchrist*, 10 Gr. 301; *Neil* v. *Neil*, 15 Gr. 110; *Holgate* v. *Shutt*, 28 Chy. D. 111.

The Master in taking the account under the usual judgment in a mortgage action for sale or foreclosure cannot go into any question affecting the validity of the plaintiff's security: *McDougall* v. *Lindsay Paper Mills Co.*, 10 P. R. 247; 20 C. L. J. 133, 253; *Wiley* v. *Ledyard*, 10 P. R. 182; *Bickford* v. *Grand Junction Ry. Co.*, 1 S. C. R. 696, and see *Re Munsie*, 10 P. R. 98; 20 C. L. J. 112.

Where the claim is brought in, in the name of the Accountant of the Court his certificate of the amount appearing due by his books and that he has not been in possession is sufficient *prima facie* evidence of his claim: *Holmested* v. *Vanderbogart*, 19 C. L. J. 97; this was a decision of the Chancellor and Proudfoot, J., on the matter being submitted to them.

Mode of taking, when equity of redemption divided.

As to the proper method of taking the account, where the mortgagor has sold the equity of redemption in part of the mortgaged lands, and has agreed to indemnify the grantee against the mortgage: see *Perkins* v. *Vanderlip*, 11 Gr. 488.

Consolidation of mortgages.

Consolidation of Mortgages.—A mortgagee has a right in actions for redemption, or foreclosure, to consolidate his mortgage with any other mortgage held by him and made by the same mortgagor: *Watts* v. *Symes*, 1 D. M. & G. 240; *Selby* v. *Pomfret*, 1 J. & H. 336; 3 D. G. F. & J. 595; *Johnston* v. *Reid*, 29 Gr. 296. A subsequent incumbrancer added in the Master's office has the same right: *Merritt* v. *Stephenson*, 7 Gr. 22; *Ross* v. *Stevenson*, 7 P. R. 126. But the right to consolidate cannot be enforced against a subsequent registered purchaser, or incumbrancer, without actual notice: *Brower* v. *Canada Permanent Building Society*, 24 Gr. 509; *Johnston* v. *Reid*, 29 Gr. 296; *Miller* v. *Brown*, 3 Ont. 210. Nor can it be enforced, where prior to the creation of the

second mortgage, the mortgagor had assigned, or mortgaged, his equity of redemption in the first mortgage, as against such assignee, or mortgagee: *Jennings* v. *Jordan*, 6 App. Cas. 698; 45 L. T. N. S. 593; *Harter* v. *Colman*, 19 Ch. D. 630; 46 L. T. N. S. 154; and see *Baker* v. *Gray*, 1 Ch. D. 491; nor where one of the mortgaged estates has ceased to exist, *e.g.*, when it was a leasehold, or life estate: *Re Raggett, ex parte Williams*, 44 L. T. N. S. 4; 50 L. J. Chy. 187; nor can a mortgage of realty be consolidated with a mortgage of chattels, so as to throw the debt secured by the realty, on the chattels: *Chesworth* v. *Hunt*, 5 C. P. D. 266; 42 L. T. N. S. 774; 49 L. J. C. P. 507; nor can it be allowed in favor of the plaintiff in an action for foreclosure, where one of the mortgages is not in default: *Cummins* v. *Fletcher*, 42 L. T. N. S. 859; 49 L. J. Chy. 117, 563. **Rule 130.**

When an intending purchaser of the equity of redemption inquires of the mortgagee the amount due on a prior mortgage, and the mortgagee neglects to notify him of the claim to consolidate the security with another, the mortgagee is deprived of the right of consolidation as against such person: *Dominion Savings & Investment Company* v. *Kittridge*, 23 Gr. 631. So also the assignee of two mortgages cannot consolidate them if his assignor was precluded from so doing: *Bird* v. *Wenn*, 33 Ch. D. 215. Mortgagee may be estopped from consolidating.

Tacking.—Tacking a subsequent, to a prior incumbrance, so as to cut out an intervening registered incumbrance, can no longer be done so as to defeat the provisions of *The Registry Act*, (R. S. O. c. 114,) s. 83; and to this extent tacking is abolished, but there are still some instances in which claims not secured by the mortgage may be tacked thereto as a condition of redemption. Tacking,—what claims may be tacked to mortgage debt.

The mortgagee cannot tack to his mortgage debt a simple contract debt due from the mortgagor: *Ferguson* v. *Frontenac*, 21 Gr. 188; *Canadian Bank of Commerce* v. *Forbes*, 10 P. R. 442; but he may as against his representatives, in case of his death; and he may tack all prior charges, or incumbrances, paid off by him: *Trust & Loan Co.* v. *Cuthbert*, 14 Gr. 410; *Teeter* v. *St. John*, 10 Gr. 85; *Wells* v. *The Trust & Loan Co.*, 9 Ont. 170; 20 C. L. J. 407; and he is entitled to claim as against subsequent incumbrancers, or the mortgagor, the full amount due thereon, no matter how advantageous the terms on which he may have acquired them: *Watkins* v. *McKellar*, 7 Gr. 586; *Dobson* v. *Land*, 8 Ha. 216.

The mortgagee is also entitled to tack to his mortgage debt, any costs occasioned by part of the mortgaged estate being expropriated under any statute: *Rees* v. *The Metropolitan Board of Works*, 14 Ch. D. 372; 42 L. T. N. S. 685; 49 L. J. Ch. 620; and also any costs incurred in protecting, or endeavoring to realise, his security: *Wilkes* v. *Sanion*, 7 Ch. D. 188; and see *Rule* 57, note p. 172; and the costs of an abortive sale: *Farrer* v. *Lacey*, 31 Ch. D. 42; 50 L. T. N. S. 121; but not the costs of unsuccessful proceedings undertaken without the concurrence of the mortgagor: *Wells* v. *The Trust & Loan Co.*, *supra*. Costs.

Merger.—Where an incumbrancer obtains a release of the equity of redemption, a question whether his incumbrance is merged arises. This is a question of intention, and where it is obviously not for his benefit, the Court will not presume any such intention: *Hart* v. *McQuesten*, 22 Gr. 133; *North of Scotland Mortgage Company* v. *German*, 31 C. P. 349; *Elliott* v. *Jayne*, 11 Gr. 412; *Weaver* v. *Vandusen*, 27 Gr. 477; *Macdonald* v. *Bullivant*, 10 App. R. 582; and see *Bell* v. *Sunderland Building Society*, 24 Ch. D. 618; 49 L. T. N. S. 555. Merger, a question of intention.

Improvements.—Where a sale of the mortgaged property under execution is set aside the vendee is entitled to improvements: *Shaw* v. *Tims*, 19 Gr. 496; and also when a sale is made by the mortgagee proves invalid: *McLaren* v. *Fraser*, 17 Gr. 567; *Carroll* v. *Robertson*, 15 Gr. 173. The expense of erecting a carding mill was disallowed: *Kerby* v. *Kerby*, 5 Gr. 587. Expenses of planting and tending fruit, and ornamental trees, suitable for carrying out improvements commenced by the mortgagor were allowed, but not their value at the time of redemption: *Paul* v. *Johnson*, 12 Gr. 474. Where the mortgagee is charged with rents arising from improvements made by himself, he should be Improvements.—What allowed mortgagee in possession.

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Rule 130.

allowed the expenses of such improvements, to a corresponding amount: *Constable* v. *Guest*, 6 Gr. 510; and see further as to allowances to mortgagees in possession: notes to *Rule* 57 *ante* pp. 177-2.

Interest, arrears of, how far recoverable against mortgaged land.

Interest.—Interest on moneys secured by mortgages made after 1st July, 1880, is subject to the provisions of R. S. C. c. 127, ss. 3-8.

Although no arrears of interest which have accrued more than six years before the commencement of the action, can ordinarily be recovered against the land, during the lifetime of the mortgagor, yet where the action is brought against the representative of a deceased mortgagor who had covenanted for payment, the mortgagee may tack all the interest recoverable on the covenant: *Carroll* v. *Robertson*, 15 Gr. 173; but where there is no covenant, even in such a case, no more than six years' arrears can be recovered: *Taylor* v. *Hargrave*, 19 Gr. 271; and see *Airey* v. *Mitchell*, 21 Gr. 510; *Howeren* v. *Bradburn*, 22 Gr. 96; *Weaver* v. *Vandusen*, 27 Gr. at p. 481.

When a mortgagee sells under a power of sale he may retain out of the proceeds, the arrears of interest though they exceed six years: *Edmunds* v. *Waugh*, L. R. 1 Eq. 418; *Ford* v. *Allen*, 15 Gr. 565; *In re Marshfield*, *Marshfield* v. *Hutchings*, 34 Ch. D. 721; 56 L. T. N. S. 694.

Rate of interest recoverable.

RATE OF INTEREST.—Since the repeal of the usury laws, the Court will not refuse to enforce any contract, which parties, competent to contract, may make for the payment of interest, provided it is understood: *Teeter* v. *St. John*, 10 Gr. 85; R. S. C. c. 127, s. 1. But the rate of interest chargeable by corporations or companies or association of persons, not being a bank, is restricted in certain cases to six per cent. or eight per cent.: see R. S. C. c. 127, ss. 9-11.

Stipulation for increased rate on default may be enforced

Where a mortgage stipulated that up to a certain day the interest to be charged should be eight per cent., and if the principal were not then paid twelve per cent., it was held the mortgagee was entitled to recover the twelve per cent. on default: *Waddell* v. *McColl*, 14 Gr. 211.

Mortgage payable without interest.

Where a mortgage is made payable without interest, or no interest is reserved, interest may nevertheless be recovered at six per cent. from the time of default: *McDonell* v. *West*, 14 Gr. 492; *Reid* v. *Wilson*, 9 P. R. 165; 18 C. L. J. 58. Compound interest may now, subject to the provisions of R. S. C. c. 127, ss. 10, 11, be stipulated for, and recovered: *Clarkson* v. *Henderson*, 14 Chy. D. 348; 43 L. T. N. S. 29; *Henderson* v. *Dickson*, 9 Gr. 379; or an increased rate in case of default: *Downey* v. *Parnell*, 2 Ont. 82; 18 C. L. J. 241; but a mortgagee is *prima facie* only entitled to simple interest, and where an account charging compound interest was assented to by the mortgagor in ignorance of his rights it was re-opened: *Daniell* v. *Sinclair*, L. R. 6, H. L. 181; 44 L. T. N. S. 257; and a bargain for an exorbitant rate of interest will not be enforced if it is shown not to have been understood by the mortgagor: *Teeter* v. *St. John*, 10 Gr. 85.

Compound interest.

Exorbitant interest.

Interest on prior incumbrances paid off by mortgagee

Where the incumbrancer has redeemed a prior incumbrance, he is entitled to recover interest on the aggregate amount of principal, interest, and costs, so paid; on the principal, at the rate reserved in his own mortgage, and on the interest, and costs, at six per cent.: *McMaster* v. *Hector*, 8 C. L. J. 284; and he has a lien on the land therefor as against subsequent incumbrancers: *Trust & Loan Company* v. *Cuthbert*, 14 Gr. 410; *Teeter* v. *St. John*, 10 Gr. 85. But where a solicitor purchases securities at his client's request, simple interest on the amount paid, is all that is chargeable, and not the rate reserved by the securities purchased, unless otherwise agreed: *Macleod* v. *Jones*, 50 L. T. N. S. 358.

Rate of interest payable after time for payment.

The rate of interest reserved by the mortgage, is not necessarily payable after default, unless the mortgage expressly so provides: *Cook* v. *Foster*, L. R. 7 H. L. 27; *Dalby* v. *Humphrey*, 37 U. C. Q. B. 514; *Jackson* v. *Harris*, 78 L. T. Jour. 130; and a covenant to pay interest on instalments in default does not necessarily mean that interest is to be paid on interest in default: *Goldstrom* v. *Tatterman*, 17 Q. B. D. 30; 18 Q. B. D. 1; 55 L. T. N. S. 866. But such rate was allowed after default, by way of damages, where it was not expressly shown by evidence to be excessive: *Simonton* v. *Graham*, 8 P. R.

495; but in another case, where no evidence was given by the mortgagees as to the rate of interest after default, only six per cent. was allowed: *Archbold* v. *Building & Loan Assoc.*, 15 Ont. 237; but see *S. C.* 16 Ont. App. 1. A covenant to pay interest at a higher rate than six per cent. "until mortgage money paid" does not entitle the covenantor to such higher rate after the time fixed for payment has expired: *Powell* v. *Peck*, 12 Ont. 492, 23 C. L. J. 93; 15 Ont. App. 138.—But in computing the amount to be paid for redemption in the case of a mortgage the payment of which had been accelerated by default in the payment of an instalment, the Court allowed the mortgage rate for the six months allowed for redemption though it exceeded six per cent.: *Muttlebury* v. *Stephens*, 6 C. L. T. 588. **Rule 130.**

Where an instrument provided for payment of interest at a given rate, until the principal money should be paid, it was held that the rate contracted for could not be recovered after judgment had been obtained on the instrument; but only legal interest at six per cent. on the amount of the judgment: *St. John* v. *Rykert*, 4 Ont. App. 213; *Ex p. Fewings*, 25 Ch. D. 338; 50 L. T. N. S. 109; but see *contra*, *Popple* v. *Sylvester*, 22 Ch. D. 98; 47 L. T. N. S. 329; and see 19 C. L. J. 21; *Re Atkinson* before Boyd, C., 4th May, 1883.

Where the interest is payable in advance, the mortgagee is nevertheless not entitled to have interest allowed for a period subsequent to that appointed for redemption: *Trust & Loan Co.* v. *Kirk*, 8. P. R. 203. Interest in advance.

Tender.—Where a tender is relied on, it should be set up by statement of defence. Where such a defence is pleaded, it is sometimes specially referred to the Master to inquire as to the tender, or whether the amount tendered was sufficient: *Knapp* v. *Bower*, 17 Gr. 695. *Prima facie* a tender stops interest; but if the mortgagee shews that the money was subsequently used by the mortgagor, and a profit made, subsequent interest is nevertheless chargeable; *Ib.*; and see *Pearce* v. *Morris*, L. R. 5 Chy. at p. 231. Tender *Prima facie* it stops interest.

Parol Agreements affecting mortgage.—A written agreement, for value, by mortgagor to pay additional interest, is enforceable against mortgagor, though not under seal: *Brown* v. *Deacon*, 12 Gr. 198; and see *Alliance Bank* v. *Brown*, 10 Jur. N. S. 1121. But a verbal agreement to that effect will not bind the lands, as against a subsequent purchaser of the equity of redemption: *Totten* v. *Watson*, 17 Gr. 233; or even as against a devisee, or heir-at-law, of the mortgagor: *Re Houston*, *Houston* v. *Houston*, 2 Ont. 84. Parol agreements affecting mortgage debt.

An agreement for extra interest between a derivative mortgagee and the mortgagor enures to the benefit of the original mortgagee: *Grahame* v. *Anderson*, 15 Gr. 189.

Where, after the mortgage debt was partly paid off, the mortgagor re-borrowed the money and returned the receipts given for his previous payments, it was held that he was estopped from disputing that the amount so re-advanced was still secured by the mortgage: *Inglis* v. *Gilchrist*, 10 Gr. 301. Estoppel.

Statute of Limitations.—Under a dispute note, the Statute may be set up as a bar to the recovery of more than six years' arrears of interest; but where it is relied on as a defence to the whole claim, a statement of defence must be filed: *Wright* v. *Morgan*, 1 Ont. App. 613; *Cattanach* v. *Urquhart*, 6 P. R. 28. Statute of Limitations.

Although ten years is now a bar to the recovery of money charged on land, as against the land, R. S. O. c. 111, s. 4; yet it was held that the right of action on the covenant was not barred until the lapse of twenty years under R. S. O. c. 60, ss. 1, 6: *Allan* v. *McTavish*, 2 Ont. App. 278; *Macdonald* v. *McDonald*, 11, Ont. 187; *McDonald* v. *Elliott*, 12, Ont. 98; but see *contra*, *Sutton* v. *Sutton*, 22 Chy. D. 511, 48 L. T. N. S. 95; *Fearnside* v. *Flint*, 22 Chy. D. 579; 48 L. T. N. S. 154. How far a bar to recovery of interest.

The Statute is no bar to an account for more than six years' rent, as against a mortgagee in possession: *Coldwell* v. *Hall*, 9 Gr. 110; affirmed in appeal, 7 U. C. L. J. 42; 8 U. C. L. J. 93. No bar to account for rents.

Where a prior mortgagee, or other incumbrancer, has been in possession of any land, or in the receipt of the profits thereof, within one year next before an Subsequent in-

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Rule 130. action is brought by any person entitled to a subsequent mortgage, or other incumbrance on the same land, the person entitled to the subsequent mortgage, or incumbrance, may recover in such action the arrears of interest which have become due during the whole time that such prior mortgage, or incumbrancer, was in possession, or receipt, as aforesaid, although such time may have exceeded the term of six years : see R. S. O. c. 111, s. 18.

cumbrancer, how affected by.

Action for foreclosure effect of.

An action for foreclosure, or sale, is an action to recover land, and the commencement of an action for foreclosure, or sale, by a mortgagee out of possession stops the running of the statute : *Harlock* v. *Ashberry*, 19 Ch. D. 539; 46 L. T. N. S. 356 ; *Pugh* v. *Heath*, 7 App. Cas. 235 ; 46 L. T. N. S. 321 ; *Fletcher* v. *Rodden*, 1, Ont. 155 ; but see *Barwick* v. *Barwick*, 21 Gr. 39 ; and an action for redemption is also an action to recover land : *per* Strong, J., *Faulds* v. *Harper*, 11 S. C. R. 639 ; see also notes to *Rule* 341.

Tenant in common entitled to redeem whole estate.

Where some of several tenants in common, are barred by the Statute of Limitations, and others of them are not ; the latter are entitled to redeem the whole mortgaged estate, and not merely an aliquot part : *Faulds* v. *Harper*, 2 Ont. 405; 9 Ont. App. 537 ; 11 S. C. R. 639 ; see also *Martin* v. *Miles*, 5 Ont. 404.

Payments to take a case out of the Statute of Limitations must be made by the mortgagor or his duly authorized agent ; payments made on his behalf without his authority will not prevent the Statute reviving ; *Newbould* v. *Smith*, 29 Ch. D. 882 ; 53 L. T. N. S. 137 ; or else by some person to whom the right of redemption is expressly reserved by the mortgage even though he is no party to it : see *Lewin* v. *Wilson*, 11 App. Cas. 639.

Payments. **Payments.**—Payment to one of several executors, is a good payment on account of a mortgage held by two of them as executors : *Ewart* v. *Dryden*, 13 Gr. 50 ; but payment to one of several trustees, who held a mortgage, is not good as to the other trustees : *Ewart* v. *Snyder*, 13 Gr. 55.

When mortgagee liable for moneys not received.

Where a mortgagor requested his mortgagee to release a part of the mortgaged property on payment of £100, and he released it on payment of £50 only, he was held liable for the difference : *Bull* v. *Jarvis*, 10 Gr. 568. But when a mortgagee refused to accept £100 offered as the price of part of the mortgaged property, which was expropriated, and upon an arbitration only £30 was awarded, the mortgagee was held not to be liable for the difference : *Gunn* v. *McDonald*, 11 Gr. 140.

Appropriation of payments. **Appropriation of Payments :—**

Payments made on account are to be appropriated (1) as the debtor directs at the time of payment. (2) When there is no direction by the debtor, as the creditor directs. (3) When neither makes any direction, the law will apply it to the older debt, or as may be just : *Wilson* v. *Rykert*, 14 Ont. 188 ; and see *Lowther* v. *Hunter*, 41 Ch. D. 248.

A mortgagee in possession, and in receipt of rents, and profits, may sell under the power of sale, if the mortgage be in default, even though the rents are sufficient to keep down the interest ; as in the absence of any agreement there is no appropriation of payments until the taking of the account : *Cockburn* v. *Edwards*, 18 Ch. D. 449 ; 45 L. T. N. S. 500 ; 51 L. J. Ch. 46 ; and see *Harlock* v. *Ashberry*, 19 Ch. D. 539.

Appropriation of purchase money, on sale by mortgagee.

Where a mortgagee sells under a power of sale, he is bound to apply the proceeds, first, in payment of interest, and costs, and then either pay the balance to the mortgagor, or apply it in reduction of principal : *Thompson* v. *Hudson*, L. R. 10 Eq. 497. He may sell on time, but he must give credit for the amount secured by the mortgage of the purchaser as cash, and even if he gets the consent of the mortgagor to a sale on credit, he is not at liberty to convert the mortgage taken to secure that part of the purchase money for which credit is given into cash, and charge the mortgagor with the discount and expenses, without a distinct bargain to that effect : *Beatty* v. *O'Connor*, 5 Ont. 731 ; any surplus in his hands should be either paid over to the party entitled, or if there be no hand to receive it, it should be either paid into Court under the Trustee

Relief Act, or set apart so as to be fruitful for the benefit of the party entitled. If the mortgagee neglect to do either of these things, he will be chargeable with interest on the money so long as it remains in his hands: *Charles* v. *Jones*, 35 Ch. D. 544; 56 L. T. N. S. 848. A mortgagee who concurs in a sale by his mortgagor is responsible for the due application of the purchase money: *West London Commercial Bank* v. *Reliance Permanent Building Society*, 29 Ch. D. 954; 53 L. T. N. S. 442. **Rule 130.**

Payments, how to be appropriated.

If money is not expressly appropriated by the party paying it, the party receiving it may appropriate it, even upon a claim which he cannot enforce by suit; but an appropriation cannot be made by the creditor after action brought, on bringing in his account: *Fraser* v. *Lowie*, 10 Gr. 207; *Hagerman* v. *Smith*, Tay. 123; *Armour* v. *Carruthers*, 4 U. C. L. J. 210; *Fuller* v. *Parnall*, 8 C. L. J. 86; and where a mortgagee held as security for a partnership debt the mortgage of one partner and the note of the other, it was held that he could not, as against an assignee of the equity of redemption, appropriate all payments on account of the note, but that he was bound to apply one half of the sums paid out of the partnership assets, on account of the mortgage: *Moore* v. *Riddell*, 11 Gr. 69.

Where two securities held for same debt.

Where no appropriation by payer, payments how to be applied.

In taking the account, payments on account, should (if not otherwise appropriated by the debtor or creditor at the time of payment) be applied first, in payment of overdue interest, and costs, and then of overdue principal, and where there are several items, the appropriation should be made in discharge of those earliest in date: *McGregor* v. *Gaulin*, 4 U. C. Q. B. 378; *Cummings* v. *Usher*, 1 P. R. 15; *Ross* v. *Perrault*, 13 Gr. 206; *Clayton's Case*, *Devaynes* v. *Noble*, 1 Mer. 530, 604; *Wilson* v. *Rykert*, 14 Ont. 188. But where an accounting party (a solicitor) had in his accounts appropriated payments to principal, instead of the overdue interest, he was held bound by the appropriation: *Taylor* v. *Magrath*, 10 Ont. 669. Where the creditor claims to have appropriated a payment, the onus lies on him of showing affirmatively that no appropriation was made by the debtor: *Lowther* v. *Hunter*, 41 Ch. D. 248.

Appropriation of payments, where mortgage given to secure a floating balance.

A mortgage given to secure a floating balance, however, is not discharged by payments made on account, so long as the dealings between the parties continue, and any balance remains due in respect thereof, even though the payments exceed in amount the debt due when the mortgage was given, or the amount of the debt mentioned in the mortgage: *Cameron* v. *Kerr*, 3 Ont. App. 30; *Russell* v. *Davey*, 7 Gr. 13; *The City Discount Company* v. *McLean*, L. R. 9 C. P. 692; *Fenton* v. *Blackwood*, L. R. 5 P. C. 167; but see *Re Brown*, 2 Gr. 111, 590; *Buchanan* v. *Kerby*, 5 Gr. 332.

Payments by guarantor, lien for.

Payment by Guarantor.—A mortgagee who has assigned the mortgage, and covenanted for its payment, is entitled to a lien as against the mortgagor for all payments so made: *Fleming* v. *Palmer*, 12 Gr. 226.

Insurance money, how applicable.

Insurance Money.—When the mortgage contains no provision for the application of insurance money, the mortgagee is not bound to apply it in reduction of his debt before the time appointed for payment, or on the interest to accrue thereon, until it is actually due. In such a case, where the mortgagee declines to apply the money on his debt, or interest, the mortgagor is entitled to have the moneys laid out in rebuilding, and restoring, the premises to the *status quo*; but if the mortgagee retain the money he must apply it on account: *Austin* v. *Story*, 10 Gr. 306. He, however, must apply the money in payment of instalments in arrear or as they subsequently fall due; he cannot without the mortgagor's consent apply it in payment of moneys not yet due: *Corham* v. *Kingston*, 17 Ont. 432.

42 Vict. c. 20, s. 1 (O).

Mortgagee may have money applied in rebuilding.

In mortgages executed after 11th March, 1879, after default, there is a statutory power to insure, and the mortgagee may recover premiums paid, with interest, at the rate reserved by the mortgage: R. S. O. c. 102, s. 18. Where the mortgagor insures, though there be no covenant, in the event of a loss the mortgagee may have the insurance money laid out in re-building: Imp. Stat. 14 Geo. 3, c. 78, s. 83; *Stinson* v. *Pennock*, 14 Gr. 604; followed *(sed, dub.)* *Carr* v. *Fire Insurance Association*, 14 Ont. 487; the Imperial Statute is now repealed as to this Province by 50 Vict. c. 26, s. 154, (O); but see now R. S. O. c. 102, s. 4.

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Mortgagee insuring, whether he can recover both, insurance and debt, *quære.?*

A mortgagee insuring out of his own funds, is not bound to give the mortgagor credit for the moneys received in the event of a loss: *Russell* v. *Robertson*, 1 Chy. Ch. 72. Nor is he entitled to charge him with the premiums, unless the insurance is effected under R. S. O. c. 102, *supra*: *McIntosh* v. *Ontario Bank*, 20 Gr. 24. But whether a mortgagee can recover both the insurance money, and also the mortgage debt seems doubtful: see *Castellain* v. *Preston*, 8 Q. B. D. 613; 46 L. T. N. S. 568; 19 C. L. J. 143; as to the right of a second mortgagee to recover on an insurance effected by him, when there is also an insurance on the same property effected by a prior mortgagee: see *Westminster* v. *Glasgow*, 12 App. Cas. 699; 59 L. T. N. S. 641.

Insurance by mortgagor.

Assignment of mortgage to Insurance Co., effect of.

Where the mortgagor had insured in pursuance of a covenant, loss, if any, being payable to the mortgagee, and the buildings were burnt by the mortgagor, and the insurance money paid to the mortgagee, who assigned the mortgage to the insurance company; it was held, that inasmuch as the mortgagor could not have recovered on the policy, the insurance company were not bound to give credit on the mortgage debt for the amount of the insurance money, as against a *puisne* incumbrancer: *Westmacott* v. *Hanley*, 22 Gr. 382; *Livingstone* v. *The Western Assurance Company*, 14 Gr. 461; *S. C.* 16 Gr. 9; and see *Klein* v. *Union Fire Insurance Company*, 3 Ont. 234; *Bull* v. *North British & Commercial Insurance Company*, 14 Ont. 322; *Reddick* v. *The Saugeen Mutual Insurance Company*, 14 Ont. 506; 15 Ont. App. 363; *Sems*, if the mortgagor had not been debarred from recovering: *Howes* v. *Dominion Insurance Company*, 2 Ont. 89; this case was reversed on appeal: see 19 C. L. J. 348, but not on the point for which the case is here cited: *Austin* v. *Story*, 10 Gr. 306; and see *Provincial Insurance Company* v. *Reesor*, 21 Gr. 296; *Burton* v. *Gore District M. F. I. Co.*, 12 Gr. 156; affirmed in appeal, January 21, 1875; see R. & J. Dig. 1819, and *per* Proudfoot, V.C., 22 Gr. 384; *Green* v. *Hewer*, 21 C. P. 531.

A boiler and other machinery were held as between mortgagor and mortgagees to be included under the word "building," as they were treated by the parties as part of the freehold and passed as such, and the mortgagor was held entitled to the benefit of the insurance thereon as on part of the building: *Carr* v. *The Fire Insurance Association*, 14 Ont. 487.

Rent, chargeable against mortgagee.

Rents.—A mortgagee in possession may be charged with rents actually received, or which, but for wilful neglect and default, he might have received; or he may be charged with an occupation rent when he has been in actual occupation, using and enjoying the mortgaged property in the place of a tenant; in the latter case, he is charged with a fair rental, such as a tenant might be expected to give, unless it is shown that he actually made a larger profit: *Truelock* v. *Robey*, 15 Sim. 265; *S. C.* Phill. 395; *Coldwell* v. *Hall*, 9 Gr. 110.

A mortgagee is accountable not merely for his actual receipts whilst in possession, but also for whatever is received by those to whom he transfers possession under an arrangement inoperative to transfer title, and in derogation of the rights of the mortgagor: *National Bank of Australasia* v. *United Hand in Hand Band of Hope*, 4 App. Ca. 391.

A mortgagee in possession, but not in actual occupation, will not be held liable for any greater rent than he actually received, unless it is clearly established in evidence, that he knew a greater rent might and could have been obtained, and that he refused, or neglected, to obtain the same: *Merriam* v. *Cronk*, 21 Gr. 60: *Waddell* v. *McColl*, 14 Gr. 211; *Penn* v. *Lockwood*, 1 Gr. 547.

Mortgagee in possession by arrangement with mortgagor, how far liable to subsequent incumbrancer.

A mortgagee receiving rents, or going into occupation by consent of the mortgagor, must account as a mortgagee in possession to a subsequent incumbrancer, or purchaser of the equity of redemption, although the mortgagor has directed the rents to be applied in payment of another debt due by him to the mortgagee: *Gilmour* v. *Roe*, 21 Gr. 284; *Court* v. *Holland*, 29 Gr. 19; and where a mortgagee, pursuant to a power, enters into possession and manages the mortgaged estate without default, at a loss, he is entitled to be recouped the loss as against a *puisne* incumbrancer, not only out of the rents, but also out of any surplus proceeds arising from the sale of the property: *Bompas* v. *King*, 33

Ch. D. 279; 55 L. T. N. S. 190. But when a mortgagee suffers the mortgagor to resume possession he ceases to be liable to account for rents: *Rice* v. *George*, 19 Gr. 174. Where the mortgage provided for payment of five per cent. interest, reducible, if punctually paid, to four-and-a-half per cent, a mortgagee, on going into possession, after default, is not bound to accept the lower rate: *Union Bank* v. *Ingram*, 16 Ch. D. 53 (overruling *Stains* v. *Banks*, 9 Jur. N. S. 1049); *Bright* v. *Campbell*, 41 Ch. D. 388. A mortgagee in possession is entitled to be allowed a commission reasonably paid for collecting the rents: *Union Bank* v. *Ingram*, *supra*; but see *Eyre* v. *Hughes*, 2 Ch. D. 148. **Rule 130.**

A mortgagee in possession, should not be charged with rests on rents received by him, until he has been paid in full, when his money was in arrear when he entered: *Coldwell* v. *Hall*, 9 Gr. 110; affirmed in appeal, 7 U. C. L. J. 42; 8 U. C. L. J. 93; but by setting up a title adverse to the mortgagor's right of redemption, he may lose the immunity of an ordinary mortgagee: *National Bank of Australasia* v. *United Hand in Hand Band of Hope*, 4 App. Cas. 391. Rests, where chargeable.

Notwithstanding the Statute of Limitations, a mortgagee in possession may be compelled to account to the mortgagor for more than six years' rent: *Coldwell* v. *Hall*, *supra*; although if the mortgagee have been overpaid, the statute would doubtless be a bar to the mortgagor recovering payment of more than six years' arrears. Mortgagee in possession, account by.

Where the mortgagee is in occupation, he should be charged with an occupation rent up to the day appointed for payment: *Pipe* v. *Shafer*, 1 Chy. Ch 251.

The mere existence of an attornment clause in a mortgage, does not make the mortgagee liable to account to a subsequent incumbrancer, as a mortgagee in possession: *Stanley* v. *Grundy*, 48 L. T. N. S. 106; but see *Re Stockton Iron Company*, 10 Ch. D. 335; 40 L. T. N. S. 19; *Ex parte Jackson*, 14 Ch. D. 725; 43 L. T. N. S. 272; *Ex parte Punnett*, 16 Ch. D. 226; 44 L. T. N. S. 226; *Ex parte Harrison*, 18 Ch. D. 127; 45 L. T. N. S. 290. Attornment clause, effect of.

Estoppel.—A mortgagee may be estopped as against a person inquiring of him the amount due on his mortgage, with a view to purchasing the equity of redemption, from claiming more than the amount then claimed: *Dominion Savings & Investment Co.* v. *Kittridge*, 23 Gr. 631. But if such representations are made to a person not known to be intending to purchase, or deal in respect of, the equity of redemption, they are not binding on the mortgagee, although actually acted upon: *Moffatt* v. *Bank of Upper Canada*, 5 Gr. 374. Estoppel arising from representation to persons dealing with equity of redemption.

The mortgagor may, by his conduct, be also estopped from setting up payments on account of the mortgage: *Inglis* v. *Gilchrist*, 10 Gr. 301.

Vendor's Lien.—Void Mortgage for Purchase-money.—Where a mortgage was given by an infant for purchase money, and the infant on coming of age adopted the purchase, but repudiated the mortgage; an assignee of the mortgage was held nevertheless entitled to a lien for the purchase money: *Grace* v. *Whitehead*, 7 Gr. 591. Vendor's lien enforcable, where mortgage taken for purchase money, invalid.

Where land is conveyed in consideration of maintenance, the vendor has a lien for the consideration: *Paine* v. *Chapman*, 6 Gr. 338; 7 Gr. 179.

Mortgage payable in Foreign Currency.—Where the mortgage debt is payable in lawful money of the United States, the mortgagee is entitled, at his option, to claim the amount in the current money of that country, or its equivalent in Canadian currency, at the time of default made in payment: *Morrell* v. *Ward*, 10 Gr. 251; *Crawford* v. *Beard*, 14 C. P. 87. Mortgage payable in foreign currency.

Priorities.—Formerly the priorities were determined in the case of executions, by the date of the delivery of the writs to the sheriff for execution and for this purpose a fraction of a day was regarded: *Beekman* v. *Jarvis*, 3 U. C. Q. B. 280; *Converse* v. *Michie*, 16 C. P. 167. But now under the *Creditor's Relief Act*, R. S. O. c. 65, all execution creditors whose writs are in the sheriff's hands to be executed are entitled to rank *pari passu*: *Harvey* v. *McNeil*, 12 P. R. 362; 24 C. L. J. 122. But an execution creditor directing the sheriff to stay execution, may now, as formerly, thereby lose his priority as against any subsequent execution then in, or thereafter coming into, the sheriff's hands, before the stay Priorities, as to executions. Stay of execution, effect of.

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Rule 130. is removed: *Ross* v. *Hamilton*, E. T. 3 Vict.; *Foster* v. *Smith*, 13 U. C. Q. B. 243; *Re Ross*, 3 P. R. 394; *Bank of Montreal* v. *Munro*, 23 U. C. Q. B. 414; *Kerr* v. *Kinsey*, 15 C. P. 531; *Trust & Loan Co.* v. *Cuthbert*, 13 Gr. 412. But the sheriff, after being stayed, may make a second seizure during the currency of the writ: *Gates* v. *Smith*, 13 C. P. 572.

Priority of Mortgagees Mortgagees for value are usually entitled to priority, according to the date of registration of their mortgages; and the omission of the Registrar to index a registered instrument will not deprive it of its priority: *Lawrie* v. *Rathburn*, 38 U. C. Q. B. 255; *Green* v. *Ponton*, 8 Ont. 471.

Voluntary mortgagees. Voluntary mortgagees, and mortgagees with actual notice of a prior unregistered instrument, however, are not within protection of *The Registry Act* (R. S. O. c. 114, s. 76); and see *Greaves* v. *Tofield*, 43 L. T. N. S. 100; *Kettlewell* v. *Watson*, 46 L. T. N. S. 83; 51 L. J. Chy. 281; *Clarke* v. *Palmer*, 48 L. T. N. S. 857.

Execution creditors, purchasers at sheriff's sale. An execution creditor cannot get priority over a prior unregistered deed: *Russell* v. *Russell*, 28 Gr. 419; but it would seem that a purchaser at a sheriff's sale may: *Van Wagner* v. *Findlay*, 14 Gr. 53.

Absconding debtor, inquiry as to. When it is necessary, for the purpose of settling the priority of incumbrancers, to inquire whether a person who has been sued was, or was not, an absconding debtor within the meaning of the Act, the Master may do so, although the party sued may have taken no proceedings to set aside the attachment: *Montreal Bank* v. *Baker*, 9 Gr. 97, 298; but see *Martin* v. *Boulanger*, 8 App. Cas. 296; 49 L. T. N. S. 62. An attachment only binds lands from the date of the seizure under it, and an execution delivered to the sheriff before seizure made under the attachment is entitled to priority over it: *Robinson* v. *Bergin*, 10 P. R. 127.

Creditor, when postponed, by conduct to prejudice, of other creditors. Where a creditor who had obtained security by an assignment from his debtor of his chattels, and other assets, by way of mortgage, was notified by a subsequent execution creditor of his claim, and informed that he would be held answerable for his dealing with the assets assigned, but negligently allowed the debtor to use, and deal with them, so that they were lost: it was held that the first creditor was thereby postponed to the second, as regards other property liable for the payment of their debts: *Huntingdon* v. *Van Brocklin*, 8 Gr. 421.

Two deeds on same day, priority how settled. For the purpose of determining priorities between two deeds executed the same day, the Master may inquire which was in fact first executed, and may have regard to the internal evidence of the deeds themselves, for the purpose of ascertaining the intention of the parties upon the question of priority: *Garside* v. *Silkstone, D. C. & I. Co.*, 21 Ch. D. 762; 47 L. T. N. S. 76.

Where a judgment has been pronounced on the construction of an instrument declaring A. is entitled to priority to B., such judgment is a bar to any subsequent action by B. for the rectification of the instrument so as to give him priority: the proper course in such a case is for B. to procure a stay in the first action until his suit for rectification can be determined: *Caird* v. *Moss*, 33 Ch. D. 22; 55 L. T. N. S. 453.

Disputes between incumbrancers, how determined. **Disputes Between Incumbrancers.**—Where there is a dispute between two persons, as to which of them is entitled to an incumbrance, the Master may determine the question himself, or, where to do so, would be likely unduly to delay the plaintiff and other parties not interested im the question, he may report the incumbrance, and its priority as regards other incumbrances, and the dispute between the claimants, so that the Court may give proper directions for determining the question: *McDonald* v. *Wright*, 12 Gr. 552.

Place of payment. **Place of Payment.**—The Master, in appointing the place, and manner of payment, must proceed under *Rule* 85.

Day of payment not to be a *dies non* Omission. **Persons to Redeem, and Day for Redemption.**—The Master is to appoint a day for redemption. He should be careful to see that the day appointed is not a Sunday, nor a bank holiday, otherwise a new day will have to be appointed, before a final order can be obtained: *Holcumb* v. *Leach*, 3 Gr. 449. The

omission of the Master to appoint a day for redemption may be remedied by order in Chambers: *King* v. *Connor*, 10 Gr. 364. **Rule 130. to appoint a day.**

When the judgment is for sale, one day is appointed six calendar months from the making of the report, for the mortgagor to redeem the plaintiff, and all subsequent incumbrancers who have proved claims; in default of payment a final order for sale is made: see *Rules* 353, 133; but see *Jones* v. *Harris*, 55 L. T. N. S. 884, where only three months were allowed for redemption. **Sale,—redemption, how directed.**

Where the judgment is for foreclosure, the subsequent incumbrancers are ordinarily entitled to successive rights of redemption in the order in which they acquired their charges; six calendar months being given to the first in priority, and three calendar months to each of the others in succession: Seton 1085, *Webster* v. *Patterson*, W. N. 1884, 20. But the Court may specially direct that one day only be given to all the defendants to redeem the plaintiff, without prejudice to their priorities *inter se*: *Bartlett* v. *Rees*, L. R. 12 Eq. 395; *The General Credit & D. Co.* v. *Glegg*, 22 Ch. D. 549; 48 L. T. N. S. 182; *Smith* v. *Olding*, 25 Ch. D. 462; 50 L. T. N. S. 357: *Lewis* v. *Aberdare & P. Co.*, 50 L. T. N. S. 451. In *Mutual Life Assurance Co.* v. *Langley*, 26 Ch. D. 686; 51 L. T. N. S. 284, Pearson, J., said that as a general rule where there are several defendants, but one day should be given: and see *Platt* v. *Mendel*, 27 Ch. D. 246; 51 L. T. N. S. 424; where the practice of giving successive days for redemption, where there are subsequent incumbrancers, was declared to be anomalous; and see *Davis* v. *Manley*, 78 L. T. Jour. 318; *Doble* v. *Manley*, 28 Ch. D. 664; *Tufnell* v. *Nicholls*, 56 L. T. N. S. 152. A *puisne* incumbrancer, and all persons claiming under him are entitled to but one day for redemption: *Loveday* v. *Chapman*, 32 L. T. N. S. 689; *Beevor* v. *Luck*, L. R. 4 Eq. 537, and so are judgment creditors, where there are no intermediate incumbrances: *Bates* v. *Hillcoat*, 1 Beav. 139; *Stead* v. *Banks*, 5 D. & S. 560; *Ardagh* v. *Wilson*, 1 Chy. Ch. 389; Seton, 1085; Taylor & Ewart, 228; but see *Carroll* v. *Hopkins*, 4 Gr. 431. **Foreclosure,—redemption, how directed.**

A party making default in redemption at the time appointed, may be foreclosed: *Rule* 353, and new accounts may, from time to time, be taken without further order: *Rule* 132. When all the subsequent incumbrancers have been foreclosed, three calendar months are given to the mortgagor to redeem, and on default, he may be foreclosed. An incumbrancer redeeming, may proceed to foreclose the subsequent incumbrancers and the mortgagor, as if he were the original plaintiff in the action. A subsequent incumbrancer redeeming out of his order of priority may add the amount paid to his own claim as against all incumbrancers subsequent to himself, but not as against any that are prior; as against the latter he may claim to be redeemed in respect of any claim he has paid which had priority over the latter's claim. But, inasmuch as a prior incumbrancer on redeeming a subsequent incumbrancer, in respect of a prior claim paid off by the latter, would be entitled, to add the amount so paid to his own debt, and to be redeemed by the latter, it will generally be found inexpedient to claim the right to be redeemed, and the incumbrancer next in priority to the plaintiff should be appointed to be redeemed as to his claim, without first requiring him to redeem a subsequent incumbrancer in respect of any prior claim paid by the latter. Where the mortgagor redeems after *puisne* incumbrancers have been foreclosed, he thereby opens the foreclosure as to them: see *Box* v. *Bridgman*, 6 P. R. 234; *Otter* v. *Lord Vaux*, 2 K. & J. 650; 6 D. G. M. & G. 638; *Read* v. *Smith*, 14 Gr. 250; 16 Gr. 52; *Bell* v. *Sunderland Building Society*, 24 Ch. D. 618; 49 L. T. N. S. 555: and see *Ledbrook* v. *Passman*, 59 L. T. N. S. 306. **Subsequent incumbrancer redeeming out of his order.**

Where portions of an estate under mortgage are conveyed away by the mortgagor, one day should be given to all the persons interested in the equity of redemption to redeem: *Hill* v. *Forsyth*, 7 Gr. 461; so also where there is any dispute between co-defendants as to their priorities, one day may be given to all to redeem without prejudice to their rights *inter se*: *General Credit & D. Co.* v. *Glegg*, 22 Ch. D. 549; 48 L. T. N. S. 182; *Smith* v. *Olding*, 25 Ch. D. 462; 50 L. T. N. S. 357; *Lewis* v. *Aberdare & P. Co.*, 50 L. T. N. S. 451; but where there is a stipulation in the mortgage that in case of sales by the mortgagor, the mortgagee shall, on payment of a certain portion of the purchase money, release the part sold, each purchaser is entitled to redeem his own part **Redemption, how directed where equity of redemption divided.**

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Rule 130. on payment of the stipulated portion of the money, and the Master should, in such a case, appoint one day for each of the several persons so entitled, to redeem his respective portion accordingly : *Davis* v. *White*, 16 Gr. 312.

Right of purchasers of different parts of mortgaged estate.

As to the rights of purchasers of different portions of the mortgaged estate *inter se* : see *Barker* v. *Eccles*, 17 Gr. 277 ; *Jones* v. *Beck*, 18 Gr. 671 ; *Pearce* v. *Canavan*, 28 Gr. 356, 7 Ont. App. 187 ; *Buckler* v. *Bowman*, 12 Gr. 457 ; *Norris* v. *Meadows*, 28 Gr. 334, affirmed on appeal, 18 C. L. J. 165 ; *Clark* v. *Bogart*, 27 Gr. 450 ; *Fraser* v. *Nagle*, 16 Ont. 241.

Where a mortgage comprised both real and personal estate, on the death of the mortgagor it was held that his personal representative was entitled to redeem both properties, but that the reconveyance to him should reserve the right, or equity of redemption, of any other person or persons : *Hall* v. *Heward*, 32 Ch. D. 430 ; 54 L. T. N. S. 810 ; but see now R. S. O. c. 108, ss. 3-10.

Where several persons are interested in the equity of redemption, each one is entitled to redeem the whole mortgaged property and not merely a proportionate part, but the reconveyance to one of several persons entitled to the equity of redemption should be made subject to the right of redemption of such other persons : *Pearce* v. *Morris*, L. R. 5 Chy. 227 ; 22 L. T. N. S. 190 ; *Faulds* v. *Harper*, 11 S. C. R. 639. But *semble*, one of several joint mortgagors may be permitted to redeem his proportionate part of the mortgaged estate on payment of a proportionate part of the mortgage debt : *Readdy* v. *Pendergast*, 56 L. T. N. S. 790.

Where the day appointed for redemption is uncertain a new day must be appointed : *Scott* v. *McKeown*, 1 Chy. Ch. 186.

Master's report, date of; should be confirmed.

Master's Report.—The Master's report should bear date the day it is signed, and not before : *Waddell* v *McColl*, 14 Gr. 211. It must be confirmed before the day appointed for redemption, or a final order will be refused : *Mountain* v. *Porter*, 1 Chy. Ch. 207 ; *Mills* v. *Dixon*, 2 Chy. Ch. 53. In the latter case a month's further time to redeem was allowed.

As to confirming report see *Rules* 82, 848, and notes. The omission to appoint a day for redemption may be remedied by application in Chambers : *King* v. *Connor*, 10 Gr. 364.

Correcting mistake in.

Where the Master had omitted to allow the plaintiff two items of interest, an order was made to correct the mistake, after a final order for sale, without appointing any new day for payment : *Bessey* v. *Graham*, 9 U. C. L. J. 82 ; and see *Morley* v. *Matthews*, 12 Gr. 453 ; but the Master cannot, of his own motion, in a subsequent report, correct a mistake in a prior report : *Crooks* v. *Street*, 1 Chy. Ch. 78 ; and see further *Rule* 82 note.

Extension of time for payment, when granted.

Extending time for Payment.—Application to extend the time for payment should be made in Chambers : *Anon*, 4 Gr. 61 ; where the defendant showed that he had sold for £300, and the mortgage debt was only £250, and that he expected to receive payment in full in two or three months, the time was extended : *Ford* v. *Steeples*, 1 O. S. 282. So also where the mortgage was for purchase money, and the vendor had neglected to pay off a prior mortgage, pursuant to his covenant, and it appeared that the existence of the first mortgage prevented the defendant from raising money to pay off the second, the time was extended : *G.* v. *V.*, 2 Chy. Ch. 33. So also six months' further time was given, where the defendant was prevented from raising the money by reason of an improper advertisement published by the plaintiff's solicitors : *Gilmour* v. *Myers*, 2 Chy. Ch. 179. So also where it was shown that the value of the property would be enhanced in the meantime, by the construction of a railway : *Cameron* v. *Cameron*, 2 Chy. Ch. 375 ; and where a reasonable prospect of payment at the extended time was shown, the time was extended : *Cahuac* v. *Durie*, 2 Chy. Ch. 394 ; *Street* v. *O'Reilly*, 2 Chy. Ch. 270 ; but an affidavit of the solicitor, that he believed his clients had exerted themselves, and were endeavouring to raise the money, and that the property was worth much more than the debt, was held insufficient : *Anon*, 4 Gr. 61.

Where the application is made after the day fixed for redemption, the applicant is usually required to pay interest for the extended time, on the whole amount found due for principal, and interest: *Street* v. *O'Reilly*; *Cahuac* v. *Durie*; *Cameron* v. *Cameron*, *supra*; and the payment of the whole costs, or at all events the costs of the application, is also usually made a condition precedent: *Ib.*; and see *Holford* v. *Yate*, 1 K. & J. 677; *Whitfield* v. *Roberts*, 7 Jur. N. S. 1268; and where the mortgagee swore that he had been compelled, in consequence of the mortgagor's default, to contract a loan to meet his liabilities, at a higher rate of interest than that reserved by the mortgage; on extending the time, the mortgagor was required to pay such a sum as would cover the excess of interest payable by the mortgagee: *Howard* v. *Macara*, 1 Chy. Ch. 27. It is probable that where the application is made before a final order has been obtained, however, the application would be more readily granted, and on less stringent terms, than where it is made after the final order has issued: *Patch* v. *Ward*, L. R. 3 Chy. 212. **Rules 131, 132.** Application after day appointed has elapsed. Terms imposed.

See further as to applications to open foreclosure, and extend the time for payment: *Rule* 353, note.

131. The Master's report must state the names of all persons who have been made parties in his office, and who have been served with the notice or appointment hereinbefore provided, and the names of such as have made default, and must settle the priorities, &c., of such as have attended, and these latter are to be certified as the only incumbrancers upon the estate. Chy. O. 449. Master's report, contents of.

For forms of reports in mortgage cases: see Leggo's Forms, 2nd ed., Nos. 67, 968, 969, 972, 977.

132. All subsequent accounts are, from time to time, to be taken, subsequent costs taxed, and necessary proceedings had, for redemption by, or foreclosure of, the other party or parties entitled to redeem the mortgaged premises, as if specific directions for all these purposes had been contained in the judgment. Chy. O. 452. Subsequent accounts to be taken by Master.

If the mortgagor, or owner of the equity of redemption, or any incumbrancer, redeems any prior charge which was his own debt, or which, by contract, express or implied, he was bound to discharge, he cannot keep such charge alive as against a *mesne* incumbrancer, whose incumbrance he is also expressly, or impliedly, bound to discharge: *Blake* v. *Beaty*, 5 Gr. 359. Mortgagor paying off incumbrance, effect of.

In taking the subsequent account the master may allow a sum paid for insurance since the last account, under a provision in the mortgage: *Bethune* v. *Calcutt*, 3 Gr. 648. Insurance.

In England, it is the practice on taking the subsequent account, to allow interest on the gross amount of principal, interest and costs, found due by the last report: *Elton* v. *Curteis*, 19 Ch. D. 49; 45 L. T. N. S. 435; and see *Jacob* v. *Earl of Suffolk*, Mos. 27; but in Ontario, it has not been customary to allow interest upon interest in respect of an incumbrancer's own proper debt, unless the mortgage expressly provides therefor. But where a subsequent incumbrancer pays off a prior incumbrance, he is entitled to interest on the aggregate amount paid by him for principal, interest and costs; the interest on the principal being computed at the rate reserved in his own security, but on the interest and costs, at six per cent. only: *McMaster* v. *Hector*, 8 C. L. J. 284. Interest on subsequent account.

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Rules 133-135.

Sale.—proceedings on.

133. If the judgment directs a sale instead of foreclosure on default in payment, then on default being made, and an order for sale obtained, the premises are to be sold, with the approbation of the Master, and he is to settle the conveyance to the purchaser in case the parties differ about the same; and the purchaser is to pay his purchase money into Court, to the credit of the action, subject to the further order of the Court. Chy. O. 452.

Master may sell by tender, private contract, &c. Settle all conveyances.

By *Rules* 89, 97, 109, where a sale is ordered, the Master may cause the property, or a competent part thereof, to be sold, either by public auction, private contract, or tender; or part by one mode, and part by another, as he may think best for the interest of all parties; and he may fix an upset price, or reserved bidding, but such price, or bidding, must be so fixed at the meeting held by him for the purpose of settling the advertisement, and making the other arrangements preparatory to the sale, and must be notified in the conditions of sale. The Master is to settle all necessary conveyances for the purpose of carrying out the sale, in case the parties differ; or in case there shall be any persons under any disability (other than coverture) interested in such sale.

Before a sale can take place, a final order must be obtained: see *Rule* 353 note.

Whole should not be sold where part sufficient.

It is the Master's duty not to sell the whole, when it is clear that a sale of part would suffice for the payment of the incumbrances. When the mortgagor thinks more land is offered for sale than is necessary, he should object at the settlement of the advertisement. It is too late to take the objection after the sale: *Beaty* v. *Radenhurst*, 3 Chy. Ch. 344.

Purchase money, application of.

134. The purchase money, when so paid, is to be applied in payment of what has been found due to the plaintiff and the other incumbrancer or incumbrancers (if any), according to their priorities, together with subsequent interest, and subsequent costs. Chy. O. 454.

Even after a sale, a dowress was allowed to come in and prove her claim: *Hyde* v. *Barton*, 8 P. R. 205.

Residue of purchase money, how disposed of.

This *Rule* makes no provision for the disposition of the residue, after payment of the claims of the plaintiff, and other incumbrances. A motion may be made by the mortgagor, before a Judge in Chambers, for payment of the residue. Since 11th March, 1879, a wife barring dower in a mortgage, does so only for the purpose of the mortgage, and is consequently dowable out of any surplus after satisfying the mortgage debt. It will therefore be necessary whenever this right exists, that the wife should be notified, and provision made for her protection, in any order directing payment out of the surplus: R. S. O. c. 133, s. 1; *Martindale* v. *Clarkson*, 6 Ont. App. 1.

The *Creditors Relief Act*, (R. S. O. c. 65,) applies to executions against lands which have been sold in a mortgage action; and the surplus after payment of specific incumbrancers is distributable, ratably among the execution creditors: *Harvey* v. *McNeil*, 12 P. R. 362; 24 C. L. J. 122.

Master to take account in redemption suits.

135. Upon a reference under a judgment for redemption, the Master is, without any special direction, to take an account of what is due to the defendant for principal money

and interest, and his costs are to be taxed, and a time and place, or times and places, appointed for payment according to the present practice of the Court in that behalf. J. A. Rule 332. Rules 136, 137.

Six months is usually allowed for redemption by the plaintiff in a redemption action, as in the case of a defendant in a foreclosure action: see *Rule* 130, note. But it would seem that if the mortgagee were to insist on exercising his power of sale instanter, a mortgagor could not by commencing a redemption action, where the right to redeem is not in dispute, procure an extension of time for redemption, nor even stay the sale pending the action, except on the terms of bringing the money sworn to be due by the mortgagee for principal, interest and costs, into Court, to abide the taking of the account. But where the right of redemption is in dispute, a sale may be restrained until the trial or hearing of the cause without bringing the amount claimed into Court: *Rhodes* v. *Buckland*, 16 Beav. 212, 219; and the general rule requiring the payment of the money into Court may be modified, having regard to the special circumstances of the case: see *Hickson* v. *Darlow*, 23 Ch. D. 690; *Macleod* v. *Jones*, 24 Ch. D. 289.

In the event of a plaintiff in a redemption action failing to redeem at the time appointed he may be foreclosed. *Rule* 362.

136. Where the order is for redemption or foreclosure, or redemption or sale, such proceedings are in such case to be thereupon had, and with the same effect as in an action for foreclosure or sale, and in such case the last incumbrancer is to be treated as the owner of the equity of redemption. J. A. Rule 335. Procedure where order is for redemption, etc.

In an action for redemption the plaintiff is not entitled to a sale in default of redemption, and it is only when the mortgagee expressly consents, that a judgment in a redemption action can be so framed.

Usually the only alternative of redemption is foreclosure, or dismissal of the action, which is equivalent to a foreclosure. The plaintiff may be foreclosed: see *Rule* 362; and under this *Rule* the mortgagee may bring in any subsequent incumbrancers and foreclose them. But when the mortgagee brings in the subsequent incumbrancers it would seem that they would have the ordinary right of defendants in a foreclosure action and be entitled to claim a sale on the usual terms, because the action then ceases to be a redemption action, and becomes one for foreclosure: see *Rule* 350. A mortgagor, or any person liable to pay, is entitled to redeem any mortgage made after the 1st July, 1880, may do so after it has run five years, even though the time limited by the mortgage itself for redemption has not expired: R. S. C. c. 127, s. 7.

137. In an action for foreclosure or sale upon payment by the defendant, or in an action for redemption upon payment by the plaintiff, of the amount found due, the plaintiff or defendant shall, unless the judgment otherwise directs, assign and convey the mortgaged premises in question to the defendant, (or plaintiff, as the case may be,) making the payment, or to whom he may appoint, free and clear of all incumbrances done by him, and deliver up all deeds and writings in his custody or power relating thereto, upon Assignment of property and delivery of documents.

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Rule 138. oath, and in case of a corporation the affidavit shall be made by the officer thereof having the custody of such deeds and writings. J. A. Rule 336.

Judgment creditor.

A judgment creditor is bound to assign his judgment to the party redeeming him: *Bank of British North America* v. *Moore*, 8 Gr. 461.

Who entitled to conveyance.

Where both the mortgagor, and a subsequent incumbrancer, pay the money due to the plaintiff into the bank, the subsequent incumbrancer has the right to a conveyance in preference to a mortgagor, and as between two incumbrancers, the one who is prior is entitled to the conveyance: see *Teevan* v. *Smith*, 20 Ch. D. 724.

Redemption by one of several interested in equity of redemption.

Where there are other persons interested in the equity of redemption, besides the person redeeming, the mortgagee should convey to the party redeeming, subject to the equities of such other persons: *Pearce* v. *Morris*, L. R. 5 Chy. 227; and see *Boyd* v. *Petrie*, L. R. 10 Eq. 482; L. R. 7 Chy. 392; and see further as to form of conveyance: *Hartley* v. *Burton*, L. R. 3 Chy. 365.

Where a mortgagor who has assigned his equity of redemption taking a covenant of indemnity from his assignee, is compelled to pay the mortgage debt, he is entitled to a reconveyance subject to the equities of persons other than himself in the property: *Kinnaird* v. *Trollope*, 39 Ch. D. 636; 59 L. T. N. S. 433: and he is entitled to a charge on the land for the amount so paid as against his assignee: *Hamilton Provident, L. & I. Co.* v. *Smith*, 17 Ont. 1. As to the terms of a conveyance to a tenant for life who redeems: see *Alderson* v. *Elgey*, 26 Ch. D. 567. Where a mortgage is paid off, the mortgagee is bound to reconvey the mortgaged property so that it will revest in the mortgagors; if he reconvey to one of several mortgagors, he will be liable at the suit of the other mortgagors for any loss they may sustain by his so doing: *Magnus* v. *Queensland National Bank*, 36 Ch. D. 25; 57 L. T. N. S. 136, affirmed by C. A.; 37 Ch. D. 466; 58 L. T. N. S. 248.

Reconveyance.

A mortgagor redeeming is entitled to a reconveyance, or vesting order, and is not obliged to accept a certificate of discharge of the mortgage: *Ellis* v. *Ellis*, 1 Chy. Ch. 257; *McLennan* v. *McLean* 27 Gr. 54.

Redemption money how paid out of bank

In order to get the money out of the bank, it is necessary to produce to the officer required to sign the cheque, the consent of the party paying it in, duly verified, or that of his solicitor, if any. If this consent cannot be procured, an order must be obtained in Chambers, on notice to such party, and the costs of such motion will not be ordered to be paid by the latter: *Bernard* v. *Alley*, 2 Chy. Ch. 91; *Weeks* v. *Stourton*, 11 Jur. N. S. 278. The party paying in the money, is entitled to receive his conveyance, and deeds, before the money is paid out.

Lost mortgage, indemnity required.

Where the mortgagee has lost the mortgage deed, he is bound at his own expense to furnish the mortgagor, or any incumbrancer redeeming him, with proof of the loss, and with an indemnity against any demand of third persons: *McDonald* v *Hime*, 15 Gr. 72.

11. Local Masters.

138. Every Local Master who does not practise as a Barrister or Solicitor and who has not taken out certificates to practice, shall, in addition to his other powers as Local Master, have in all actions brought in his County concurrent jurisdiction with and the same power and authority as the Master in Chambers in all proceedings now taken in Chambers at Toronto, except that the authority of such

Local Masters shall not extend to proceedings in the nature of a *quo warranto* under *The Municipal Act*, or to payment of money out of Court, or dispensing with payment into Court, or to appeals from the taxing officers at Toronto pending taxation; or to making an order for sale of infants' estates. *See* 48 V. c. 13, s. 21; J. A. Rules 22, 584. Rules 139-141.

See notes to *Rules* 30, 41.

12. Accountant's Office.

(i) *General Rules.*

139. The Suitors' Accounts in the Court of Appeal, and the High Court shall be in charge of "The Accountant of the Supreme Court of Judicature for Ontario." J. A. Rule 475. Suitors' accounts.

The suitors' accounts in the Courts of Queen's Bench, Common Pleas, and Chancery, were, on the passing of *The Judicature Act*, consolidated and placed in charge of an officer called the Accountant of the Supreme Court: original *Rule* 475, 44 Vict. c. 5, s. 68; and by *Rule* 10, H. C. J., passed 25th August, 1881, all moneys and securities, etc., standing in the name of the Accountant of the Court of Chancery, or the Referee in Chambers, or any other officer named by the Court of Chancery, or in the name of the Clerk of the Crown and Pleas of the Court of Queen's Bench, or the Clerk of the Crown and Pleas of the Court of Common Pleas, on the 21st August, 1881, were transferred to, and vested in, the Accountant of the Supreme Court as such Accountant, and by 48 Vict. c. 13, s. 19, all moneys and securities in the hands of the Registrar of the Court of Appeal were also transferred to, and vested in, the Accountant.

The Accountant of the Supreme Court of Judicature for Ontario is constituted a corporation sole: see *ante*. p. 118, s. 133.

In case of the office being at any time vacant provision is made for vesting all moneys and securities in some other officer to be named by Rule of Court: *Ib.*, s. 136.

140. In the following Rules the word "Accountant" shall mean "The Accountant of the Supreme Court of Judicature for Ontario." J. A. Rule 550. "Accountant" defined.

141. The following books are to be kept by the Accountant:— Books to be kept.

1. A Book of Directions to the Bank to receive money.
2. A Book of Cheques.
3. A Journal.
4. A General Ledger.
5. A Stock Journal.
6. A Stock Ledger.

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7. A Balance Book.
8. A Book of Investments.
9. A Bond Index.
10. A Deposit Index.
11. A Private Ledger. J. A. Rule 551.

Directions and cheques.

142. The *Directions* and *Cheques* are to be in the form approved of by the Judges of the Chancery Division, and are to be numbered consecutively. J. A. Rule 552.

Journal

143. The *Journal* is to show the several sums daily paid into and out of Court, and is to be so kept, that at the foot of the account for each month will appear the total amount paid into and out of Court during such month, and the amounts to the debit and credit of the said account are to be transferred each month to the Private Ledger. J. A. Rule 553.

General Ledger.

144. The *General Ledger* is to contain a separate account for every action or matter, in which there is money in Court; and also, "The Suitor's Fee Fund Account," and "The Suspense Account" for each Division of the High Court, and for the Court of Appeal, each of which accounts is to show correctly the state and condition thereof for the time being. J. A. Rule 554.

To "The Suitors' Fee Fund Account" is to be transferred the surplus income arising from the funds in the High Court after payment of the expenses of the Accountant's office, and interest payable to suitors: see J. A. s. 139, *ante* p. 120. Out of the funds standing to the credit of this account any Divisional Court or Judge of the Supreme Court of Judicature may order such sums to be applied as may be necessary for the protection of infants and other persons not *sui juris*, on whose behalf proceedings may be had in the Court, or be directed to be taken in other Courts; and may also order any sum to be paid required to make good a default arising in respect of suitors' money or securities, from any mistake, act or omission of any official of the Court without prejudice to the liability of the official or his sureties: and see J. A. s. 140, *ante* p. 120.

Form of accounts.

145. In each of the suitor's accounts there are from time to time to be entered, the date, purport, or material contents, of all orders, judgments, reports, pleadings, affidavits, or other documents, affecting the payment into or out of Court, of money therein; also, every sum paid into Court, and by whom, and for what purpose paid in, and under what authority; and also every sum paid out, to whom, and on what account paid out, and under what authority. J. A. Rule 555.

Rules 146-151.

146. Each account opened in the Ledger is from time to time until the same shall be closed, to be credited with the bank interest which shall from time to time accrue in respect of such account and a corresponding transfer of interest is to be made at the bank by cheque signed and countersigned as in other cases, and there is also to be entered in each account any statement or memorandum of any other matters material to be recorded for the information of the Court or its officers, or any of the parties. J. A. Rule 556. Crediting Bank interest.

147. Compound interest is not to be credited to any action or matter, or allowed or paid to any suitor in respect of any fund which has not been in Court for at least five years. J. A. Rule 557. Compound interest.

148. Whenever the balance remaining to the credit of any action or matter to which an adult party is entitled does not exceed $10, and 2 years elapses without the balance being claimed, the account in such action or matter shall be closed by the transfer of the balance to "The Suspense Account" of the proper Division of the High Court, or of the Court of Appeal, but such transfer shall not in anywise prejudice the claim of any suitor entitled to the balance to its payment. J. A. Rule 558. Balances under $10 standing for two years carried to Suspense Account.

149. In the *Stock Journal* and *Stock Ledger* are to be entered all transactions relating to Dominion Stock held or purchased by the Court for suitors, other than such orders, reports and other particulars as to the said stock as are entered in the General Ledger. J. A. Rule 559. Stock Journal and Ledger.

150. The *Balance Book* is to contain a statement to be entered therein quarterly of the balances at the credit of the various accounts in the three Ledgers at the date of such statement; such balances are to be made up to the 31st of March, 30th of June, 30th of September, and 31st of December of every year. J. A. Rule 560. Balance Book.

151. In the *Book of Investments* are to be entered under the heading of the action or matter in which any mortgage or other security other than Dominion stock has been taken by the order of the Court, the date, and a concise statement of the material contents of the mortgage or Book of Investments.

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other security, and of all subsequent orders and proceedings in relation thereto until the mortgage or other security is discharged by the order of the Court. J. A. Rule 561.

Bond Index

152. In the *Bond Index* shall be entered under the heading of the action or matter in which the same may be entitled, a memorandum of all bonds, or recognizances, filed or deposited with the Accountant, and also receipts for all bonds, or recognizances delivered out pursuant to any order. J. A. Rule 562.

Deposit Index.

153. In the *Deposit Index* shall be entered under the heading of the action or matter in which the same may be ordered to be deposited, a memorandum of all securities for money, or other documents, books, papers, or other things which may at any time be ordered to be deposited with the Accountant for safe custody, and also receipts for all such documents, books, papers, or other things so deposited as may be delivered out pursuant to any order. J. A. Rule 563.

Private. Ledger

154. In the *Private Ledger* is to be entered "The General Interest Account," "The Toronto General Trust Company Account," the "Bank Account," and "The Account of Official Guardian *ad litem*." J. A. Rule 564.

Books to be open to inspection.

155. The books kept under these Rules, except the Private Ledger, are to be open to inspection by any person interested in any account entered therein, or his solicitor or agent. The Accountant is to give a certificate of the state of any account, or an abstract therefrom, or of any entry in such books, at the desire of any person interested, or his solicitor or agent, and all such certificates shall be signed by the Accountant, or the Chief Clerk in the Accountant's office. J. A. Rule 565.

Securities to be taken in name of Accountant.

156. All mortgages and other securities taken under an order or judgment of the Court, and all bonds, recognizances and other instruments required by the practice of the Court for the purpose of security are to be taken in the name of the Accountant, his successors and assigns, unless it is expressly directed that the same are to be

taken in the name of some other person or persons. J. A. Rules 566, 519. Rules 157-160.

Bonds for security for costs, are not within this *Rule*: see *Rule* 1247.

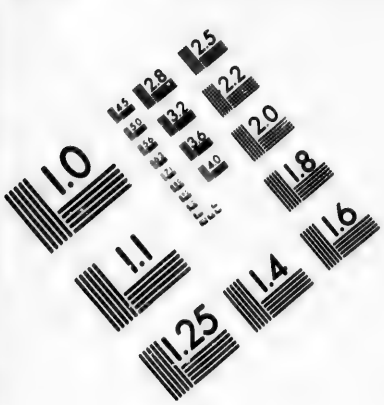
157. One Auditor or more shall be appointed to the Supreme Court. It shall be the duty of the Auditor in each year to examine the several account books in the Accountant's office and to compare the balances entered in the *Balance Book* with the balances entered in the Ledgers, and with the Bank Account, and to certify such balances if found to be correct, and to make such further and other examination of the said book as he may think necessary for the proper audit thereof, and to report forthwith, after making such examination, the result thereof to the Judges of the Chancery Division, and from time to time to make such suggestions to the said Judges as may appear to be desirable for the efficient keeping of the accounts in the said Accountant's office. J. A. Rule 567. Audit of accounts.

158. The remuneration of each Auditor is hereby fixed at the sum of $100 per annum, for which sum a cheque is to be issued payable out of the General Interest Account, upon the fiat of any Judge of the High Court. J. A. Rule 568. Auditors' remuneration.

159. During the month of January in each year the Accountant shall present to the Judges a statement of the amounts paid for salaries and expenses of the Accountant's office during the previous year, and the names of the persons to whom such amounts were respectively paid, and also an estimate of the salaries and expenses of the Accountant's office for the current year, and such estimates shall be examined by the Judges who shall be at liberty to make such variations therein as they may think necessary, and when approved of by them, a fiat shall be indorsed thereon or appended thereto which shall be signed by one or more of such Judges, authorizing the payment from time to time as may be requisite of such sums as shall be necessary, not exceeding in the aggregate the amounts specified in the said estimates, for the services and purposes mentioned in the said estimates. J. A. Rule 569. Salaries and expenses of office

160. Cheques for the salaries and expenses included in such estimates as shall be so approved of as aforesaid may Cheques for salaries.

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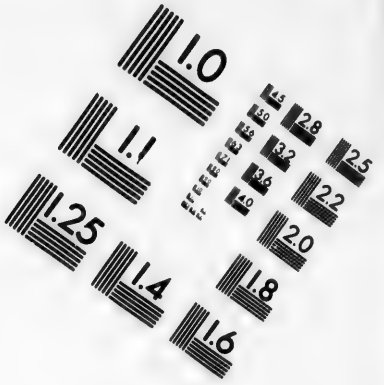
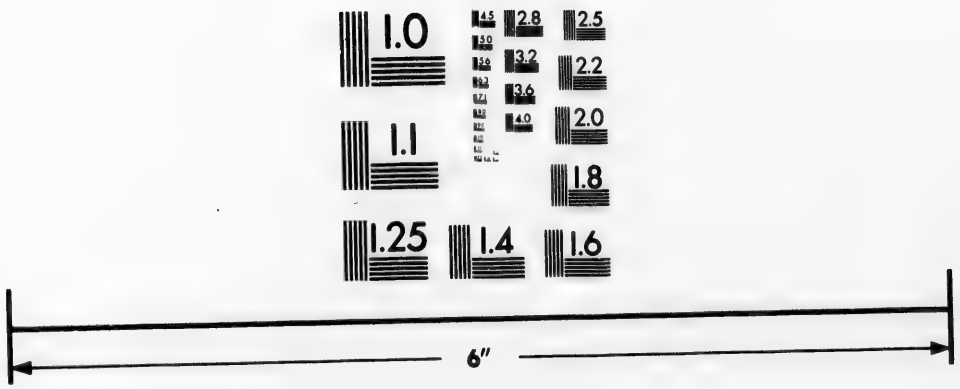
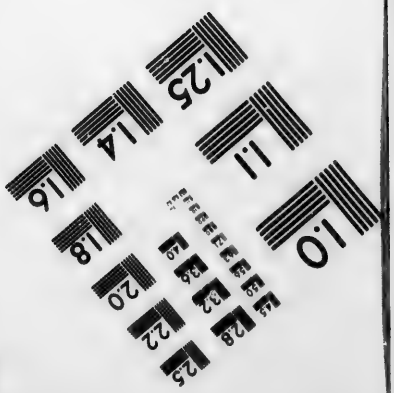


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Rules 161-162.

from time to time as occasion may require, be signed, countersigned, and issued to the parties entitled, without further order. J. A. Rule 570.

Accountant to render statements yearly.

161. The Accountant shall prepare in the month of January in every year a statement of all moneys paid into Court and withdrawn respectively, and a statement of the condition of the various accounts upon the 31st day of the preceding December, and shall transmit one copy to the Provincial Secretary and one to the President of the High Court of Justice, with a declaration thereto annexed, made before a Justice of the Peace or Commissioner for taking affidavits, in the form No. 217 in the Appendix. J. A. Rule 476.

Not taken from any English Rule.

List of mortgages and securities to be left half yearly with Judges.

162. A list signed by the Accountant of all the mortgages and securities, other than Dominion Stock, outstanding on the 1st January and 1st July in each year is to be delivered to, and left with, the President of the High Court within 10 days thereafter, and such list is to set forth in convenient form :

1. The short style of the cause or matter ;
2. Date of order under which mortgage or other security executed ;
3. Date thereof ;
4. Amount ;
5. When payable ;
6. For whose benefit ;
7. What sums, if any, overdue for principal or interest ;
8. Name of mortgagor or party giving security ;
9. Locality (not description) of mortgaged property ;
10. Remarks. Chy. O. 367.

(ii) *Mode of paying into Court.*

Excepted towns.

163. The next seven Rules as to the mode of paying money into Court shall not apply to moneys so payable at L'Original, ~~Cayuga, or Sault Ste. Marie~~, until further order. New.

Provision is made by *Rule* 171 for the payment of money into Court with a defence at the places mentioned in this *Rule*. Other moneys required

to be paid into Court, as for instance purchase money on sales under judgments, moneys payable into Court in administration and partition actions, etc., will have to be paid in at one of the agencies of the Canadian Bank of Commerce, or at one or other of the agencies of the other Banks authorized to receive moneys payable into Court under *Rule* 165. **Rules 164-167.**

164. A person desiring to pay money into Court shall pay the same into the Canadian Bank of Commerce at Toronto, or at some branch or agency thereof, or as mentioned in Rule 165 and in no other way. New. Bank of Commerce.

The Accountant is the only proper person to receive payment of money into Court: *Leroux* v. *Lanthier*, 2 C. L. T. 431; except in the cases otherwise provided: see *Rule* 171.

When money was ordered to be paid into Court, payment to the solicitor of the party entitled to it, was held not to be a ground for dispensing with its payment into Court: *Blackburn* v. *Sheriff*, 1 Chy. Ch. 208.

165. Money required to be paid into Court in any of the following places (so long as the Canadian Bank of Commerce shall have no branch office thereat) shall be paid into the branch or agency office of the Bank set opposite the said places respectively: Other Banks.

St. Thomas	The Merchants Bank
Kingston	The Bank of Montreal
Owen Sound	The Merchants Bank
Milton	The Bank of Hamilton
Perth	The Bank of Montreal
Brockville	The Bank of Montreal
Napanee	The Merchants Bank
Cobourg	The Bank of Montreal
Whitby	The Dominion Bank
Brampton	The Merchants Bank
Picton	The Bank of Montreal
Pembroke	The Bank of Ottawa
Cornwall	The Bank of Montreal
Lindsay	The Bank of Montreal
Welland	The Imperial Bank
Port Arthur	The Ontario Bank

New.

166. The person paying money into Court shall first obtain from the Accountant, Local Registrar, Deputy Registrar, or Deputy Clerk of the Crown, a direction to the Bank to receive the money. Chy. O. 352 altered. Direction.

167. The person applying for the direction is to file a præcipe therefor in the form No. 112 in the Appendix and Præcipe and order to be left

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Rules 168-171.

is to leave with the officer issuing the direction, the judgment, order, writ, or pleading or copy thereof, under which the money is payable, and in case the direction is obtained elsewhere than in Toronto he shall also leave the necessary postage for the transmission of the documents to the Accountant and a further copy of the pleading for transmission. Chy. O. 353 altered.

Outside towns.

168. Where the direction is issued elsewhere than in Toronto, the officer issuing the same shall forthwith transmit to the Accountant by post the præcipe for such direction together with the papers left on the application therefor. New.

Date of crediting money.

169. The person paying money into Court elsewhere than in Toronto shall be entitled to credit therefor as of the date on which the same was deposited in the bank, but the party entitled thereto shall not be entitled to receive bank interest thereon until the money shall have been received by the Canadian Bank of Commerce at Toronto. New.

Receipt to be given in duplicate by Bank.

170. The Bank, on receiving money to the credit of any cause or matter, is to give a receipt therefor in duplicate; and one copy is to be delivered to the party making the deposit, and the other is to be posted or delivered the same day to the Accountant. Chy. O. 354.

Payment with defence in certain towns.

171. Money paid into Court with a defence at L'Orignal, Cayuga or Sault Ste. Marie, shall be paid to the proper officer of the Court, who, for receiving the same, may exact a sum not exceeding one per cent. on the sum so paid in, and shall sign a receipt for the amount in the margin of the pleading, for signing which receipt he shall be entitled to twenty cents, and the sum so paid in may be paid out to the plaintiff, or to his solicitor upon a written authority from the plaintiff. R. S. O. 1877, c. 50, s. 109.

(iii) *Payment out of Court, Investments, etc.*

Payment out of Court.

172. Money is to be paid out of Court upon the cheque of the Accountant, countersigned by any one of the Registrars. J. A. Rule 477.

Rules 172-178.

173. Money paid in with a defence at L'Orignal, Cayuga, or Sault Ste. Marie, is to be paid out with the privity of the officer who received the same.

174. No cheque shall be issued ~~prior to~~ during the long vacation in any year unless the *præcipe* therefor is lodged in the Accountant's office on or prior to the ~~twentieth~~ thirtieth day of June, unless otherwise ordered by a Judge. J. A. Rule 606.

Cheques to be initialed by Chief Clerk.

175. Every cheque is to be initialed by the chief Clerk in the Accountant's office before the same is presented for the signature of the Accountant or other officer. J. A. Rule 478. (a) a judge may or Accountant's absence authorize any other officer to sign

On application for payment out, orders and reports to be produced.

176. The person entitled to a cheque is to produce and leave with the Accountant the orders and reports entitling such person to the money, and is to ~~file~~ a *præcipe* in the form No. 113 in the Appendix. Chy. O. 356.

Liability of solicitor, for improperly procuring money to be paid out of Court.

Where one member of a firm of solicitors was cognizant of a fraudulent application to the Court, whereby money was improperly paid out to a party not entitled, it was held that each member of the firm was liable to refund it, including those who were ignorant of the fraud: *Brydges* v. *Branfill*, 12 Sim. 369, and see *Atkinson* v. *Mackreth*, L. R. 2 Eq. 570; *St. Aubyn* v. *Smart*, L. R. 3 Chy. 646; *Dundonald* v. *Masterman*, L. R. 7 Eq. 594; *Plumer* v. *Gregory*, L. R. 18 Eq. 621; *Cleather* v. *Twisden*, 24 Ch. D. 731; 49 L. T. N. S. 633; 28 Ch. D. 340; 51 L. T. N. S. 330; *Thompson* v. *Robinson*, 15 Ont. 662; 16 Ont. App. 175: but see *Re McCaughey & Walsh*, 3 Ont. 425.

Where a solicitor allowed his name to be used in an application for payment by a third person, who by forged affidavits and powers of attorney succeeded in getting the fund into his hands, out of which he paid the solicitor a portion, and absconded with the balance, the solicitor was held liable for the whole fund, both what he actually received and what he did not, though ignorant of the fraud: *Slater* v. *Slater*, 58 L. T. N. S. 149; and see *Re Spencer*, 21 L. T. N. S. 808.

And when money is improperly ordered to be paid out of Court to parties not entitled without fraud, but through the negligence of a solicitor, he is liable to the parties injured thereby for the consequences: *Re Dangar*, 60 L. T. N. S. 491; 41 Ch. D. 178.

Consent of purchaser to payment out.

Purchase money is not paid out except either on proof being given the Accountant of the purchaser having received a conveyance or vesting order, or upon the production of the written consent of the purchaser, or his solicitor, and see Daniel Pr. 6th ed., 1100.

Copies of orders.

177. ~~Copies of~~ orders dispensing with payment of money into Court are in all cases to be left with the Accountant forthwith after entry thereof. J. A. Rule 504.

Orders and reports, to be returned.

178. The orders and reports produced as aforesaid are to be re-delivered to the party entitled thereto, with the cheque. Chy. O. 358.

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Rules 179, 180.

Stock, how transferred to a married woman.

179. Where money or stock, or securities in Court are directed by an order to be paid or transferred to an unmarried woman, and she marries before payment of the money or transfer of such stock or securities, the Accountant, if the same do not in the whole exceed $600 of principal money, or $50 in annual instalments, may draw for the money or make or execute a transfer of such stock or securities, in favour of such woman, upon an affidavit of herself and her husband that no settlement or agreement for a settlement has been made or entered into before, upon or since their marriage; or in case any settlement or agreement for a settlement has been entered into, then upon an affidavit by the woman and her husband, identifying the settlement or agreement for a settlement, and stating that no other settlement or agreement for a settlement has been made or entered into as aforesaid, and an affidavit of the solicitor of the woman and her husband, that such solicitor has carefully perused such settlement or agreement for a settlement, and that according to the best of his judgment, such money, stock or securities are not, nor is any part thereof, subject to the trusts of the settlement or agreement for a settlement, or in any manner comprised therein or affected thereby. J. A. Rule 571.

Settlement of fund, may be waived.

If the fund exceed $600 the money cannot be paid out, or stock transferred, without a special order, in which the Court will provide for the settlement of the fund before paying it out; and where the applicant is an infant, it has been held she has no power to waive her equity to a settlement: *Shipway* v. *Ball*, 16 Ch. D. 376; 44 L. T. N. S. 49. But where the husband and wife are of age, the Court will order the money to be paid out without a settlement if the parties appear by separate solicitors, and consent: *Cline* v. *Cline*, before Blake, V.C., 8th March, 1875; but see *Tompkins* v. *Holmes*, 14 Gr. 245, where a wife was directed to be examined before a Master, apart from her husband, as to her consent to abandon a fund in litigation.

Affidavit when dispensed with.

When the fund was under £10, an affidavit was dispensed with: *Veal* v. *Veal*, L. R. 4 Eq. 115: *Guest* v. *Newmes*, 78 L. T. Jour. 96; and where the husband was permanently resident out of the jurisdiction, the affidavit of the wife alone was accepted and acted on: *Wilkinson* v. *Schneider*, L. R. 9 Eq. 423; and in another case an affidavit by a solicitor disclosing facts, from which it appeared that it was unlikely that there was any settlement, was accepted as sufficient: *Woodward* v. *Pratt*, L. R. 16 Eq. 127.

Where an infant is found entitled to moneys in Court in an administration suit the Court takes charge of the fund, and will not suffer it to go into the hands of a trustee for the infant: *Kingsmill* v. *Miller*, 15 Gr. 171; *Mitchell* v. *Richey*, 13 Gr. 445. But where a married woman died entitled to a fund in Court which she bequeathed to her executor to be invested and the income applied for maintenance of her children, the fund was ordered to be paid out to the executor: *Re McDougall*, 11 P. R. 494.

Transfer of stock to representa-

180. Where moneys or stock, or securities in Court are directed to be paid out of Court or transferred to the legal

personal representative of any person, or to persons to be named in an order or report, and such moneys, stocks, or securities are reported or found to be due to any persons as legal personal representatives, the same or any portion thereof for the time being remaining unpaid or untransferred, may, upon proof, to the satisfaction of the officers signing and countersigning the cheque, of the death of any of them whether before, on, or after the day of the date of the order, be paid to the survivors or survivor of them. J. A. Rule 572.

Rules 181-183. tives of person entitled.

181. Where moneys, stock or securities in Court are directed to paid out or transferred by the Accountant to any person named in the order or judgment, or named, or to be named in any report, the same or any portion thereof for the time being remaining unpaid or untransferred may, on proof, to the satisfaction of the officers signing and countersigning the cheque, of the death of such persons, whether before, on, or after the date of the order or judgment, and that his legal personal representatives are entitled thereto, be paid or transferred to the legal personal representatives of such deceased person or the survivors or survivor of them. J. A. Rule 573.

Money, etc., payable to representatives may be paid to survivor of them.

Where no letters of administration have been taken out to the estate of a person who has died entitled to money in Court, and the amount is so small as not to warrant the expense of procuring letters of administration, the Court may direct the money to be paid out on the undertaking of the solicitor for the applicant to see to its due administration: *Ross* v. *Ross*, 4 Chy. Ch. 27; *Callender* v. *Tensdale*, 3 W. R. 289; *King* v. *Isaacson*, 9 W. R. 369; *Hinings* v. *Hinings*, 2 H. & M. 32; *Re Cabel*, 3 W. R. 84; but see *Re Cabel*, 3 W. R. 280.

182. No principal sum of money, nor any stocks, funds, shares or securities shall, under Rules 180 and 181, be paid, transferred or delivered out of Court to the legal personal representative of any person under any probate, or letters of administration, purported to be granted at any time subsequent to the expiration of 6 years from the day of the date of the order, or judgment, directing such payment, transfer or delivery. J. A. Rule 574.

Principal money, etc., not to be paid to representatives after six years.

183. No interest or dividends shall under Rule 181 be paid out of Court to the legal personal representatives of any person under any probate, or letters of administration, purported to be granted at any time subsequent to the expiration of 6 years after the day of the date of the order

Interest in like manner not to be paid after six years.

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Rules 184-881.

or judgment directing such payment, or after the last receipt of such interest or dividends under such order or judgment, whichever shall last happen. J. A. Rule 575.

Payments to partners.

184. Where money is directed to be paid out of Court to any persons named or to be named in an order or report, and the money is, by the order or report, found to be due to them as partners, the same may be paid to any one or more of the partners by cheque payable to the firm. J. A. Rule 576.

Investment of funds in Court in Dominion Stock.

185. Persons entitled to money in Court may have a sufficient amount of the unappropriated Dominion Stock standing in the name of the Accountant appropriated as an investment of such money, or of part thereof, at par value. J. A. Rule 577.

Appropriation made without order.

186. If all parties interested consent in writing, the consent is to be filed with the Accountant, and he is to make the appropriation without an order being drawn for the purpose, and is to enter the consent in the Stock Ledger under the heading of the cause or matter, with the material contents of all orders, judgments and reports necessary to show who are interested in such account and the shares in which they are respectively interested therein, which may not be entered in the General Ledger. J. A. Rule 578.

Purchase of Stock if none held for investment.

187. If there is no unappropriated stock applicable to the purpose, a direction signed and countersigned in the same manner as a cheque, is to be delivered to the bank for the purchase, to be made in the name of the Accountant, and when the purchase is made a cheque is to be drawn for the amount and the brokerage charges, signed and countersigned as aforesaid, and like entries are to be made in the Stock Ledger. J. A. Rule 579.

Crediting interest on stock.

188. The interest on stock so appropriated or purchased, is, each half year, to be credited to the various accounts entitled thereto; and wherever interest is ordered to be paid from time to time to any person in respect of the moneys which shall have been so invested he is to be entitled to receive a cheque therefor without further order. J. A. Rule 580.

Rules 189-191.

Stock may be purchased from time to time under one order.

189. Where an order or judgment directing the investment from time to time of any interest or dividends accruing upon any stock, funds, shares or securities standing in the name of the Accountant in trust in or to the credit of any action, matter or account, or upon any stocks, funds, shares or securities which may be directed to be transferred into the name of the Accountant, or to be carried over from one account to another, or upon any stocks, funds, shares or securities which may be directed to be purchased with any cash in Court, or with any cash to be paid into Court, with his privity, is brought to the Accountant for the purpose of having such direction for investment carried into effect, the Accountant may from time to time until he receives notice of an order or judgment to the contrary without any further request invest the interest or dividends so directed to be invested, together with all accumulations of interest or dividends thereon, as soon as conveniently may be after they accrue due and have been received, in the purchase of the particular description of stocks, funds, shares or securities named in the order or judgment directing such investment, and place such stocks, funds, shares or securities when purchased to the credit of the action, matter or account respectively, as may be directed by such order or judgment. J. A. Rule 581.

Official Guardian to see to payment of mortgages in which moneys of parties for whom he has acted are invested.

190. It shall be the duty of the Official Guardian to see that moneys payable on mortgages held by the Accountant, in which persons for whom the said Guardian has acted are interested, are promptly paid, and that the mortgaged premises are kept properly insured, and that the taxes thereon are duly paid. J. A. Rule 507.

Remuneration of Guardian.

(*a*) There shall be paid quarterly to the Official Guardian out of the surplus interest fund for services rendered by him under this Rule the sum of $200 per annum; and in the event of the fund to the credit of the account of the Official Guardian exceeding the sum requisite to meet the other charges thereon, the moneys so to be paid out of the said surplus interest fund, shall be recouped out of the funds to the credit of the said account of the said Official Guardian. J. A. Rules 507. 536.

Toronto General Trusts

191. The Judges may arrange with the Toronto General Trusts Company to make investments, and to take the

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Rule 192. Co. empowered to make investments of funds in Court.

securities in the name of the Accountant of the Supreme Court of Judicature, of moneys in Court, upon first mortgages of lands, and may direct the issue of cheques therefor upon condition that the said Company do, by proper instrument, guarantee the sufficiency of such securities, and the due payment of interest at the rate of 4½ per cent. per annum, half-yearly, on the moneys so invested from the date of the receipt by the Company of the money for each investment, and also the due repayment of the principal moneys so invested; and upon further condition that in case the said Company makes an investment as aforesaid at a higher rate than 6 per cent., then the said Company is to pay interest thereon to the Court at the rate of 4¾ per cent.; and upon further condition that the said Company is to satisfy the Official Guardian of the said High Court of the sufficiency of the security as to value, and he is to certify the same to the Court before the cheque issues for each investment. J. A. Rule 521.

(iv) *Stop Orders.*

Liability of person obtaining Stop Order to pay costs and expenses occasioned thereby.

192. Where any stock, debentures, funds, securities, or moneys, are standing in Court to the credit of any action, or to the account of any class of persons, or are invested in the name of the Accountant, or other officer of the Court, and an order is made to prevent the transfer or payment of such stock, debentures, funds, securities, or moneys, or any part thereof, without notice to the assignee of any person entitled in expectancy or otherwise to any share or portion of such stock, debentures, funds, securities, or moneys, the person by whom any such order is obtained, or the share of such stock, debentures, funds, securities, or moneys affected by such order, shall be liable at the discretion of the Court, or a Judge, as the case may be, to pay any costs, charges and expenses which by reason of any such order having been obtained, shall be occasioned to any party to the action or matter, or any person interested in any such stock, debentures, funds, securities, or moneys. Chy. O. 286.

Jurisdiction to grant stop orders.

The power to grant stop orders was formerly part of the jurisdiction of the Court of Chancery, and which now, under *The Judicature Act*, is vested in all the Divisions of the High Court.

This *Rule*, therefore, applies to the moneys and investments in Court, in any action pending in any of the Divisions of the High Court, which are vested in the Accountant of the Supreme Court.

The object of the *Rule* is to prevent injustice being done by the granting of stop orders *ex parte*. The applicant for a stop order is always required to submit to be bound by the terms of this *Rule* as a condition of getting the stop order. See form of order Seton, 300. **Rule 192.**

The effect of a stop order is simply to prevent the payment out of money, or the transfer of securities in Court, to the person appearing on the books of the Accountant to be entitled thereto, without notice being first given to the person who obtains the stop order. Nothing is decided thereby as to the rights of the parties: *Lucas* v. *Peacock*, 9 Beav. 177. A stop order has no effect until delivered to the Accountant, but the payment out may be stayed for twenty-four hours, on lodging a caveat with that officer. Object of stop order.

Stop orders may be granted against a fund in Court, on the application of an execution creditor of the party entitled to the fund: *Wilson* v. *McCarthy*, 7 P. R. 132; *Courtoy* v. *Vincent*, 15 Beav. 486. A motion by a judgment creditor who had not obtained execution was refused: *Brooke* v. *Brooke*, before Ferguson, J., 28th May, 1884. A stop order may be obtained on a fund ordered to be paid into Court, though it has not been actually paid in: *Shaw* v. *Hudson*, 48 L. J. Chy. 689; but not when it is neither in Court, nor ordered to be paid in: *Wellesley* v. *Mornington*, 11 W. R. 17. An assignor should be served with notice of the application for a stop order by the assignee, even though a party to the cause, notwithstanding *Rule* 193; *Parsons* v. *Groome*, 4 Beav. 521; but the want of notice to the assignor cannot be set up by a subsequent assignee: *Cottingham* v. *Cottingham*, 11 Ont. 294; but payments made by the Accountant to the second assignee, before notice of the prior assignment, will not be disturbed: *Ib.* An execution creditor obtaining a stop order cannot thereby gain priority over a prior mortgagee: *Re Bell, Carter* v. *Stadden*, 54 L. T. N. S. 370. The application must be supported by evidence of the applicants' title: *Wood* v. *Vincent*, 4 Beav. 419; *Quarman* v. *Williams*, 5 Beav. 133. When granted.

Sometimes the stop order is followed by an application for payment to the party obtaining it, such a motion is of course made on notice to all parties interested in the fund: *Re Gilchrist, Bohn* v. *Fife*, 7 P. R. 430, including any other persons who have obtained stop orders against the fund: see *Hulkes* v. *Day*, 10 Sim. 41. Application to pay out.

Where the party obtaining the stop order does not move for an order for payment to him of the fund, the opposite party may move for payment out notwithstanding the stop order, or may move to discharge the stop order; such motions must, of course, be made on notice to the person who has obtained the stop order.

An order for payment out to a party entitled was made notwithstanding a stop order had been lodged by a mortgagee of a person who had a contingent interest in the fund, but whose interest never actually vested, and without notice to the mortgagee: *Vernon* v. *Croft*, 58 L. T. N. S. 919; 36 W. R. 778; This, however, seems like adjudicating upon a man's rights in his absence, and is a precedent that will no doubt be very cautiously followed.

Priorities.—As between specific chargees on a fund, a subsequent chargee having at the time of his advance notice of the prior charge, cannot obtain priority over it by first obtaining a stop order against the fund: *Livesey* v. *Harding*, 23 Beav. 141; *Brearcliff* v. *Dorrington*, 4 D. G. & S. 122; *Swaine* v. *Swayne*, 11 Beav. 463; *Re Holmes*, 29 Ch. D. 786; but if he had no notice of the prior charge when making his own advances, he may gain priority over it by first obtaining a stop order, even though he do so after notice of the prior charge: *Ib.*, *Greening* v. *Beckford*, 5 Sim. 195; but as between parties having no specific charge against the fund; *e.g.*, execution creditors, he who first obtained a stop order formerly gained priority: *Thomas* v. *Cross*, 2 Dr. & S. 423; but now the fund will be distributed among all creditors rateably according to the principle of *The Creditors' Relief Act* (R. S. O. c. 65): *Dawson* v. *Moffatt, infra*; but an execution creditor cannot by obtaining a stop order acquire priority over a prior charge, legal, or equitable: *Re Bell, Carter* v. *Stadden*, 54 L. T. N. S. 370. Effect of stop order on priorities.

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Rules 193-196.

When a trust fund is being administered by the Court, the trustees cease to have any power over it, and a notice to them of an incumbrance will not give the party giving the notice priority over a prior incumbrancer who has not given notice; a stop order in such a case is the most effectual notice: *Pinnock* v. *Bailey*, 23 Ch. D. 497; 48 L. T. N. S. 811; *Mutual Life Assurance Company* v. *Langley*, 26 Ch. D. 686; 51 L. T. N. S. 284.

In *Dawson* v. *Moffatt*, 11 Ont. 484; 22 C. L. J. 31, it was held by analogy to the provisions of *The Creditors' Relief Act*, 1880, that where several creditors obtain stop orders against a fund in Court to which the common debtor is entitled, and which is insufficient to pay all in full, that it ought to be distributed among them and other creditors not having specific liens *pro rata*.

The priority acquired by a stop order extends only to the charge in respect of which it was obtained: *Macleod* v. *Buchanan*, 33 Beav. 234; 4 D. J. & S. 265.

Stop order cannot defeat lien of solicitor.

The stop order cannot defeat the rights of third parties to the fund: thus, the lien of a solicitor on the fund, cannot be defeated by obtaining a stop order against his client, even under an assignment: *Haymes* v. *Cooper*, 33 Beav. 431.

Costs of, Notice of.

Costs of obtaining a stop order are not given as of course: *Grimbay* v. *Webster*, 8 W. R. 755; *Hoole* v. *Roberts*, 12 Jur. 108; *Waddilove* v. *Taylor*, 6 Ha. 307.

Stop Order need not be served on parties not sought to be affected.

193. A person applying for such order, shall not be required to serve notice thereof upon the parties to the cause, or upon the persons interested in such parts of the stock, debentures, funds, securities, or moneys, as are not sought to be affected by the order. Chy. O. 287.

Service on assignor not dispensed with.

This *Rule* does not dispense with service on the assignor, although a party to the cause: *Parsons* v. *Groome*, 4 Beav. 521, nor on other parties who have obtained stop orders against the fund: *Hulkes* v. *Day*, 10 Sim. 41. The applicant may be ordered to pay the costs of parties unnecessarily notified: *Glasbrook* v. *Gillatt*, 6 Beav. 611.

13. Taxing Officers.

Taxing Officers.

194. There shall be two or more Taxing Officers of the Supreme Court at Toronto. *See* J. A. Rule 438.

Local taxing Officers.

195. Every Local Registrar, Local Master, Deputy Registrar and Deputy Clerk of the Crown, is a Local Taxing Officer.

Powers of local taxing Officers.

196. Every Local Taxing Officer, shall, subject to the provisions of Rules 1207 to 1211 inclusive, in actions begun or pending in his office, be entitled to tax all bills of costs, including counsel fees, subject only to appeal to a Judge of the High Court. This Rule shall not apply to cases in which infants are concerned, unless the Official Guardian is the guardian *ad litem* for the infants. 48 V. c. 13, s. 22.

Rules 197-201. Powers of Taxing Officers.

197. All Taxing Officers, shall, for the purpose of any taxation, have power to administer oaths and take evidence, direct production of books and documents, make certificates, and give general directions for the conduct of taxations before them. *See* J. A. Rule 438.

Substantially to the same effect as Eng. R. August 1875, R. 23 (1883 R. 27 (25)).

Taxing officers have power to call evidence on taxations before them: *Williamson* v. *Town of Aylmer*, 12 P. R. 129.

Where the taxing officer refused to proceed until the plaintiff was produced for examination as to a retainer, and he was out of the jurisdiction, the taxing officer was directed to examine other witnesses, and if unable to decide as to the retainer then, to report to a Judge in Chambers: *Ib.*

Where solicitor and client contradict one another in affidavits, the taxing officer should allow oral evidence to be taken under this *Rule*: *Re Evans*, 35 W. R. 546.

There is no power to direct shorthand notes of evidence before him without the consent of the parties: *Re Hilleary* v. *Taylor*, 36 Ch. D. 262; unless *Rule* 502 is applicable in such a case, which does not seem to have been contemplated.

14. Barristers and Solicitors.

Solicitors' Roll.

198. There shall be one Roll of Solicitors of the Supreme Court of Judicature for Ontario, and all persons who shall be admitted as Solicitors shall sign the same upon taking the prescribed oaths. J. A. Rule 602.

Registrar of C. P. D. to have custody of roll.

199. The Registrar of the Common Pleas Division shall have the custody of such Roll and of all former Rolls of Attorneys and Solicitors, and he shall on the request of the Registrar of any other Division of the High Court, or of the Court of Appeal, transmit such Roll to such officer, who shall forthwith return the same to the Registrar of the Common Pleas Division when the purpose for which the same may be required shall have been accomplished. J. A. Rule 603.

Barristers' Rolls.

200. *Mutatis mutandis*, the Roll and Rolls for Barristers shall be in the same form and custody as the Solicitor's Roll and Rolls. J. A. Rule 604.

Striking solicitor off roll.

201. Where a case appears justifying or requiring by the practice hitherto an order against a Solicitor that he be struck off the Roll of Solicitors, unless he shall, before a time therein limited, show unto the Court good cause to the contrary, it shall be competent for the Court, in lieu

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Rule 201. **thereof, to issue an order calling upon the Solicitor to answer the matters appearing on affidavit or otherwise. Chy. O. 52.**

The Court of Appeal, as well as the High Court, has power to strike a solicitor off the rolls: R. S. O. c. 147, s. 2, (2): *Re Whitehead*, 28 Ch. D. 615.

In *Burton* v. *Earl of Chesterfield*, 9 Jur. 373, it was said that the motion could not be made, calling on an attorney to answer the affidavits and at the same time to show cause why he should not be struck off the rolls; and in that case the rule was confined to calling on him to answer the affidavits. In a later case, however, the rule *nisi* was granted in the double form: *Re Blake*, 3 E. & E. 34; and see *Re Grueber*, 63 L. T. Jour. 637.

Where the motion is confined to calling on the solicitor to answer affidavits simply, and the Court is of opinion that his answer is insufficient, the practice at law has been to enlarge the motion to a future day, intimating to the solicitor that he may be further heard on that day, why he should not be struck off: *Re Wright*, 12 C. B. N. S. 705: *Re H.*, 31 L. T. N. S. 730.

In order to give the Court jurisdiction to entertain an application for a solicitor to answer matters contained in an affidavit, or to strike him off the rolls, it is not necessary that the misconduct of which he is accused should arise strictly between solicitor and client: *Re Aitken*, 4 B. & Ald. 47; *Re Attorney*, 39 U. C. Q. B. 171; *Re Knight*, 1 Bing. 91; *Re Blake*, 3 E. & E. 34; *Re Hill*, L. R. 3 Q. B. 543; *Re Chandler*, 22 Beav. 353; and see *Re Cutts*, 16 L. T. N. S. 715; *Re Keays*, 13 C. P. 282; *Re Solicitor*, 80 L. T. Jour. 103; *Re Strong*, 53 L. T. N. S. 694; 55 L. T. N. S. 3; 31 Ch. D. 273.

Where in the course of a cause, evidence of fraudulent conduct on the part of a solicitor is brought to light, the Court may *sua sponte* direct proceedings to be taken against the offending solicitor: *Goodwin* v. *Gosnell*, 2 Coll. 457, 462; *Wheatley* v. *Bastow*, *Re Collins*, 7 D. M. & G. 261, 588; *Re Toms*, 3 Chy. Ch. 204, 215; *Re Currie*, 25 Gr. 538; *Re Solicitor*, 27 Gr. 77; *Thorndyke* v. *Hunt*, 5 Jur. N. S. 879; and upon the application of any party interested: *Cave* v. *Cave*, 43 L. T. N. S. 158.

A solicitor may be struck off the rolls for fraudulent conduct as a trustee: *Re Chandler*, *supra*, where the application was made by the *cestui que trust*; and see *Thorndyke* v. *Hunt*, *supra*; *Dolland* v. *Johnson*, 2 Jur. N. S. 633; or for fraudulently abusing the confidence of a client: *Re Martin*, 6 Beav. 337; *Re J. C. M. & J. M.*, 24 W. R. 111; or for obtaining a client's money to discharge alleged liabilities of the client which did not exist: *Re H.*, 31 L. T. N. S. 730; *Re Strong*, 31 Ch. D. 273; 55 L. T. N. S. 3; or for getting a false affidavit sworn, and without authority instructing counsel to consent to payment of money out of Court: *Wheatley* v. *Bastow*, 7 D. M. & G. 261, 558; or for falsely representing an injunction to have been granted: *Kimpton* v. *Eve*, 2 V. & B. 352; or for making an interlineation in an affidavit after it had been sworn: *Erskine* v. *Adeane*, 18 Sol. Jour. 573; 10 C. L. J. 209; or for committing perjury, Seton 652; or for revealing the secrets of a client: *Re Cutts*, 16 L. T. N. S. 715; *Cholmondeley* v. *Clinton*, 19 Ves. 261; or for persuading his client to give him money to be used for bribing a jury before whom the client was to be tried for a criminal offence: *Re Titus*, 5 Ont. 87.

Where the application is made on the ground of fraud, the fraud must be clearly proved; the Court will not infer an equivocal action to have been fraudulent: *Re Stewart*, L. R. 2 P. C. 88; *Re S——*, 14 C. P. 323.

Under R. S. O., c. 147, s. 25, a solicitor may be struck off the rolls for default of payment of money received by him as a solicitor: *Anon*, 12 C. L. J. 204. But where considerable sums had got into the hands of a solicitor who made default in payment, but the client issued execution upon the order directing payment, it was held that he had treated the claim as a debt, and a subsequent motion to strike the solicitor off the rolls for non-payment was therefore refused: *Re Fletcher*, 28 Gr. 413. And where the client had sued the

solicitor for the money and failed on the ground that his claim was barred by the Statute of Limitations; it was held that he could not afterwards resort to summary proceedings against the solicitor without any allegation of misconduct: *Sittingbourne & S. Ry. Co.* v. *Lawson*, 80 L. T. Jour. 448. The Court will not exercise its summary jurisdiction over a solicitor to compel repayment of a loan: *Re Bryant*, 50 L. T. N. S. 450; unless the loan has been fraudulently obtained by the solicitor from his client: see *Re Strong supra*. **Rules 202, 203.**

Repayment, pending a motion to strike off the rolls, of money fraudulently obtained, is no purgation of the offence: *Re H.*, 31 L. T. N. S. 730; nor is it, where the money was properly obtained, but misappropriated: *Re Solicitor*, 62 L. T. Jour. 446. But when a solicitor has been struck off, it is a condition precedent to restoration that he shall have made full restitution, or made the best efforts in his power thereto, and satisfy the Court as to the propriety of his conduct in the meantime: *Re Poole*, L. R. 4 C. P. 350; *Ex parte Pyke*, 6 B. & S. 703. And the Law Society must be notified of any application to restore to the rolls, a solicitor who has been struck off for misconduct: *Re Solicitor*, 19 C. L. J. 234.

Where a solicitor is struck off the rolls for misappropriating the moneys of his client, the order directing him to be struck off may properly contain a reference to ascertain the amount for which he is liable and direct him to pay the amount so to be ascertained, and payment may be enforced against him even after he has been struck off: *Re Strong*, 31 Ch. D. 273; 55 L. T. N. S. 3.

In some cases the solicitor has been suspended from practice for a specified time, and not actually struck off: see *Erskine* v. *Adeane*, 18 Sol. Jour. 573; *Re Hill*, L. R. 3 Q. B. 543; *Re Blake*, 3 E. & E. 34; and see further as to proceedings against solicitors, Cordery's Law of Solicitors.

An order striking a solicitor off the rolls is not a criminal proceeding and is appealable: *Re Hardwick*, 49 L. T. N. S. 584.

202. A book to be called "The Solicitors' and Agents' Book" shall be kept by the Registrars of the Queen's Bench and Common Pleas Divisions of the High Court in Toronto and the Clerk of Records and Writs, at their respective offices, to be there inspected by any solicitor or his clerk without fee or reward; and every solicitor practising in said Court and residing within the city of Toronto or having an office and carrying on his business within the said city, shall enter in such book (in alphabetical order) his name and place of business or some other proper place within the city where he may be served with pleadings, notices, orders, and other proceedings; and as often as any such solicitor changes his place of business or the place where he may be so served as aforesaid, he shall make the like entry thereof in the said book. Rules T. T. 1856, 136. Chy. O. 24. **Book to be kept by Registrar, in which addresses of solicitors practising in Toronto to be entered.** **Change of residence to be entered.**

The entries required to be made under this *Rule* are compulsory: *Essery* v. *G. T. Ry. Co.*, 9 C. L. T. 423; 25 C. L. J. 567.

For the consequences of not complying with this *Rule*, see *Rule*, 461.

203. Every other solicitor practising in the said Court shall enter in the said books (in like alphabetical order) his **Book to be kept by Registrars**

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Rules 204-206.

in which names and addresses of Toronto agents to be entered.

name and place of business, and also in an opposite column the name of some solicitor having an office and carrying on business in the city of Toronto as his agent. Rules T. T. 1856, 137. Chy. O. 24.

The entry of a Toronto agent by solicitors practising out of Toronto is compulsory: *Essery* v. *G. T. Ry. Co.*, *supra*. See also *Rule* 461.

Deputy Registrars. Solicitors and Agents' book.

204. Every Deputy or Local Registrar is to keep in his office a book to be called "The Solicitors' and Agents' Book," in which each solicitor residing elsewhere than in the County in which such Deputy or Local Registrar's office is, may specify the name of an agent, being a solicitor of this Court, and having an office in the city or town where the office of such Deputy or Local Registrar is situated, upon whom all writs, pleadings, notices, orders, warrants, and other documents, and written communications in relation to proceedings conducted in the office of the Local Master, Deputy Clerk, Deputy or Local Registrar of such County, may be served. Chy. O. 33.

The entry of the name of an agent in the books required to be kept under this *Rule* is optional: *Essery* v. *G. T. Ry. Co.*, *supra*. If the entry is made services may be effected accordingly: see *Rule* 461; but service on an agent is not good service on the principal, unless the agent is booked as agent under this *Rule*: *Robinson* v. *Robinson*, 13 P. R. 51.

15. Shorthand Writers.

Money received by shorthand writer how applicable.

205. All moneys received by a shorthand writer for copies of evidence shall, when the shorthand writer is paid by salary, be accounted for by him to the Clerk of the proper Court, and shall be by the Clerk of such Court deposited in the Bank for the time being, where moneys of the Province are deposited, to the credit of an account to be called "The Shorthand Writers' Fund." C. L. Rules, 10th March, 1876, 5.

Shorthand writers not paid by salary, entitled to fees.

206. When the shorthand writer is not paid by salary, the said moneys shall belong to and be the property of the said shorthand writer. C. L. Rules, 10th March, 1876, 6.

By order in council of 10th March, 1887, Mr. Clark, one of the taxing officers, was appointed to receive the moneys payable for copies of evidence furnished by the regular shorthand writers, and he is required to pay them into Court to the credit of "The Shorthand Reporters' Account," and he is the person to whom applications for copies of the shorthand reporters' notes should be made.

16. EXPERTS. Rule 207.

207. The Court may obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, in such way as it thinks fit, the better to enable it to determine any matter in evidence in any cause or proceedings, and may act on the certificate of such person. Chy. O. 541.

Court may obtain services of experts.

It is only the Court that is authorized to obtain the assistance of experts. A Master to whom a cause is referred, has no authority to employ experts for the purpose of assisting him to come to a conclusion on matters referred to him: *Re Robertson, Robertson* v. *Robertson*, 24 Gr. 555; *Mildmay* v. *Lord Methuen*, 1 Drew. 216; 16 Jur. 965; but see *contra*, *Re London & Birmingham Ry. Co.*, 6 W. R. 141; and see *Rule* 73 note.

Master cannot employ experts.

Where, however, the Master had, at the instance of the plaintiff, and with the consent of the creditors, in an administration suit, employed an expert, and the parties received the benefit of his services without objection, the Court on appeal by the creditors refused to disallow the costs incurred: *Re Robertson, Robertson* v. *Robertson, supra.*

Costs of expert may be allowed though improperly employed.

This *Rule* gives a wide discretion to the Court as to the manner in which experts shall be employed; but it does not apparently give the Court power to direct experts to be employed for the purpose of giving evidence as witnesses, but appears merely to enable the Court to procure the assistance of experts for the purpose of getting their opinions, on the evidence adduced by the parties, or upon a view of the *locus in quo*: see *Enderwick* v. *Allden*, 88 L. T. Jour. 12.

In *Broder* v. *Saillard*, 24 W. R. 456, the M. R. at the trial appointed an independent surveyor to make a report, and at the adjourned hearing his report was handed to the Judge; the Judge thought that two points should be stated more fully, and he directed the surveyor to make an addition to his report, observing that he preferred not to allow the surveyor to be sworn as a witness, as he was acting in a *quasi*-judicial capacity.

Cases in which expert appointed.

Where there is contradictory evidence on a scientific question the Court is at liberty to employ an independent expert to give advice upon which the Court may form its judgment: *Badische Anilin, etc.* v. *Levinstein*, 24 Ch. D. 156.

An expert has been employed to ascertain the effect of a dam on the water penned back: *Hawkins* v. *Mahaffy*, 29 Gr. 326; and the amount of encroachment of alluvium on a sea shore: *Attorney-General* v. *Chambers*, 4 DeG. & J. 55, 58; and as to the effect of using steamboats on a canal: *Case* v. *Midland Ry. Co.*, 27 Beav. 247; and as to the circumstances under which the Court will send an expert, to report in the case of a suit to abate a nuisance: see *Slavin* v. *North Brancepeth Coal Co.*, L. R. 9 Chy. 705; *Enderwick* v. *Allden, supra.*

Court cannot refuse to grant relief against nuisance until inquiry made by expert how it may be best abated.

Where a plaintiff proves himself entitled to an injunction against a nuisance, or other injury, the Court cannot, before pronouncing judgment, order an expert to be employed, for the purpose of ascertaining the best mode of removing the nuisance, etc., even though the injunction to which the plaintiff is entitled, be a difficult one for the plaintiff to obey: *Attorney-General* v. *Colney Hatch Asylum*, L. R. 4 Chy. 146; and a general inquiry as to what ought to be done to preserve the plaintiff's light and air, was refused: *Stokes* v. *City Office Co.*, 13 W. R. 537. But after judgment, the opinion of an expert may be taken, as to the time which ought to be allowed, for carrying it into effect: *Attorney-General* v. *Merthyr Tydfil*, 5 W. R. 148.

In the *Baltic Co.* v. *Simpson*, 24 W. R. 390, it was held that the Court ought not under 15 & 16 Vict. c. 80, s. 42, or sec. 57 of the Jud. Act. (Ont. Act. sec. 102, p. 97, *supra*) to make an order before trial, appointing a scientific person to report on a question of fact.

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Rule 207. Where a matter is referred by the Court to an expert or report, a forma order of reference to him should be drawn up; but where an expert acted, and made his report, without this having been done, the Court acted on the report notwithstanding the objection: *Enderwick* v. *Allden*, 88 L. T. Jour. 12.

Appointment *ex parte*. Where an expert is employed, it is not absolutely necessary that the appointment should be made in the presence of the parties: *Re London & Birmingham Ry. Co.*, 6 W. R. 141.

Expert cannot call witnesses. An expert cannot call witnesses: *Morris* v. *Llanelly Ry. Co.*, W. N. 1868, 46; and his report is not conclusive: *Ford* v. *Tynte*, 2 D. J. & S. 127; *Adamson* v. *Gill*, 16 W. R. 306.

Assessors. Under the Jud. Act, s. 101, (*ante* p. 96), the Court may call in the aid of one or more assessors specially qualified, and may try or hear a cause or matter wholly, or partially, with the assistance of such assessors. Where experts are called in to act as assessors their powers are merely advisory, and the Court is not bound to adopt, or follow, the advice which they may offer. Assessors sit with the Judge and hear the evidence upon which their advice is required. It has not been usual for them to take any oath of office.

Reference to experts under secs. 101, 102. Under s. 101 of the Act, (*ante* p. 96) any question arising in any cause or matter may be referred to a Judge of a County Court, official referee, or to any referee agreed on by the parties, for inquiry and report, and in this way the assistance of experts may be obtained. And under s. 102 (*ante* p. 98), a cause or matter may, in certain cases therein mentioned, be referred to a special referee (if the parties so agree) for trial.

No power it will be seen is given to the Court under sec. 101, or 102, to refer a cause to anybody but a Judge of a County Court, or an official referee, except by consent of the parties. Where, therefore, a reference is required under those sections to an expert, it would seem the parties must agree on the referee to be named. It is possible, however, that this *Rule* may be held so to amplify the power of the Court as to enable it to refer causes for the purposes mentioned in secs. 101, 102, to special referees of its own nomination, independently of the consent of the parties.

Where a reference is directed to an expert for inquiry or report under sec. 101, or for trial under sec. 102, that is, of course, an exception to the rule laid down in *Morris* v. *Llanelly Ry. Co.*, *supra*, that he cannot call witnesses: see *Rules* 34-36, 552 (*a*).

When a question, or a cause or matter, is referred to a special referee under sec. 101, or 102, his report would appear to be appealable in the same way and within the same time as a Master's report: see *Rules*, 43, 84, and heading to *Rules* 848, 849, 850; but see *Rule* 5 as to effect of headings.

Expert evidence. Where an expert is required to give evidence, his evidence should be given *viva voce*, as the Court as a general rule discourages the taking of such evidence by commission: *The Attorney-General* v. *Gooderham*, 10 P. R. 259.

Where parties adduce *quasi* expert evidence, it is not open to the Court, upon a trial by jury, to withdraw the case from the jury, because in the opinion of the Court, the witnesses are incompetent to give expert evidence, but the evidence must be submitted *quantum valeat; e.g.*, in an issue in which the mental capacity of a testator was in question, the evidence of witnesses who spoke to his mental capacity was held to be admissible even though the witnesses were not in the opinion of the Court experts: *Regan* v. *Waters*, 10 Ont. App. 85. As to the weight to be attached to the conclusions of scientific witnesses: see *Goldsmid* v. *Tunbridge Wells*, L. R. 1 Chy. 349.

Where the opinions of experts on foreign law are conflicting, the Court will examine for itself the texts books and judicial decisions of the foreign country, in order to arrive at a satisfactory conclusion: *Rice* v. *Gunn*, 4 Ont. 579; *The Stettin*, 14 P. D. 142. The Court will not receive the opinions of experts as to the proper construction of a statute; *e.g.*, the evidence of surveyors as to the mode of making a survey under a statute is inadmissible: *Stafford* v. *Bell*, 6 Ont. App. 273.

The costs incurred in order to qualify experts to give evidence do not appear to be taxable between party and party: see *McGannon* v. *Clarke*, 9 P. R. 555.

CHAPTER III.

SITTINGS OF THE COURTS.

1. Court of Appeal, 208, 209.
2. High Court, 210-223.
(i) *Weekly Sittings*, 210-212.
(ii) *Sittings for trials*, 213.
(iii) *Vacation Judges*, 214-215.
(iv) *Divisional Courts*, 216-223.

1. Court of Appeal.

Sittings of Court of Appeal.

208. There shall be five sittings of the Court of Appeal in the year for the hearing of arguments, commencing on the second Tuesday in January, the first Tuesday in March, the second Tuesday in May, the first Tuesday in September, and the second Tuesday in November, or in case any of these days shall be a legal holiday, then on the following day. App. O. 53.

Extra sittings may be appointed.

209. In case of sittings at any other time being deemed necessary, or convenient, for the despatch of business, due notice of the time of holding the same will be given. App. O. 54.

2. High Court.

(i) *Weekly Sittings.*

See Rule 1876 s. 1 Repeals

Weekly sittings of High Court.

210. A Judge shall sit at Osgoode Hall, every week, except during the vacations, for the purpose of disposing of all business except trials, which may be transacted by a single Judge. Rules H. C. J., i.

The operation of this *Rule* is at present suspended: see *Rule* 3 (*a*) and note.

Order of business. Repeals

211. The business of the weekly sittings shall be taken as follows, unless the Judge otherwise orders:—Monday—Chambers; Tuesday—Appeals; Wednesday—Court; Thursday—Chambers; Friday—Court. New.

See Rules 1876 s. 1 [illegible]
Papers for weekly Court to be filed with Clerk of Records & Writs. Rule 1876 s. 1

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Rules 212-214.

The operation of this *Rule* is at present suspended : see *Rule* 3 (*a*) and note. Until it comes into force the former practice as to the sittings of the Judges in Court and in Chambers is continued : viz., in the Chancery Division—Monday, Judges' Chambers ; Tuesday, Court motions not required to be set down ; Wednesday, Court motions required to be set down ; Thursday, Court appeals from Masters, etc. In the Queen's Bench, and Common Pleas Divisions, —Tuesday and Friday in each week, Judges' Chambers and Court motions, including appeals.

Cases to be called in order entered on list.

212. All cases entered for argument on the list shall be called on and disposed of in the order in which the same are entered on the list, unless the Judge otherwise orders. Rule 10 of 15th May, 1876.

(ii) *Sittings for Trials.*

Sittings for trials.

213. The High Court shall sit for the trial of actions at such times as may be fixed from time to time.

The Sittings are at present fixed under secs. 89-94 of the Act.

(iii) *Vacation Judges.*

Vacation Judges.

214. One or more of the Judges of the High Court shall be selected at the commencement of each Long Vacation, for the hearing in Toronto during vacation of all such applications as may require to be immediately or promptly heard. Such Judge or Judges shall act as vacation Judge or Judges for one year from appointment. In the absence of arrangement between the Judges, the vacation Judge or Judges shall be the Judge or Judges last appointed (whether as Judge or Judges of the said High Court or of any Court whose jurisdiction is by the Act vested in the said High Court) who have not already served as vacation Judges of any such Court and if there shall not be any Judge or Judges for the time being of the said High Court who shall not have so served, then the vacation Judge or Judges shall be the Judge or Judges (if any) who has or have not so served and the senior Judge or Judges who has or have so served once only according to seniority of appointment whether in the said High Court or such other Court as aforesaid. J. A. Rule 481.

Same in effect as Eng. R., February, 1875, R. 9 ; (1883, R. 955), except that the latter provides for two Judges, instead of one or more. It provides also that the Lord Chancellor is not to be a vacation Judge.

No provision, it will be observed, is made for the attendance of vacation Judges of the Court of Appeal.

No business is heard by the vacation Judges, or any other Judges sitting for them under the next *Rule*, except such as requires "to be immediately or promptly heard" within the meaning of the above *Rule*. No Judges except the vacation Judges, or those sitting for them, can dispose of business in vacation: *Per* Lush and Lopes, JJ., 24th Sept., 1877. But *query*. Rules 215, 216.

An application for judgment under *Rule* 739, will be heard as urgent if the right to make it has accrued in vacation, not otherwise: *Ibid.* But *query*.

As to what is vacation business, see also *Re Wigan Junction Railway Co.*, L. R. 10 Chy. 541.

215. The vacation Judges may sit either separately, or together as a Divisional Court, as occasion shall require, and may hear and dispose of all actions, matters, and other business to whatever Division the same may be assigned. No order made by a vacation Judge shall be reversed or varied except by a Divisional Court or the Court of Appeal, (*a*) or the Judge who made the order. Any other Judge of the High Court may sit in vacation for any vacation Judge. J. A. Rule 482. Jurisdiction of vacation Judges.

(*a*) The Eng. R. 1875, O. 61, r. 6 (1883, R. 956), has here the words "or a Judge thereof"; it is otherwise the same.

Motions requiring to be made within a period defined by reference to the old Trinity Term must be made to the vacation Judge: *Giles* v. *Morrow*, 4 Ont. 649.

(iv) *Divisional Courts.*

216. The sittings of the Divisional Courts shall be three in every year, viz., the Michaelmas sittings, the Hilary sittings, and the Easter sittings. Sittings of Divisional Courts of Q. B. and C. P. Divisions.

(*a*) The Michaelmas sittings shall begin on the third Monday in November, and end on Saturday of the second week thereafter; the Hilary sittings shall begin on the first Monday in February, and end on the Saturday of the following week; the Easter sittings shall begin on the third Monday in May, and end on the Saturday of the second week thereafter;

(*b*) In case it appears to the Judges of any Division of the said Court, or a majority of them, that the number of days so provided for holding any sittings is not required, or is insufficient, for the due despatch of the business to be transacted by the Court in such sittings, such Judges may from time, shorten the period for holding the sittings to such

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Rules 217-219.

period, not less than two weeks, or increase the length of the same to any period, as the case may require;

(*c*) The preceding provisions of this Rule are not to apply to the Chancery Division except when the Judges thereof shall be of opinion that the business of the said Division is such as to render the said provisions necessary or convenient for the due despatch of business, and shall give notice to that effect.

Sittings of Divisional Court in Ch. Div.

217. The Divisional Court of the Chancery Division shall hold sittings commencing on the ~~first~~ Thursday in ~~September, the first Thursday in December~~, and third Thursday in February ~~in each year~~. J. A. Rule 524.

These sittings correspond with the former Re-hearing Terms: see Chy. Gen. O. 413.

218. Divisional Courts of the High Court are to sit at such further or other times as may be directed by the High Court or as, in the opinion of the Judges of the Division, may be necessary for the due despatch of business. J. A. Rule 524.

Proceedings to be taken before Divisional Courts.

219. The following proceedings and matters shall be heard and determined before the Divisional Courts; but nothing herein contained shall be construed so as to take away or limit the power of a single Judge to hear and determine any such proceedings or matters in any case in which he has heretofore had power to do so, (*d*) or so as to require any interlocutory proceeding therein, heretofore taken before a single Judge, to be taken before a Divisional Court (*a*):

Appeals from orders of a Judge in Chambers (*b*).

For restrictions upon the right to appeal in such cases, see secs. 68 and 69 of the Act, pp. 77-78.

There is no appeal to the Divisional Court from a Judge sitting in Court: see note to sec. 61, p. 71.

Proceedings directed by any Statute to be taken before the Court, and in which the decision of the Court is final.

Cases of Habeas Corpus, in which a Judge directs that a motion for the writ, or the writ be made returnable before a Divisional Court. Rule 220.

Other (*c*) cases where all parties agree that the same be heard before a Divisional Court.

Applications for new trials in the said Divisions where the action has been tried with a jury (*e*). J. A. Rule 471.

(*a*) The preceding part of this *Rule* is taken from the English Order, Dec., 1876, R. 8. See *Rules* of 1883, R. 884.

(*b*) The present English Rule is confined to appeals from Chambers in the Q. B. Division.

(*c*) Instead of the word "other" the English Rule has the word "special."

The English Rule also includes proceedings on the Crown side of the Queen's Bench Division; appeals from Revising Barristers, and proceedings relating to Election Petitions, Parliamentary and Municipal; appeals under section 6 of the County Courts Act, 1875; proceedings on the Revenue side of the Exchequer Division; and cases stated by the Railway Commissioners under 36 & 37 Vict. c. 48.

(*d*) For the cases here referred to, see R. S. O. 1877, c. 50, ss. 281-282.

(*e*) Also motions against judgments where the trial was without a jury: see *Rules* 789, 798.

A Divisional Court ought not to entertain applications to quash by-laws, but *quære* whether a Divisional Court has not jurisdiction: *Landry* v. *Ottawa*, 11 P. R. 442.

A Divisional Court has no jurisdiction in appeal from a Judge under *The Railway Act*, R. S. C. c. 109, s. 8 (28). The Judge under that clause acts not as a Judge in Chambers, but as a *persona designata* for the purposes of the Act: *Re McMillan & the Guelph Junction Ry. Co.*, 12 P. R. 294.

The jurisdiction of the High Court in criminal matters is exercised by the Q. B. or C. P. Divisions sitting as such Divisions, not as Divisional Courts: see *Reg.* v. *Beemer*, 15 Ont. 266.

The jurisdiction of Divisional Courts is strictly limited by these provisions. It has therefore no power to hear an appeal from a Referee or Master: *Clarke* v. *Jamieson*, 9 C. L. T. 97; or from the Master in Chambers: *Ball* v. *Cathcart*, 16 Ont. 525.

220. Six cases, in the order of their priority on the general list of a Divisional Court, shall be set down by the Registrar in the peremptory list for argument, on each day of the Sittings of the Divisional Court, excepting upon the last day, and, except by consent and by leave of the Court, no argument shall be heard in any other case, until the cases in the peremptory list for the day are disposed of. C. L. Rules 17 Nov. 1875, 9, 10; 27 Nov. 1880. Peremptory list.

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Rules 221-223.

Postponed cases.

221. Any case entered on the peremptory list for any day, and postponed by order, or default, shall be placed at the foot of the general list, unless, for sufficient cause, it is otherwise specially ordered by the Court. C. L. Rules 17 Nov. 1875, 11.

Party ready to proceed with case on peremptory list, may be heard, though other side not ready, or cause may be enlarged.

222. If either party to a case on the peremptory list, is prepared to be heard and the other party is not prepared, and it is not duly postponed as aforesaid, the Court may hear the party so prepared, whereupon the case shall stand for judgment; or the Court may extend the time on sufficient cause being shown by affidavit, to enable the other party to be heard, on payment of the costs of the day, if the Court shall so order. If neither party to a case on the peremptory list is ready, the Court may, if it sees fit, strike the case out of the list. C. L. Rules 17 Nov. 1875, 12.

Causes on peremptory list not disposed of, to be entered first for next day.

223. If all the cases on the peremptory list for any day, are not disposed of on that day, such cases shall be entered by the Registrar first on the peremptory list for the next day as part of the six cases for such next day. C. L. Rule 17 Nov. 1875, 13; 27 Nov. 1880.

CHAPTER IV.

ACTIONS—COMMENCEMENT OF ACTIONS, ETC.

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1. Form and Commencement of Action.

(i) *Writ of Summons.*

All actions commenced by writ of summons.

224. All actions which prior to *The Ontario Judicature Act, 1881*, were commenced by [any form of] writ, and all suits which were commenced by bill or information shall be commenced by the issue of a writ of summons, (*a*) which shall be prepared by the plaintiff, (*b*) and shall contain the name of the Division from which it is issued, the names of the parties and the characters in which they sue and are sued, (*c*) and the office (*d*) in which and the time within which the defendant is to enter his appearance, and shall be indorsed with a short statement of the nature of the plaintiff's claim. (*e*) *See* R. S. O. 1877, c. 50, s. 14; c. 52, s. 4. J. A. Rules 1, 5, 13, 22, 23.

(*a*) taken from original *Rule* 1: Comp. Eng. R. 1875, O. 1, r. 1, (1883 R. 1.)

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Rule 224.

Actions generally.

The term "action" is defined by the Act, (s. 2) to be a civil proceeding commenced by writ or in such other manner as may be prescribed by *Rules* of Court. As to the effect of this definition: see *Darcy* v. *Whittaker*, 33 L. T. N. S. 778; 24 W. R. 244; *Hamlyn* v. *Betteley*, 6 Q. B. D. 63.

The words in brackets have been introduced to make it clear that there is now to be no special form of writ for particular kinds of actions such as proceedings by *capias* and against absconding debtors, dower, replevin, ejectment, etc. See also *Rules* 231, 249, 290, 1045, 1089, 1098.

The effect of the J. A. *Rules* is to abolish the non-finality which a judgment in ejectment formerly had. A former judgment on the same question will now sustain a defence of *res judicata*: *Ball* v. *Cathcart*, 16 Ont. 525; *Cochrane* v. *Hamilton Prov. L. S.*, 15 Ont. 128.

Proceedings by capias.

In *Robertson* v. *Coulton*, 9 P. R. 16, Osler, J., expressed the opinion that actions formerly commenced by writ of *capias* must now be commenced by writ of summons. This view was not concurred in by Cameron, J., in *Vetter* v. *Cowan*, 46 U. C. Q. B. 435, 441, but the determination of the point was not necessary in either case; it was, however, made clear that a writ of *capias* might be issued as formerly, either before: *Vetter* v. *Cowan*, *supra*, or after: *Robertson* v. *Coulton*, *supra*, action brought, as a proceeding ancillary to an action, and not abolished by the Jud. Act: see 2 C. L. T. 69. All question on the subject is now set at rest by the present *Rule* and *Rule* 1045, which latter abolishes writs of *ca. re.* and substitutes an order which must be made "in an action" that is a proceeding commenced by writ of summons in the ordinary way.

Dower.

Before the Con. *Rules* it was not clear how far R. S. O., c. 56, *The Dower Procedure Act* was affected by the Jud. Act An action of dower is now however to be commenced by an ordinary writ of summons, and prosecuted in the same way as other actions: see *Rule* 290, and R. S. O. c. 56.

Absconding debtors

Replevin.

The modes of instituting proceedings against an absconding debtor under R. S. O. 1877 c. 68: *Sutherland* v. *Leys*, Mr. Dalton, 23rd Aug., 1881, and in replevin: *Lawless* v. *Radford*, 9 P. R. 33; *Campan* v. *Lucas*, 9 P. R. 142 were unaffected by the J. A. 1881; but when instituted were regulated in matters of ordinary procedure by the *Rules*: see *Wallace* v. *Cowan*, 9 P. R. 144. An ordinary writ of summons is now the way to commence such proceedings: see *Rules* 1089, 1098.

Informations.

An action may, by amendment of the writ and statement of claim be turned into an action by the Attorney-General at the suit of a relator corresponding to an information under the old practice, the sanction of the Attorney-General being obtained: *Caldwell* v. *Pagham Harbour, etc., Co.*, 2 Ch. D. 221; see *Rule* 444. The title information is no longer to be used: *Attorney-General* v. *Shrewsbury Bridge*, 42 L. T. N. S. 79; W. N. 1880, 23. An action by the Attorney-General can only be instituted by his sanction: see *Attorney-General* v. *Toronto Street Railway Co.*, 2 Chy. Ch. 165, and his *fiat* should be obtained and indorsed on the writ and a copy thereof. The copy should then be filed under *Rule* 234.

Indorsement of claim.

(b) Taken from original *Rule* 5. Corresponds substantially with Eng. R. 1875, O. 2, r. 1, (1883, R. 3). Comp. Eng. R. 1875, 5 Sch. A.; R. S. O. 1877, c. 50, ss. 3, 29 *et seq.*; *Ib.* c. 67, s. 8, *et seq.*; *Ib.* c. 137.

It is irregular to proceed by statement of claim upon a different cause of action from that mentioned in the writ: see *United Telephone Co.* v. *Foster*, 59 L. T. N. S. 852, and notes to *Rule* 368.

In case a *mandamus*, or an injunction, or a receiver is claimed, the plaintiff ought to indorse his writ accordingly, though, if the necessity for such relief arises incidentally in the course of the action, the Court has power to give the relief even if a claim for it was not indorsed on the writ: see *Colebourne* v. *Colebourne*, 1 Ch. D. 690; *Norton* v. *Gover*, W. N., 1877, 206. A defective indorsement may be amended. A general power of amending proceedings is given by *Rule* 444.

In an action for administration, the writ should show that such is the nature of the action, by being entitled "in the matter of the estate of"; *Re Jones*, 24 W. R. 317. Rules 225, 226.

No very precise indorsement of the nature of the claim is required; see *Rule* 243.

A writ against A. O. & R. indorsed to have set aside a deed from A. to O. and a deed from O. to A. was held sufficient on motion by R. to have service on him set aside as showing no cause of action against him: *Gilmore* v. *Orford*, 11 P. R. 437.

(c) Taken from original *Rule* 13, identical with the Eng. R. 1875, O. 3, r. 4, (1883, R. 14.)

In *Worraker* v. *Pryer*, 2 Ch. D. 109, it was held by Jessel, M.R., and in *Re Boyle*, 5 Ch. D. 540, by Bacon, V.C., and in *Adcock* v. *Peters*, W. N. 1876, 139; 2 Charl. N. C. (Court) 288, by Malins, V.C., that in an ordinary creditors' action for administration of the real and personal estate of a deceased debtor, the action must be by the plaintiff on behalf of himself and all the other creditors; and the writ must be indorsed accordingly. In the earlier case of *Cooper* v. *Blissett*, 1 Ch. D. 691, Hall, V.C., had taken a contrary view. In the later case of *Eyre* v. *Cox*, 24 W. R. 317, Jessel, M.R., said that when it appeared in the statement of claim that the plaintiff was suing on behalf of himself and other creditors, it was not necessary to amend the writ by the insertion of those words. Actions on behalf of a class.

Where a judgment is applied for by motion under the former Chancery Orders 467, 638, etc. (now *Rules* 965, 972), it has not been the practice to require the style of the cause to shew that the suit is on behalf of all the creditors, etc. See also *Re Blount*, 27 W. R. 865.

A statement of the representative capacity in which a plaintiff sues cannot be supplied from allegations in plaintiff's affidavits on a motion: *Hynes* v. *Fisher*, 4 Ont. 78. Or in representative character.

(d) Comp. Eng. R. 1875, O. 5, r. 2, 3, (1883, R. 25, 26.) Issue of writ.

(e) Taken from original *Rule* 23.

The Eng. R., 1875, O. 5, r. 5 (1883, R. 32,) gives directions also as to the description of paper to be used.

Where notice of action is necessary it may not be required where the principal relief sought is an injunction, and damages are only claimed as subsidiary thereto: see *Flower* v. *Low Leyton*, 5 Ch. D. 347.

225. Every matter or proceeding not commenced by writ of summons shall be assigned to one of the Divisions of the High Court, by marking the document by which the same is commenced with the name of the Division. *See* 44 V. c. 5 s. 25. Proceedings to be assigned to a Div. of the H. C.

Petitions, notices of motion for administration or appointment of a guardian, etc., are examples of matters not commenced by writ of summons.

226. Writs of summons shall be issued in rotation from the Queen's Bench, Chancery, and Common Pleas Divisions; and in the County of York shall be issued by the Clerk of the Process, and in other counties or union of counties for judicial purposes, by the Deputy Clerk of the Crown or Local Registrar, as the case may be. Writs to issue in rotation.

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Rules 227-231.

(*a*) Writs issued by a Deputy Clerk or a Local Registrar need not be signed or sealed by the Clerk of the Process. *See* J. A. Rule 545; R. S. O. 1877, c. 50, ss. 5, 6.

County Courts.

227. The Clerks of the County Courts shall issue all similar writs in the County Courts respectively. R. S. O. 1877, c. 50 s. 6.

Office from which issued to be noted in the margin.

228. The Clerk of the Process and each Deputy Clerk of the Crown, Local Registrar and Clerk of each County Court, shall note in the margin of every writ issued by him, from what office and in what County the writ issued, and shall subscribe his name thereto. *See* R. S. O. 1877, c. 50. s. 9.

Sealing and issue of writ.

229. Every writ of summons shall be signed and sealed by the officer issuing the same, and shall thereupon be deemed to be issued. J. A. Rule 24.

Identical with the Eng. R. 1875, O. 5, r. 6, (1883, R. 33.)

The issue of the writ is not so far a judicial act that the Court will not take cognizance of the fact that it was not issued till later in the day than the cause of action arose: *Clarke* v. *Bradlaugh*, 8 Q. B. D. 63.

Writ may issue in any county.

230. A plaintiff may issue his writ of summons in any County. J. A. Rule 20; R. S. O. 1877. c. 50, s. 10.

This *Rule* corresponds substantially with the Eng. R. 1875, O. 5, r. 1 (1883. R. 23); and with the former practice in this Province as respects transitory actions. District Registries were established in England by The Judicature Act of 1873, s. 60, to decentralize the business, as far as consistent with the due administration of justice.

The writ in an action of ejectment may under this *Rule* issue out of the proper office in any County without reference to the locality of the land, though the trial must, under *Rule* 653, be in the County where the land lies: *Canada Permanent, etc.* v. *Foley*, 9 P. R. 273.

An action for assignment of dower is an action for the recovery of land: *McCulloch* v. *McCulloch*, 4 C. L. T. 252.

Writ for service in Ontario.

231. [Where the service is to be made in Ontario] the writ of summons for the commencement of an action shall be in Form No. 1 in the Appendix hereto, with such variations as circumstances may require. J. A. Rule 7.

Corresponds with the English Rule, 1875, O. 2, s. 3 (1883, R. 5), except the words in brackets. The *Rule* applies to ejectment as well as other actions. Before the J. A., 1881, in Equity a suit for land, under *The Administration of Justice Act* or otherwise, did not differ from other suits, but in the Common Law Courts the case was otherwise, and a special form of writ of ejectment, prescribed by s. 220 of the C. L. P. Act of 1856 (R. S. O. 1877, c. 51, s. 2) was in use. The C. L. P. Act, 1856, U. C., abolished a previous cumbrous method of pro-

ceeding by ejectment, and provided a simpler procedure in its place, but left the proceedings in ejectment different in many respects from those in ordinary actions; the writ was different: it gave sixteen days to appear, instead of, as in other actions, eight; and there were no pleadings. Since 1881 an action for the recovery of land will now, with a few exceptions (expressly mentioned in the *Rules*), proceed like any other action. The writ will be the same, the indorsement thereon, as in other actions, showing the nature of the claim; and there will be pleadings. The most material differences will be, that the right of a landlord to intervene and defend is preserved; *Rules* 293, 294; and that a defendant in possession need not in general plead his title; *Rule* 416. **Rule 232.**

A writ in the form for service within, the jurisdiction will not be set aside before service because defendant is resident without the jurisdiction, for the plaintiff may wait until he comes within the jurisdiction to serve him: *The Helenslea*, 51 L. J. Adm. 16; 30 W. R. 616; 47 L. T. N. S. 446; 18 C. L. J. 161; and see *Snow* v. *Crie*, 7 P. R. 162: *Fry* v. *Moore*, 23 Q. B. D. 395, 397.

A writ for service on persons domiciled within, was served on them without the jurisdiction. Leave was given to issue *nunc pro tunc* a concurrent writ for service out of the jurisdiction, and to amend the copies served in accordance therewith: *Metcalfe* v. *Davis*, 6 P. R. 275.

Where a writ for service out of the jurisdiction is issued, and the defendant is abroad, the Judge may, if the circumstances warrant substitutional service, order a copy to be served within the jurisdiction, although it is not in the form for service within the jurisdiction: *Ford* v. *Shephard*, 34 W. R. 63; 53 L. T. N. S. 564. See notes to *Rule* 271.

In *The W. A. Scholten*, 36 W. R. 559, a writ was set aside for not containing the address of defendant as prescribed by the form of writ, but the decision seems to have proceeded upon the fact that the defendant was a foreign corporation, and if the address abroad had been inserted the writ could not under the English Rules have been issued without leave. In Ont., see *Rule* 274. See also *Sedwick* v. *Yedras Mining Co.*, 35 W. R. 780.

232. [Where there is jurisdiction to proceed with an action on a service out of Ontario,] the writ of summons to be so served (*a*) shall be in Form No. 2, in the Appendix hereto, with such variations as circumstances may require, and shall bear the indorsement contained in said form purporting that such writ is for service out of Ontario. [Where a defendant is not a British subject, and is not in British Dominions, notice of the writ of summons is to be served in lieu of service of the writ, and] such notice shall be in Form No. 3 in the Appendix with such variations as circumstances may require. J. A. Rule 8; R. S. O. 1877, c. 50, s. 48. Writ and notice for service out of jurisdiction.

See Eng. R., 1875, O. 2, r. 5 (1883, R. 7).

The first clause in brackets is not in the English Rule, but does not vary the effect of the *Rule*. At (*a*) the English Rule has the words "or of which notice is to be given out of the jurisdiction." In other respects the *Rule* corresponds substantially with the English Rule.

The second clause in brackets is adopted from R. S. O. c. 50, s. 45, and is not in the English Rule. Under section 19 of the C. L. P. Act of 1852, in England service on a foreigner resident out of the jurisdiction was directed to be made in a similar way, and that enactment has been held to be in force in England since the Judicature Act: *Westman* v. *Aktiebolaget, E. M. Snickarefabrik*, 1 Ex. D. 237, *Beddington* v. *Beddington*, 1 P. D. 426; and to apply to

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Rules 233-235.

the Chancery Division equally with the other Divisions: *Re Howard, Padley* v. *Camphausen*, 10 Ch. D. 550. As to the form of affidavit of service: see *Bustros* v. *Bustros*, 14 Ch. D. 849, and Form No. 45 in the Appendix.

Where a writ for service on a foreigner out of the jurisdiction was served on him while within the jurisdiction on a temporary visit, a judgment signed by default of appearance was held regular: *Snow* v. *Cole*, 7 P. R. 162.

When a foreigner is served out of the jurisdiction, with a writ, instead of a notice as prescribed by this *Rule*, the service is void: *Hewitson* v. *Fabre*, 21 Q. B. D. 6.

See also notes to *Rule* 271.

Date and teste of writ.

233. Every writ ~~of summons and every other writ~~ shall bear date on the day on which the same is issued, and shall be tested in the name of the President of the High Court of Justice, and shall require the defendant to appear thereto in ten days after service [including the day of service], if the service is to be made in Ontario. J. A. Rule 9. 1307 as provided by rule 375 as amended

Corresponds substantially with the Eng. R. 1875, O. 2, r. 8 (1883, R. 10). The writ is in England tested in the name of the Lord Chancellor; or, if the office of Lord Chancellor is vacant, in the name of the Lord Chief Justice of England. In Ontario by section 3, sub-section 10, of the Act, the President of the High Court is "that one of the Presidents of the Queen's Bench, Chancery and Common Pleas Divisions, who, for the time being, is first in order of seniority."

Every writ must have the full title of the action, including the names of all the defendants, but need only be directed to the particular defendant or defendants intended to be served with it. Where different times have to be mentioned for different defendants to appear, the proper course is to issue concurrent writs: *Traill* v. *Porter*, 1 L. R. Ir. 60.

A writ issued after the cause of action accrued, but on the same day is good. The issue of the writ is the act of the party and not of the Court, and the Court will in such case inquire as to the actual time, and not refer the act to the first moment of the day: *Clark* v. *Bradlaugh*, 7 Q. B. D. 151; 8 Q. B. D. 63; see *Lord Dorchester* v. *Petrie*, 3 Doug. 273; Rob & Joseph Dig. 3750.

The words in brackets were not in the original *Rule*, but the form of writ (No. 1) notified the defendant to appear within ten days after service "inclusive of the day of such service" and even under the original *Rule* the time was to be so computed: *Cornish* v. *Manning*, 18 C. L. J. 76, 143; 2 C. L. T. 105, and see *Rules* 275, 474.

See notes to *Rule* 444 as to irregu'arities in the teste of writs, and amendment thereof.

Copy to be filed.

234. The plaintiff or his solicitor shall, on presenting any writ of summons for sealing, leave with the officer a copy of such writ, and of all the indorsements thereon, signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person. J. A. Rule 547, *first part*.

Process Book.

235. The officer issuing the writ shall make an entry of every writ of summons issued by him in a book to be

called the Process Book, which is to be kept in the manner in which process books have heretofore been kept; and the action shall be distinguished by a number in the manner in which actions are now distinguished in such last mentioned books; and in case of any further proceeding in the action, an entry thereof shall be made in another book to be called the Procedure Book, which is to be kept in the manner in which Procedure Books have heretofore been kept. J. A. Rule 26. Rules 236, 237.

See Eng. R. 1875 O. 5, r. 8, (1883, R. 35) which requires the action to be distinguished by the date of the year, and a letter as well as a number. There are also some other minor variations.

236. The plaintiff in any action may, at the time of, or at any time during twelve months after the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked by the officer issuing the same with the word "concurrent" in the margin, and the date of issuing the concurrent writ: Provided always, that such concurrent writ or writs shall only be in force for the period during which the original writ in such action is in force. J. A. Rule 27. Concurrent writs.

Comp. Eng. R. 1875 O. 6, r. 1, (1883, R. 40.)

The twelve months are calendar months: *Rule* 472. The time named in the English Rule is the same.

The time by the C. L. P. Act R. S. O. 1887, c. 50, ss. 26-27, was six months. So also by the English C. L. P. Act, s. 9. With that exception the present *Rule* is substantially the same as section 26 of the Ontario C. L. P. Act, R. S. O. 1877, c. 50.

The English Rule requires that the word "concurrent" and the date should be marked with a seal to be impressed upon the writ by the proper officer.

By the terms of this *Rule* the concurrent writ can only be issued within the twelve months for which the original writ is current: see also *Smallpage* v. *Yonge*, 17 Q. B. D. 644. And under similar language in the section of the C. L. P. Act above referred to, it was held that a concurrent writ could not be issued after the renewal of the original writ: *Cole* v. *Sherard*, 11 Ex 482; but now, however, under *Rule* 485, the Court or Judge may enlarge the time, and after the renewal, allow a concurrent writ to issue: *Smallpage* v. *Yonge*, *supra*, and *Re Jones*, *Eyre* v. *Cox*, 46 L. J. Chy. 316; W. N. 1877, 38.

Where different times are to be mentioned for different defendants to appear, the proper course is to issue concurrent writs: *Traill* v. *Porter*, 1 L. R. Ir. 60; so that that course will be proper where, under *Rule* 276, defendants out of the jurisdiction have different times to appear, or where some defendants are within and others without the jurisdiction. See next *Rule*, and *Beddington* v. *Beddington*, 24 W. R. 348; 34 L. T. N. S. 366; 45 L. J. (P. D. & A.) 44.

237. A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for Concurrent writs for service

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Rule 238. within and without the jurisdiction.

service, or whereof notice in lieu of service is to be given, out of the jurisdiction; and a writ for service, or whereof notice in lieu of service is to be given, out of the jurisdiction, may be issued and marked as a concurrent writ with one for service within the jurisdiction. J. A. Rule 28.

Identical with the Eng. R. 1875, O. 6, r. 2, (1883, R. 41,) and corresponds in substance with R. S. O. c. 50, s. 52: see *Beddington* v. *Beddington*, *supra*.

A concurrent writ may be issued after the original writ has been issued, and although there is only one defendant, and for service abroad although the original writ is for service within the jurisdiction: *Smallpage* v. *Fonge*, 17 Q. B. D. 644.

Where a defendant whose domicile was within the jurisdiction was served abroad with a writ in the form for service within the Province, on an application to set aside the service for irregularity, leave was granted to issue *nunc pro tunc*, a concurrent writ for service abroad, and the copies served, were directed to be amended to conform to the concurrent writ: *Metcalf* v. *Davis*, 6 P. R. 275.

As to substitutional service within the jurisdiction of writs against defendants who are abroad, see notes to *Rule* 271.

(ii) *Renewal of Writ.*

Currency of writ.

238. No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to a Judge for leave to serve the writ after, and notwithstanding the lapse of, the said period.

(*a*) The Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the service shall be good if made within twelve months from the date of the order; and so from time to time during the currency of the further period allowed.

(*b*) The writ shall in such case be renewed by being marked with the date of the day, month and year of such renewal; such renewal to be so marked by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in Form No. 92, in the Appendix.

(*c*) In such case the original writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action is limited and for all other purposes, from the date of the original issue of the writ. J. A. Rule 31.

See Eng. R. 1875, O. 8, r. 1 (1883, R. 45), which provides for the renewal being marked with a seal.

Rule 239.

This *Rule* introduced an important change. Theretofore the writ, if not served, might, as of right, during its currency, be renewed for six months from the date of renewal, and so on from time to time during the currency of the renewed writ; so as to keep the action alive without service, and thereby defeat the Statute of Limitations for an indefinite time; whereas under this *Rule* a writ can only be renewed by leave, and if reasonable efforts have been made to serve the defendant, or for other good reason. The application is made *ex parte*: see Dan. Pr. 326, 327; Forms 131 Chitty's Arch. 229.

It is only the original writ that can be renewed. Where, therefore, a writ which had once been renewed was lost, the Court refused to direct the officer to seal a verified copy: *Davies* v. *Garland*, 1 Q. b. D. 250. *Semble* a concurrent writ might have been issued.

The writ will expire at midnight preceding the anniversary of its issue: see *Fitch* v. *Walker*, 7 P. R. 8.

Where a writ was renewed for six months from 6th April, 1881, under the former practice and was served on 27th Dec., 1881, it was held that the writ being in force on 22nd Aug., 1881 (when the Jud. Act. came into force), it was continued in force under this *Rule* for a year, and service was therefore good: *Mackelcan* v. *Becket*, 9 P. R. 289.

The twelve months are calendar months (*Rule* 472) and run from the date of the writ: *Re Jones, Eyre* v. *Cox*, 46 L. J. Chy. 316; W. N. 1877, 38; and vacation is included: see *Rule* 484, and *Mullin* v. *Bonjor*, 5 Ir. C. L. 475.

By *Rule* 485 a Court or Judge may enlarge the time for any proceeding, and although the prescribed time has elapsed. In *Re Jones, Eyre* v. *Cox, supra*, Jessel, M.R., allowed a writ to be renewed after its period of currency had expired, the plaintiff not having been able to serve it. But where the Statute of Limitations had in the meantime run, the Queen's Bench Division held that it could not renew the writ: *Doyle* v. *Kaufman*, 3 Q. B. D. 7, affirmed in Appeal, 340.

Where a writ was taken out in the C. P. Div. so as to save the Statute of Limitations, but not served, and after the period of the Statute had run, but before the expiration of the writ, an administration action was commenced in the Chancery Div., it was held that the writ in the C. P. Div. did not keep the debt alive for the purpose of the administration suit: *Manby* v. *Manby*, 3 Ch. D. 101.

Where the writ has expired before service, the copy and service of the writ may be set aside, but not the original writ: *Fitch* v. *Walker*, 7 P. R. 8.

Where a defendant has been served with an unrenewed writ after the expiration of twelve months from the date of its issue, he probably cannot treat it as a nullity, but should apply to set aside the service for irregularity: see *Rule* 442, and *Hemp* v. *Warren*, 11 M. & W. 103; 2 Dowl., N. S. 758.

Evidence of renewal.

239. The production of a writ of summons purporting to have been renewed in manner aforesaid shall be sufficient *prima facie* evidence for all purposes of the writ having been so renewed, and of the commencement of the action as of the date of the issue of the writ in manner provided as aforesaid. J. A. Rule 32.

See Eng. R. 1875, O. 8, r. 2 (1883, R. 46).

This corresponds in substance with the English C. L. P. Act 1852, s. 13, and with R. S. O. 1877, c. 50, s. 28.

See *Fisher* v. *Cox*, 16 L. T. N. S. 397.

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Rules 240, 241.

(iii) *Indorsement of Address.*

Address of plaintiff and of solicitor.

240. Where a plaintiff sues by a solicitor, the writ of summons or notice in lieu of service of a writ of summons, shall be indorsed with the solicitor's name or firm and place of business, where writs, notices, petitions, orders, warrants and other documents, proceedings, and written communications may be left for him.

(*a*) Where any such solicitor is only agent of another solicitor, there shall be added to his name or firm and place of business the name or firm and place of business of the principal solicitor. J. A. Rule 18.

Compare Eng. R. 1875, O. 4, r. 1 (1883, R. 19).

Where a petition was indorsed by agents only, it was held to be irregular and was set aside: *Re Scholes*, 34 W. R. 501; 54 L. T. N. S. 466: see also *Wray* v. *Kemp*, 26 Ch. D. 169.

The English Rule requires also the address of the plaintiff to be indorsed on the summons, and provides, if the solicitor's place of business is more than three miles from Temple Bar the writ is to be indorsed with another proper place to be called his address for service which shall not be more than three miles from Temple Bar. The Ontario *Rule* corresponds with the enactment in the R. S. O. 1877, c. 50, s. 16., except that the latter names place of abode instead of place of business.

It has been held in Ontario that the plaintiff's address, as well as the solicitor's address, must be indorsed, as the form of writ No. 1 in the Appendix so provides and it is made imperative by *Rule* 231: *Chess Carley Co.* v. *Rodger*, 4 C. L. T. 500. A writ not so indorsed may be set aside as irregular: *Ib.*; *Sherwood* v. *Goldman*, 11 P. R. 433; see also *McCready* v. *Henessy*, 9 P. R. 489.

The address of the plaintiff indorsed must be that of his residence: *Mee* v. *Denbigh*, 27 Sol. Jour. 617.

Where the suit was on behalf of "the plaintiff and all others the underwriters of a steamship *Cid* at the time of loss in 1873" it was held that there was only one plaintiff, and that his address alone need be given; the other persons mentioned were not plaintiffs: *Leathley, etc.*, v. *McAndrew*, W. N. 1875, 259; 1 Charl. Ch. Ca. 58.

As to obtaining security for costs where an illusory address is given, see notes to *Rule* 1245.

Address of plaintiff in person.

241. Where a plaintiff sues in person, there shall be indorsed upon the writ of summons, or notice in lieu of service of a writ of summons, his place of residence and occupation.

(*a*) If his place of residence is more than two miles from the office in which the appearance of defendant is to be entered there shall be indorsed also another proper place, to be called his address for service, which shall not be more than two miles from such office, where writs, notices,

petitions, orders, warrants and other documents, proceedings, and written communications not requiring personal service may be left for him. Rule 242.

(*b*) If the writ or notice is not so indorsed, or if such address or place be more than two miles from the office aforesaid, then the opposite party shall be at liberty to proceed by posting up in such office all notices, petitions, orders, warrants and other documents, proceedings and written communications requiring service. J. A. Rule 19.

The English Rule of 1875, O. 4, r. 2 (1883, R. 20), names three miles from Temple Bar, instead of two from the issuing office. The words "not requiring personal service" are not contained, though they are of course implied, in the English Rule. The clause (*b*) is not in the English Rule, but corresponds with the practice of the Courts: Arch. practice, p. 176, 13th ed. The C. L. P. Act, R. S. O. 1877, c. 50, s. 17, required only that the plaintiff suing in person should mention the city, town, incorporated or other village or township in which he resided.

The present *Rule* corresponds nearly with the Reg. Gen. Trin. Term, 1856, No. 138 (taken from English Rule 166 of Hil. T., 1853), except that, instead of the information being indorsed on the writ that Rule required a memorandum to be left with the Clerk or Deputy Clerk of the Crown upon issuing the writ. The Chancery Practice was governed by Chy. Order 44, and required the plaintiff, if suing in person, to indorse on his bill his name and place of residence; and also, when his place of residence was more than three miles from the office, where the bill was filed, another proper place (to be called his address for service) not more than three miles from the said office, where writs, notices, warrants, and other documents, proceedings and written communications might be left for him.

No one but a solicitor or plaintiff in person may issue a writ. Where a person not a solicitor, but purporting to be next friend of a married woman issued a writ, the writ and all subsequent proceedings were set aside: *Swann* v. *Swann*, 43 L. T. N. S. 530; 25 Sol. Jour. 134.

As to sufficiency of address see *Smith* v. *Dobbin*, 3 Ex. D. 338. As to what retainer of a solicitor authorizes him to issue a writ: see *Wray* v. *Kemp*, 26 Ch. D. 169.

242. Indorsements similar to those mentioned in the two next preceding Rules shall also be made upon every writ sued out and upon every document by which proceedings are commenced in cases where proceedings are commenced otherwise than by writ of summons. See Chy. O. 40, 41; R. S. O. 1877, c. 50, ss. 30, 31. Indorsements on other proceedings.

The indorsement of the place of business was by the terms of Chy. O. 41, only necessary on the first writ sued out, or proceeding filed: *Redman* v. *Brownscombe*, 6 P. R. 83, and an objection to the want of the indorsement required to be supported by proof that it is the first proceeding filed, or sued out, which has been served on the party taking the objection: *Ganson* v. *Finch*, 3 Chy. Ch 296; but the name of the party or solicitor (and of the principal solicitor when the proceeding is taken by an agent) was formerly required to be indorsed on every proceeding issued or filed: *Coates* v. *Edmonson*, 2 Chy. Ch. 439. This practice it seems desirable to follow for its manifest convenience, although it is not clear that it is now compulsory to do so. The

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Rule 243. omission of the indorsement did not make the proceeding void, but entitled the opposite party to a stay of proceedings until it was supplied: *Price* v. *Webb*, 2 Ha. 511; a demand of a copy of a pleading was held to be a waiver of the objection that it was not indorsed as required: *Bennett* v. *O'Meara*, 2 Chy. Ch. 167.

(iv) *Indorsement of Claim.*

Indorsements under *Rules* 224, 246, are compulsory, as also are those under *Rules* 248, 249 in the cases therein provided for. Indorsements under *Rules* 245, 247 are optional.

Precise statement not essential.

243. In the indorsement required by Rule 224, it shall not be essential to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled. J. A. Rule 11.

Identical with Eng. R. 1875, O. 3, r. 2, (1883, R. 12). The object of the indorsement is to identify the claim to which the action relates; one advantage of this being to facilitate a settlement without the action going further. In some cases the indorsement will take the place of pleading: see *Rules* 370, 708, etc.

Eng. Order 3, r. 1, requires that an indorsement of claim shall be made on every writ of summons before it is issued. That *Rule* has not been adopted in Ontario, but *Rule* 234 provides that the plaintiff shall leave with the officer who issues the writ a copy of the writ with all the indorsements.

Though the plaintiff's precise ground of complaint, or the precise remedy or relief claimed, need not be set forth under this *Rule*, still a claim for an injunction or receiver should be indorsed where the obtaining of either is a substantial object of the action: see notes to *Rule* 224, and *Colebourne* v. *Colebourne*, there cited. As to amendment of the indorsement on the writ: see notes to *Rule* 444.

Where a plaintiff seeks to enforce a claim against the separate estate of a married woman the writ should be indorsed with a claim for that relief. Where the husband is sued as trustee of separate estate of his wife as well as in his personal capacity, the claim against him as such trustee should be made expressly in the indorsement: *Dixon* v. *Dougan*, 8 L. R. Ir. 211.

Lis pendens. Where the plaintiff desires to register a certificate of *lis pendens*, the indorsement on the writ of summons should contain a short description of the property, sufficient to identify it for the purpose of registration: see note to Form No. 9. Where the writ is issued by the Process Clerk, the Registrar of the Division in the Q. B. & C. P. D., and the Clerk of R. & W. in Chy. Div., and in other cases, the officer who issues the writ will issue the certificate of *lis pendens*, in the manner provided in R. S. O. c. 114, s. 47, 48. Where a *lis pendens* is required the plaintiff should be more precise than in ordinary cases and should by the indorsement define generally the grounds of his claim to an interest in the land: *Sheppard* v. *Kennedy*, 10 P. R. 242.

Where the title to land is not in question in the action, *e.g.*, in an alimony suit: *White* v. *White*, 6 P. R. 208; *Crandell* v. *Crandell*, 20 C. L. J. 329; 4 C. L. T. 500; it is improper to issue a *lis pendens*; and if this appears from the indorsement on the writ, the registration may be vacated on motion before the Master in Chambers: *Sheppard* v. *Kennedy*, *supra*. If the suit ostensibly brings the title to land in question, but is an illusory suit brought in order to register a *lis pendens*, the action may be dismissed on an admission by the plaintiff, as to the real nature of the suit; but otherwise it must be disposed of in the regular way. If there is not such an admission but affidavits clearly shew the nature of the suit, the Master may refer the matter to a Judge and an order may be made by a Judge directing a speedy trial: see *Jameson* v. *Laing*, 7 P. R. 404; *Sheppard* v. *Kennedy*, *supra*.

Where, however, the motion is to vacate the registration of the *lis pendens* because the remedy against the land is not appropriate to the cause of action which is pending, then the Master in Chambers may finally dispose of the matter without referring it to a Judge: *Sheppard* v. *Kennedy*, *supra*. Thus, a plaintiff may not register a *lis pendens* merely to prevent a defendant from alienating land which would be liable to satisfy the judgment if the plaintiff should succeed in the action. An action for that purpose will not lie, and the registration of a certificate of *lis pendens* may be vacated on motion: *Westloh* v. *Brown*, Referee in Chambers, 5 June, 1878; see *Newton* v. *Newton*, and *National Provincial Bank* v. *Thomas*, *supra*, p. 55; also *White* v. *White*, *supra*; *Hepburn* v. *Patton*, 26 Gr. [illegible]; *Robinson* v. *Pickering*, 50 L. J. Chy. 527. Rules 244, 245.

Where a *lis pendens* is issued, a defendant is entitled to appear *gratis* and anticipate the service upon him of actually issued process, so as to compel the plaintiff to proceed promptly: *McTaggart* v. *Toothe*, 20 C. L. J. 175; *Poulton* v. *Lee*, 7 P. R. 415.

Where a *lis pendens* is properly issued and registered it cannot be vacated pending the action: *Foster* v. *Moore*, 11 P. R. 447, a case of fraudulent conveyance.

The registration of a certificate of an order dismissing the action is a sufficient discharge of a *lis pendens*: *Tedford* v. *Tedford*, 7 C. L. T. 140; *Graham* v. *Chalmers*, 2 Chy. Ch. 53.

As to the effect of a *lis pendens*, see *Price* v. *Price*, 35 Ch. D. 297.

244. The indorsement of claim may be to the effect of such of the forms in Part II. of the Appendix hereto as shall be applicable to the case, or if none be found applicable then of such other similarly concise form as the nature of the case may require. J. A. Rule 12. Form of indorsement.

Identical with Eng. R. 1875, O. 3, r. 3 (1883, R. 13).

245. In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising (*a*) upon a contract, express or implied, (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt); or (*b*) on a bond or contract under seal for payment of a liquidated amount of money; or (*c*) on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or (*d*) on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only; or (*e*) on a trust; or (*f*) in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant; the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled. Such special Debt or liquidated demand.

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Rule 245. indorsement shall be to the effect of such of the Forms in sec. IV., of Part II. of the Appendix as shall be applicable to the case. Eng. R. 1883.

(2) Where a writ has been so indorsed the indorsement shall be considered as particulars of demand, and no further or other particulars need be delivered unless ordered by the Court or a Judge. R. S. O. 1877, c. 50, s. 19.

This Rule is adopted from Eng. R. (1883) O. 3, r. 6. It does not differ substantially from the original Ont. J. A., *Rule* 14 (taken from Eng. R., 1875, O. 3, r. 6), except that clause (*f*) is new. A special indorsement in an action to recover land so as to enable the plaintiff to move for judgment summarily, notwithstanding appearance was not previously allowed.

Special indorsement of money demand.

Special Indorsement—*Money Demands.*—Clauses (*a*) to (*e*) substantially correspond with s. 19 of the C. L. P. Act, R. S. O., 1877, c. 50, but differ in two points: First, the *Rule* includes the case of a liquidated sum payable on a trust, which the former section did not; Secondly, there are no words in the *Rule*, as there were in the section, limiting its operation to cases in which the defendant resides within the jurisdiction. It will be observed that the use of this indorsement is optional; but if used it will entitle the plaintiff to final judgment in case of default of appearance, and even notwithstanding appearance, unless the defendant can satisfy a Judge that he has a defence or ought to be allowed to defend: see *Rule* 739.

For forms of special indorsement see Appendix A. No. 7. Such forms must be substantially followed to entitle plaintiff to sign judgment under *Rules* 705 or 739, but a merely formal difference will not prejudice: *per* Archibald, J., *Anon*, W. N. 1876, 53.

Where a writ had been served before the commencement of the Act it was held that there could be no indorsement under this *Rule*, so as to enable the plaintiff to sign judgment under *Rule* 739: *Anon*, 1 Charl. Ch. Ca. 45. There are, however, two decisions to the contrary; see W. N. 1875, 260; 1 Charl. Ch. Ca. 49; and W. N. 1876, 12; 1 Charl. Ch. Ca. 55, and notes to *Rule* 739.

As the object of the special indorsement is to give the defendant an opportunity of avoiding further proceedings by payment of the debt, as well as to entitle the plaintiff to a summary remedy, the indorsement must give sufficient particulars to enable the defendant to satisfy his mind as to whether he ought to pay, or resist: *Walker* v. *Hicks*, 3 Q. B. D. 8; and if it gives sufficiently specified particulars to bring to the mind of the defendant knowledge as to what the plaintiff's claim is, it is a good special indorsement: *Bickers* v. *Speight*, 22 Q. B. D. 7. In *Anon*, W. N. 1875, p. 220, Lush, J., said that it could not be intended that a list of items, extending perhaps over three or four years, should be indorsed on the writ. In an action for the price of goods sold, the dates and amounts of consignments were held necessary: *Parpaite* v. *Dickinson*, 38 L. T. N. S. 178; 26 W. R. 479.

A claim for arrears of alimony, and alimony *pendente lite*, is not a claim for "a debt or liquidated demand in money" within this *Rule*: *Bailey* v. *Bailey*, 13 Q. B. D. 855. Neither is a claim for quarterly payments of an annuity secured by a bond for £500: *Tuther* v. *Caralampi*, 21 Q. B. D. 414; nor a claim for a sum in dispute and requiring assessment or valuation, as a claim by lessor against lessee for amount of dilapidation to premises leased: *Clarke* v. *Berger*, 36 W. R. 809.

Insufficient indorsement.

The following indorsements have been held insufficient:

(1) "The plaintiff's claim is £399 9*s.* 7*d.*, the defendant's share or contribution to the payment of certain bills of exchange and promissory notes in which he and the plaintiffs were jointly liable, and which bills and notes have been taken up by the plaintiffs: *Walker* v. *Hicks*, 3 Q. B. D. 8.

(2) "The plaintiff's claim is £399 9*s.* 7*d.*, being seventy-five per cent. of the invoice price of goods supplied by the plaintiff to the defendant under an agreement" (giving its date and nature). **Rule 245.**

"The plaintiffs also claim to recover from the defendants the following bills of exchange, drawn by the plaintiffs and payable to the order of the defendants, being bills drawn for the price of goods supplied by the plaintiffs to the defendants as aforesaid." A list of bills was then set out in the indorsement giving their dates and amounts: *Parpaite* v. *Dickinson, supra.*

(3) The plaintiff's claim is for $420.37, balance of work, etc., less credits as agreed upon. The plaintiff claims interest on $420.37 until judgment: *Fitzsimmons* v. *Wilson*, 4 C. L. T. 91.

(4) An indorsement claiming an injunction restraining the sale of mortgaged chattels, damages and payment of £1,000 alleged to be in defendant's hands: *Yeatman* v. *Snow*, 28 W. R. 574; 42 L. T. N. S. 502; see also *Fell* v. *Williams*, 3 C. L. T. 358; *Standard Bank* v. *Wills*, 10 P. R. 159; *McCallum* v. *McCallum*, 11 P. R. 16; *sed vide Huffman* v. *Doner*, 12 P. R. 492; *Hay* v. *Johnston*, *Ib.* 596.

See also *Lucas* v. *Ross*, in note to *Rule* 739; *Kilgariff* v. *McCrane* in note to *Rule* 707, and Rob. & Jos. Dig. 2877.

The following have been held sufficient:

Indorsements held sufficient.

(1) "The plaintiff's claim is £36 5*s.* for balance of goods sold." *Anon*, W. N. 1875, 220 (see *supra*); 1 Charl. Ch. Ca. 44. See, however, *Parpaite* v. *Dickinson, supra*, as to effect of absence of dates.

(2) "The plaintiff's claim is £49 5*s.* 8*d.*; the following are the particulars:

			£	*s.*	*d.*			
1879.	Feb. 14	To goods	0	16	1			
	15	Do.	4	13	6			
	etc.	etc.		etc.				
	May 21	Brit. Com.						
		Bank draft returned	20	0	0			
		Notary charges on same	0	1	6			
						£99	0	8
Cr.	March 8	By Brit. Com.	£	*s.*	*d.*			
		Bank draft	9	15	0			
	April 23	By Cash	10	0	0			
	" 29	By Brit. Com	20	0	0			
	May 23	By Cash	10	0	0			
						49	15	0
						£49	5	8

and £2 15*s.* for costs": *Smith* v. *Wilson*, 4 C. P. D. 392; 5 C. P. D. 25.

(3) "The plaintiff's claim is for £116 0*s.* 10*d.*, being the balance due to him from the defendant, for moneys paid at the said defendant's request, and on his behalf for the purchase of certain stocks and shares, between the 3rd June, 1879, and the 31st August, 1879, an account of which has been rendered and exceeds three folios": *Ashton* v. *Hurwitz*, W. N. 1879, 194. The ground of the decision was that such an indorsement would have been sufficient under C. L. P. Act: see R. S. O. 1877, c. 50, s. 19, and the schedule where the form given states that an account previously delivered may be referred to by its date: see *Bickers* v. *Speight*, 22 Q. B. D. 7.

(4) "The plaintiff's claim is £130 due him from the defendant, under an assignment, under the hand of one M. J., and dated July 14, 1888; particulars whereof are as follows: I do hereby authorize and request you to pay to Mr. E. Bickers, of, etc., the sum of £130, being the amount due or to become due from you to me, as appears by an I. O. U. signed by you, and dated Feb. 4, 1885, and his receipt for the same shall be a good discharge": *Bickers* v. *Speight*, 22 Q. B. D. 7.

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Rule 246.

(5) "The plaintiffs claim $2,000 being the amount of the defendant's overdrawn account with the plaintiffs' bank on the 18th September, 1882": *Imp. Bank* v. *Britton*, 9 P. R. 274. A similar indorsement omitting the date of the overdraft was held insufficient: *Ontario Bank* v. *Burk*, 10 P. R. 648.

Special indorsement in actions to recover land.

Actions to recover land.—The power to specially indorse a writ in an action for the recovery of land is new, and applies only in certain cases between landlord and tenant. The *Rule* is only intended to include simple cases, where the landlord is himself a party to the contract under which the tenant holds, or where there has been a payment of rent by defendant to plaintiff, or defendant is otherwise estopped from denying plaintiff's title. It has, therefore, been held not to apply where the plaintiff is the assignee or devisee of the original lessor: *Casey* v. *Hellyer*, 17 Q. B. D. 97; and where the term has neither expired nor been determined by notice to quit, *e.g.*, where the plaintiff claims to re-enter for a forfeiture: *Burns* v. *Walford*, W. N. 1884, 31; *Mansergh* v. *Rimell*, *Ib.* 34. See *Friend* v. *Shaw*, 30 W. R. 236.

Where the relationship of landlord and tenant is created between mortgagee and mortgagor by the mortgage deed, the *Rule* will apply if the tenancy expires or is determined by notice to quit: *Daubuz* v. *Lavington*, 13 Q. B. D. 347; *Hall* v. *Comfort*, 18 Q. B. D. 11, but not if it is provided that the mortgagee may enter as mortgagee: *Hobson* v. *Monk*, W. N. 1884, 17.

Particulars of claim.

Particulars.—In an anonymous case, before Quain, J., at Chambers, L. T. 4th December, 1875; 1 Charl. Ch. Ca. 35 and *Ross* v. *Gibbs*, W. N. 1875, 238; 1 Charl. Ch. Ca. 36, it was presumed that, under the Judicature Act, particulars of claim would be unnecessary, as the statement of claim or the indorsement on the writ should give full particulars. This view has not, however, prevailed: see *Barker* v. *Wood*, W. N. 1876, 56; 2 Charl. Ch. Ca. 15, where Archibald, J., made an order for particulars, saying, "I can see great convenience in allowing particulars before the statement of claim, as the defendant may withdraw." Where the plaintiff, as a claim, gave notice that the particulars were those indorsed on the writ, Lindley, J., made an order for additional particulars: *Cotton* v. *Houseman*, W. N. 1876, 22; 2 Charl. Ch. Ca. 36. The form of application in such case would seem to be, not for particulars, but for a further statement of claim: *Schomberg* v. *Zoebelli*, W. N. 1876, 106; 2 Charl. Ch. Ca. 36.

Where the plaintiff's claim was not a merely legal demand for an ascertained sum but an equitable claim which if successful would only lead to an account being taken, and particulars were not necessary to enable defendant to frame his defence, the plaintiff was not ordered to furnish them: *Augustinus* v. *Nerinckx*, 16 Ch. D. 16. But it is established in England that if it is not an account merely that the plaintiff asks but a definite sum is claimed, the plaintiff must state what his case is in detail, either in the pleadings or by way of particulars: *Blackie* v. *Osmaston*, 28 Ch. D. 119.

Where the defendant required particulars of a sum for which credit was given by the claim, in order to enable him to frame his set-off or counter-claim, he was held entitled to receive them: *Godden* v. *Corsten*, 5 C. P. D. 17; W. N. 1879, 190.

Particulars will not be ordered as a matter of course in money causes. When they can be indorsed or stated in the claim they ought to be so: *per* Lush, J., *Anon.*, W. N. 1875, 202; 1 Charl. Ch. Ca. 35. If, therefore, sufficient particulars are not indorsed, the costs of an application to obtain them should be borne by the plaintiff.

Particulars should not be ordered to be furnished in an action of seduction: *Turner* v. *Kyle*, 2 C. L. T. 311.

See further as to particulars the notes to *Rule* 399.

As to particulars of counter-claims see notes to *Rule* 373.

Indorsement in cases of

246. Where the plaintiff's claim is for a debt or liquidated demand only, the indorsement, besides stating the

nature of the claim, shall state the amount claimed for debt, or in respect of such demand, and for costs, respectively, and shall further state that upon payment thereof within eight days after service, or, in case of a writ not for service within the jurisdiction, within the time allowed for appearance, further proceedings will be stayed. Such statement may be in the form in the Appendix Part II., sec. II. The defendant may, notwithstanding such payment, have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's solicitor shall pay the costs of taxation. J. A. Rule 15.

debt or liquidated demand.

This is the same as Eng. R. 1875, O. 3, r. 7, (1883, R. 17), except that the latter names four days; and is to the same effect as section 18 of the C. L. P. Act (R. S. O. 1877, c. 50).

The indorsement must state clearly what is debt and what costs: *Truslove* v. *Whitechurch*, 8 Dowl., P. C. 837; and when interest is claimed the amount and the period from which claimed should be given: *Bardell* v. *Miller*, 7 C. B. 753.

The use of this indorsement, it will be observed, is obligatory. The effect of it is to entitle the defendant to settle the claim by payment within eight days; the plaintiff is not bound by it for any other purpose: *Jacquot* v. *Boura*, 5 M. & W. 155, 156.

Where the defendant paid the amount, but not within the four days, he was nevertheless held entitled to have the costs taxed under the last clause of this *Rule*, as the plaintiff, by accepting the amount indorsed, was considered to have waived payment within the four days: *Hoole* v. *Earnshaw*, 39 L. T. N. S. 409.

247. In all cases of ordinary account, as, for instance, in the case of a partnership, or executorship, or ordinary trust account, where the plaintiff desires to have an account taken in the first instance, the writ of summons shall be indorsed with a claim that such account be taken (*a*). This Rule does not apply to proceedings under Rules 965 to 988. J. A. Rule 16.

Indorsement of claim for account.

(*a*) This *Rule* up to this point is the same as Eng. R. 1875 O. 3, r. 8 (1883 R. 18). The proceedings under *Rules* 965 to 988 are those of summary applications for administration, etc., in which a notice of motion is given, instead of a writ being issued.

A claim against an executor for an account on the footing of wilful default is not an "ordinary account," and therefore does not fall within this *Rule* or *Rule* 745: *Re Bowen*, *Bennett* v. *Bowen*, 20 Ch. D. 538; but see *Re Allan*, 9 P. R. 277, and *supra* p. 164.

See also *York* v. *Stowers*, W. N. 1883, 174.

248. Where the claim is for the foreclosure of a mortgage or the sale of mortgaged property, and the plaintiff desires an order against a defendant for the immediate delivery of possession, or for immediate payment, the writ must, in addition to the ordinary notice, be indorsed with

Indorsement in mortgage actions where immediate possession or payment desired.

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a further notice to the effect of such of the forms in the Appendix hereto, Part II., sec. VI., as are applicable to the case. J. A. Rule 17.

The indorsement should also state concisely the lands in question : *Canada Landed Credit Co.* v. *Callaghan*, Boyd, C., 26 Oct. 1881.

This *Rule* being applicable in the case of a writ only, does not apply to a counter-claim on a mortgage, and orders for immediate payment and possession may be granted, though not asked for specifically by the counter-claim : *Klein* v. *Union Fire Insurance Co.*, 3 Ont. 250.

The forms are those numbered 9, (*d*), (*e*), in the Schedule to the Act. This *Rule* and the forms referred to are not in the English Act.

Indorsement in action of dower.

249. In case the plaintiff in an action of dower claims damages for detention of her dower, the indorsement on the writ of summons shall contain a statement that the plaintiff claims damages for the detention of her dower, from some day to be stated in the notice. *See* R. S. O. 1877, c. 55, ss. 9, 10.

When the plaintiff's husband did not die seised of the land out of which dower is claimed, no damages for detention are recoverable : *Losee* v. *Armstrong*, 11 Gr. 517, even though a demand of dower may have been made by the plaintiff before action : *Morgan* v. *Morgan*, 15 Ont. 194. See further as to damages in actions for dower : *Wallace* v. *Moore*, 18 Gr. 560 ; *Ryan* v. *Fish*, 4 Ont. 335, and notes to *Rule* 290.

2. Disclosure by Solicitors and Plaintiffs.

Whether writ issued by his authority.

250. Every solicitor whose name is [signed to or] indorsed on any writ of summons shall, on demand in writing made by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith in writing whether the writ has been issued by him or with his authority or privity.

(*a*) If he answers in the affirmative, then he shall also, in case the Court or a Judge so directs, disclose in writing within a time to be limited by the Court or Judge, the profession or occupation, and place of abode of the plaintiff, on pain of being guilty of a contempt of the Court from which the writ appears to have issued.

(*b*) If the solicitor declares that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a Judge. J. A. Rule 29.

See Eng. R. 1875, O. 7, r. 1, (1883, R. 42.)

The words in the first line, "signed to or," are not in the English Rule. The clause (*a*) is not in the English Rule, and is taken from the Ontario C. L. P. Act, 1852, s. 7. The clause (*b*) is the same in the English Rule. **Rule 251.**

Where a solicitor without authority prosecutes or defends an action, the proceedings are not necessarily void in all cases; *e.g.*, an action prosecuted without authority binds the plaintiff, and his remedy is against the solicitor, he may, however, on getting notice of the proceedings, move to stay them: see *infra*, and *Chisholm* v. *Sheldon*, 1 Gr. 294. But when a defendant has not been served with process, and an unauthorized appearance is entered for him, the proceedings will be set aside on his applying promptly after he has notice of them: *Roissier* v. *Westbrooke*, 24 C. P. 91; *Massey* v. *Rapelyi*, 5 C. P. 134; *Wright* v. *Hull*, 2 P. R. 26; by delay he may waive his rights: *Kerr* v. *Malpus*, 2 P. R. 135. In *McLean* v. *Grant*, 20 Gr. 75, the party was held to be bound by an unauthorised defence to a Chancery suit, though he does not appear to have been served with the bill. Where a defendant has been personally served with process, he is bound by an unauthorized appearance and defence, and the proceedings will not be set aside unless the plaintiff had notice: see *Roissier* v. *Westbrooke*, *supra*; *Moran* v. *Schunerhom*, 2 P. R. 261; or unless the solicitor be insolvent: *Warley* v. *Prapst*, 7 C. L. J. 294.

Where a solicitor has commenced an action in the name of a plaintiff without authority, the plaintiff may, on notice to the defendant and the solicitor, move that the action be dismissed, and that the solicitor pay the costs of the plaintiff as between solicitor and client, and the costs of the defendant as between party and party: *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*, 13 Ch. D. 310; *Nurse* v. *Durnford*, 13 Ch. D. 764; *Wray* v. *Kemp*, 26 Ch. D. 169.

Any rule of practice that an action brought without the authority of the plaintiff can be dismissed, on application of the plaintiff, only on payment of costs, is not now in force. He may now have the action stayed without payment of costs: *McKay* v. *Macfarlane*, 12 P. R. 149.

After judgment, an action for the benefit of creditors should not be dismissed: *Ib.*

251. Where a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitor, shall, on demand in writing by or on behalf of any defendant, declare forthwith in writing the names and places of residence of all the persons constituting the firm. Names and addresses of members of firm suing as partners.

(*a*) If the plaintiffs or their solicitors fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the Court or a Judge may direct.

(*b*) Where the names of the partners are so declared, the action shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as the plaintiffs in the writ; but all proceedings shall, nevertheless, continue in the name of the firm. J. A. Rule 30.

This *Rule* is the same as Eng. R. 1875, O. 7, r. 2, (1883, R. 43).

By *Rule* 317, any party to an action, in which partners either sue or are sued in the name of their firm, may apply by summons for a statement of the names of the partners, to be furnished in such manner, and verified on oath or otherwise, as may be ordered.

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Rules 252, 253.

3. Service of Writ of Summons.

(i) *Mode of Service.*

In *Re Pepper, Pepper* v. *Pepper*, 50 L. T. N. S. 580; 53 L. J. Chy. 1054; 32 W. R. 765, it was held that the *Rules* as to service apply to an originating summons as well as to writs of summons.

Undertaking to accept service.

252. No service of a writ of summons or other document by which an action or proceeding may be commenced shall be required where the defendant by his solicitor accepts service, and [undertakes to appear thereto]. J. A. Rule 33. Chy. O. 47.

The English Rule 1875, O. 9, r. 1; (1883, R. 48), has the words "enters an appearance" instead of the words in brackets.

A solicitor failing to appear according to his undertaking renders himself liable to an attachment: see *Rule* 283; but the plaintiff may also proceed against defendant as upon default of appearance. He takes the risk, however, of the solicitor not having had authority to accept service: *Roissier* v. *Westbrooke*, 24 C. P. 91; and it would therefore be proper to serve any subsequent proceedings upon the defendant personally.

Personal and substituted service.

253. Where service is required, the writ of summons may be served in any County in Ontario and the service thereof, whenever practicable, shall be personal; but if it be made to appear to the Court or Judge on affidavit that the plaintiff is from any cause unable to effect prompt personal service, the Court or Judge may make such order for substituted or other service, or for the substitution [for service of notice by advertisement or otherwise], as may seem just. R. S. O. 1877, c. 50, s. 20; c. 55, s. 11. J. A. Rule 34.

See Eng. R. 1875, O. 9, r. 2 (1883, R. 49), *Ib.* O. 10.

Instead of the words in brackets the original *Rule* had (following the Eng. R. 1875), the words "of notice for service." The present language follows that of the Eng. R. of 1883.

Under R. S. O. 1877, c. 50, and Chy. Prac.

The modes of service previously to Ont. J. A. 1881, had not been the same in Chancery and in a Common Law action: see Chy. Gen. Orders, 87, *et. seq.*, and Rev. Stat. 1877, c. 40, ss. 92-94, and Rev. Stat. 1877, c. 50, ss. 20-24. Under section 20 of the C. L. P. Act (Rev. Stat. c. 50), service of the writ was required to be personal wherever practicable, and therefore leaving a copy with a female servant at the lodging of defendant has been held not to be good service: *Price* v. *Thomas*, 11 C. B. 543; though if the service were shewn to have come to the knowledge of defendant, leave to proceed might be granted. The above service, if of a bill in Chancery, would probably have been held sufficient under Chy. Gen. Order 87: see *Elliot* v. *Beard*, 2 Chy. Ch. 80. Where, however, the service had not been personal, notice of motion to take the bill *pro confesso*, was required to be served personally, or as the Court might direct: see Chy. Order 107 and 108.

See notes to *Rule* 269, as to service of corporations.

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Personal service.

Personal service may be by delivering the process into the defendant's hand; or by seeing him and bringing the process to his notice: *Thomson* v. *Pheney*, 1 Dowl. 441; and showing him the original if he desires it: *Gogga* v. *Huntingtower*, 12 M. & W. 503; *Philipson* v. *Emmanuel*, 56 L. T. N. S. 858; *Hawthorn* v. *Harris*, 23 W. R. 214; within a reasonable time after service: *Thomas* v. *Pearce*, 2 B. & C. 761; *Petit* v. *Ambrose*, 6 M. & S. 274; a quarter of an hour was considered reasonable time in *Westley* v. *Jones*, 5 Moo. 162; or if he refuses to receive the copy, after being told its nature and being tendered it, then by placing it on his person: *Bell* v. *Vincent*, 7 D. & R. 233; or by throwing it down in his presence: 1 Dowl. 443. The copy must, however, be left with the defendant and not merely shewn to him: *Worley* v. *Glover*, 2 Str. 877, even though he refuses to take it: *Pigeon* v. *Bruce*, 8 Taunt. 410; *Erwin* v. *Powley*, 2 U. C. R. 270.

In *O'Sullivan* v. *Murphy*, 78 L. T. Jour. 213, placing the writ on the ground within 20 or 30 yards and holding up the original, the defendant having run away to evade service, was held insufficient.

Where the person serving did not show the original although requested to do so, service was set aside: *Philipson* v. *Emmanuel*, *supra*.

Appearance precludes all question as to the sufficiency of service: *Dart* v. *Citizens' Insurance Co.*, 11 P. R. 513: see *Boyle* v. *Sacker*, 39 Ch. D. 251, and notes to *Rule* 277.

If it is intended to object to the service, a motion to set it aside should be made before appearance: *Boyle* v. *Sacker*, *sup.*

Who may serve writs.

By the practice in the Common Law Courts, anyone might serve papers. But by R. S. O. 1877, c. 50, s. 335, "No mileage shall be taxed or allowed for the service of any writ, paper or proceeding, without an affidavit being made and produced to the proper Taxing Officer, stating the sum actually disbursed and paid for such mileage, and the name of the party to whom such payment has been made; and, except in the cases provided for in the 23rd section of this Act, no fees shall be allowed for the mileage or service of writs of summons or other *mesne* process unless served and sworn in the affidavit of service to have been served, by the Sheriff, his Deputy or Bailiff, being a literate person (or by a Coroner when the Sheriff is a party to the suit), nor unless a return of the Sheriff or Coroner (as the case may be) is indorsed thereon." The practice was formerly similar in Chancery under Order 298, but that Order was rescinded by Order 616, and thereafter any reasonable sum paid for serving proceedings might be taxed, no matter by whom the service was effected. Under the present tariff (item 17) the costs of service of a writ by a person other than a sheriff are only taxable where the sheriff has made default: see *Rule* 254.

Service of the writ may be effected at any time of the day; *Rule* 480 does not apply: *Murray* v. *Stephenson*, 19 Q. B. D. 60; but not on Sunday: *Mackreth* v. *Nicholson*, 19 Ves. 367; *Taylor* v. *Phillips*, 3 East 155.

Substituted service.

Substituted Service was not in use in the Common Law Courts. The equivalent practice was that provided by R. S. O. 1877, c. 50, s. 20, under which, if reasonable efforts had been made to effect service, and either the writ had come to the defendant's knowledge or he wilfully evaded service, an order might be obtained to proceed as if persona' service had been effected. In Chancery, substituted service was allowed wherever necessary: see *Hope* v. *Hope*, 19. Beav. 237; 4 D. M. & G. 328, and this jurisdiction was enlarged by Statute Rev. Stat. 1877, c. 40, s. 94 (now *Rule* 273).

Formerly.

As to substituted service where a defendant is out of the jurisdiction, see notes to *Rule* 271.

Present practice.

The present *Rule* gives a wide discretion to the Court. It allows substituted service to be ordered if, from any cause, the plaintiff is unable to effect prompt personal service, and applies to a case of persons sued in the name of a firm where no person having control or management of the business can be found: *Skillito* v. *Child & Co.*, W. N. 1883, 208.

When substituted

Where defendant has an agent within the jurisdiction, substitutional service may be allowed on such agent, *e.g.*, a managing clerk at his place of business:

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service allowed.

Armitage v. *Fitzwilliam*, W. N. 1875, 238; general agents: *Jones* v. *Cargill*, 11 L. T. N. S. 566; special agents: *Hobhouse* v. *Courtney*, 12 Sim. 140; solicitors who had acted for defendant: *Hornby* v. *Holmes*, 4 Ha. 306; *Watt* v. *Barnett*, 3 Q. B. D. 183, 363; *Tottenham* v. *Barry*, 12 Ch. D. 798; but see *The Pommerania*, 4 P. D. 195, *infra*, p. 290.

As was said in *Watt* v. *Barnett*, 3 Q. B. D. 367, substituted service may be properly ordered upon any persons with whom the Court is satisfied that the party is in communication. The Court has a right to consider that the copy of writ served will be sent on, and the service will be good, though the service is not in fact communicated.

In cases decided under the former Chancery practice the agent was required to be such in relation to the subject matter of the suit: *Allan* v. *Pyper*, 5 U. C. L. J. 118; *Cupples* v. *Yorston*, 2 Chy. Ch. 31; *Canniffe* v. *Taylor*, 2 Gr. 617; *Doremus* v. *Kennedy*, 2 Gr. 657; but under the present practice orders have been made though the person served has no connection with the subject of the suit, if only he is likely to communicate the fact of service to the defendant: see *Watt* v. *Barnett*, *supra*.

Where defendant's wife, or other relative or person, is shown to be, or to be likely to be in communication with him and is within the jurisdiction, service may be allowed on such person: *Dicker* v. *Clarke*, 11 W. R. 635; *Bank of Whitehaven* v. *Thompson*, W. N. 1877, 45; *Somerville* v. *Joyce*, 1 Chy. Ch. 358; and even under the former Chancery practice such service has been allowed though the relative was not shewn to be at the time in communication with defendant: *Cameron* v. *Baker*, 2 Chy. Ch. 281. Such service may be accompanied by advertising where the person upon whom substituted service is made, may not be able to communicate with defendant: *Bank of Whitehaven* v. *Thompson*, *Cameron* v. *Baker*, *supra*; *Coulbourn* v. *Carshaw*, 32 W. R. 33, or by mailing to an address at which defendant is shewn to have recently been: *Cupples* v. *Yorston*, *supra*.

Where a bill had been filed for foreclosure, and the defendant the official assignee of the mortgagor absconded before service effected, service was allowed substitutionally upon one of the Inspectors of the estate: *London Canadian Loan & Agency Co.* v. *Thompson*, 8 P. R. 91.

Substituted service will not be ordered under this *Rule* unless it is shewn that prompt personal service cannot be effected. The fact of a defendant being out of the jurisdiction is not alone a reason for dispensing with personal service. He must be evading service, or his whereabouts unknown: *Robertson* v. *Mero*, 9 P. R. 510. Where his residence can be ascertained by examination of relatives, that course will doubtless be proper as formerly in Chancery: see *McMurrich* v. *Hogan*, 1 Chy. Ch. 307; *McDonald* v. *McMillen*, 2 Chy. Ch. 282.

When not allowed.

Substituted service will not be ordered under this *Rule*, of a writ which could not legally have been served personally—as a writ against a colonial government: *Sloman* v. *Governor of New Zealand*, 1 C. P. D. 563; see also *Field* v. *Barnett*, 56 L. J. Q. B. 89.

The principle upon which substituted service is granted is that the service is likely to come to the knowledge of the party: *Hope* v. *Hope*, *supra*; *Furber* v. *King*, 29 W. R. 535; where therefore the defendant was shewn to have absconded from his residence and place of business, leave to serve him substitutionally, by leaving copies of the writ at those places, was refused, and service was allowed by advertising: *Wolverhampton & Staffordshire Banking Co.* v. *Bond*, 43 L. T. N. S. 72; 29 W. R. 599; see also *Coulbourn* v. *Carshaw*, 32 W. R. 33.

Not confined to service of writs.

The provision for substituted service has been held in England to apply to an originating summons as well as to a writ: *Re Pepper*, 32 W. R. 765; 50 L. T. N. S. 580; 53 L. J. Chy. 1054; though it has also been held by Denman, J., in Chambers, to relate only to service of writs of summons or notices thereof, and therefore substituted service of a notice of application for a writ of attachment was refused: *Anon.*, W. N. 1876, 105; 2 Charl. Ch. Ca. 26. It is pre-

sumed, however, that notices under *Rule* 329 may be so served, and that under the general jurisdiction, which the Courts of this Province have heretofore had they may order such service of all papers not required, to be personally served: see *McTaggart* v. *Merrill*, 7 P. R. 405, and *Rule* 467 as to notices of motion and appointments. Substituted service has been allowed of proceedings to set aside fraudulent conveyances under R. S. O. 1877, c. 49, s. 10, now *Rules* 1007 *et seq.*; *Dobson* v. *Marshall*, 9 P. R. 1; and in England of a notice of motion: *Cook* v. *Dey*, W. N. 1876, 122; *Hamilton* v. *Davies*, W. N. 1880, 82; see Dan. Pr. 5th ed., 1442; an order for an interim injunction: *Young* v *Brassey*, 1 Ch. D. 277; a summons to shew cause, where defendant was evading service: *Hunt* v. *Austin*, *ex p. Mason*, 9 Q. B. D. 598; a notice of appeal: *Ex p. Warburg*, *Re Whalley*, 24 Ch. D. 364; 25 Ch. D. 336; and a notice of motion for an administration order under Chy. Gen. O. 638 (now *Rule* 972): *Re Allan*, 9 P. R. 77; see also *Re Morant*, W. N. 1879, 144. **Rule 253.**

An order to proceed without service, will not be made; substituted or equivalent service must be effected, if personal service, or acceptance of service cannot be obtained: W. N. 1875, p. 202; 1 Charl. Ch. Ca. 37.

In *Cook* v. *Dey*, 2 Ch. D. 218, it was held by V.-C. Hall, that the substitution of notice for service mentioned in the latter part of the original *Rule* was not intended to apply to ordinary cases of persons not able to be found, but who were within the jurisdiction. He, however, directed substituted service of the writ by advertising, and by leaving a copy at defendant's office and lodgings, which is plainly authorized by the *Rule* in its present shape. In *Leddell* v. *McDougall*, 22 Sol. Jour. 838, Manisty, J., held that the Court had power to make an order for substitution of notice for service within the jurisdiction. See also *Rule* 273. Substitution of notice for service.

In such cases the time for appearance runs from the time the order takes effect, that is, from the service of the writ at the place mentioned or issue of the advertisement, whichever is the later: *Crane* v. *Jullion*, 2 Ch. D. 220; see also *Johnson* v. *Moffat*, W. N. 1875, 248; 1 Charl. Ch. Ca. 39.

Where defendant gave his club as his address, and an order for substitutional service had been granted on an affidavit of a clerk that he had been to the defendant's residence but had been unable to effect personal service, and judgment by default was signed on the substituted service, the affidavit was considered misleading, and the order for substitutional service was set aside, though two years had elapsed since the signing of judgment: *Johnson* v. *Menzies*, 72 L. T. Jour. 348. When service set aside.

An order directing substitutional service upon solicitors of defendant in a former action was set aside, it being shown that the solicitors had ceased to act for defendant in such former action: *The Pommerania*, 4 P. D. 195.

A combination of different modes of effecting service where defendant's address is not known or he cannot be found may be ordered, depending upon the circumstances of the particular case.

Examples.—Where the defendant was suppposed to be within the jurisdiction but had absconded or was evading service, service was allowed by leaving copies of writ at his last lodgings and place of business and by advertising or mailing: *Cook* v. *Dey*, 2 Ch. D. 218; *Capes* v. *Brewer*, 24 W. R. 40; by serving tenants of lands in question in the action to whom the defendant had given notice to pay rents to him, and advertisement: *Crane* v. *Jullion*, 2 Ch. D. 220; *Coulbourn* v. *Carshaw*, 32 W. R. 33; by leaving copy of writ at defendant's only known place of residence, a club, and serving solicitors who refused to accept service but had acted in other matters for defendant: *Rafael* v. *Ongley*, 34 L. T. N. S. 124; see *Anon*, 1 Char. Ch. Ca. 38; by mailing to his address and advertising: *Hamilton* v. *Davies*, W. N. 1880, 82; by serving defendant's wife, leaving copies at his residence and advertising: *Mullows* v. *Bannister*, W. N. 1882, 183; 31 W. R. 238. Where defendant is out of the jurisdiction but his whereabouts unknown, service may be allowed by advertising alone if no agent within the jurisdiction or person likely to be in communi-

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cation with defendant: *Hartley* v. *Dilke*, 35 L. T. N. S. 706; *Gordon* v. *Hanna*, 6 P. R. 266; *Whitley* v. *Honeywell*, 24 W. R. 851; or by advertising and mailing to various addresses at which defendant has been heard of: *Stimson* v. *Stimson*, 6 Gr. 379.

Practice.

Substituted service, when duly effected, is for all purposes equivalent to personal service: *Watt* v. *Barnett*, 3 Q. B. D. 363.

When necessary to effect substitutional service on several defendants at the suit of the same plaintiff, and the application is based on the same facts, a single affidavit may be used setting out the necessary facts and entitled in all the actions: *Dorsey* v. *Shanahan*, 8 L. R. Ir. 155.

Any objection to an order allowing any particular mode of service must be taken by motion to set aside the order and not by pleading the objection as a defence: *Preston* v. *Lamont*, 1 Ex. D. 363; and it should be made before the defendant has taken any other step in the action, otherwise he will be deemed to have waived his right to object: see *Fry* v. *Moore*, 23 Q. B. D. 395.

Costs.

Costs of a motion for leave to effect substituted service are taxable in the cause: *Eager* v. *Buckley*, 8 L. R. Ir. 99.

Indorsement of receipt of process, etc.; non-service, re-delivery to plaintiff; costs of service.

254. Upon the delivery of a writ of summons at the office of a Sheriff, to be served by him, he, his Deputy or Clerk, shall indorse thereon the time when it was so delivered; and in case the writ is not fully and completely served within ten days after such delivery, the plaintiff, his solicitor or agent, shall be entitled to receive back the same; and the Sheriff, Deputy Sheriff or Clerk shall indorse thereon the time of the delivery; and the costs of the mileage and service of the writ by any literate person afterwards, shall, in case the person to be served was at any time during such ten days within the County, be allowed in the taxation of costs, as if the service had been by the Sheriff or his officer. R. S. O. 1877, c. 50, s. 23; c. 40, s. 95.

Failure by Sheriff to re-deliver.

255. If the Sheriff, being applied to, neglects or refuses to return the writ, after the expiration of the ten days, the plaintiff may issue a duplicate or concurrent writ on the *præcipe* already filed, and the costs of the first or other writ not returned may be charged against and recovered from the Sheriff by the plaintiff or his solicitor. R. S. O. 1877, c. 50, s. 24; c. 40, s. 96.

Indorsement of service.

256. The persons serving a writ of summons shall, within three days at most after the service, indorse on the writ the day of the month and week of the service thereof; otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default [without the leave of a Judge, such leave to be obtained at the cost of the plain-

tiff, and such cost to be in no event charged against the defendant. Rules 257-258.

(*a*) Every affidavit of service of such writ shall mention the day on which such indorsement was made. J. A. Rule 44.

See Eng. R. 1875, O. 9, r. 13, (1883, R. 62).

The words in brackets are not in the Eng. Rule. In *Hastings* v. *Hurley*, 16 Ch. D. 734, and in *Sproat* v. *Peckett*, W. N. 1883, 76; 48 L. T. N. S. 755, and in *Shepherd* v. *Silcock*, W. N. 1886, 84, the time for making the indorsement was extended under *Rule* 485.

An order to amend the indorsement of service was granted where a wrong date was indorsed by mistake: *Hyne* v. *Murphy*, 2 L. R. Ir. 35.

Holidays are not included in the three days: *Rule* 473.

This *Rule* has been held not to apply to cases of substituted service: *Dymond* v. *Croft*, 3 Ch. D. 512; *Cruse* v. *Kuttingwell*, W. N. 1875, 250; 1 Charl. Ch. Ca. 40; or where notice in lieu of service, (see *Rule* 272) is given: *Fish* v. *Chatterton*, W. N. 1882, 145; 31 W. R. 87; 47 L. T. N. S. 328; or where the writ is served by advertisement: *Davis* v. *Lound*, 78 L. T. Jour. 318; W. N. 1885, 54.

(a) *Married Women, Infants, Lunatics.*

257. A married woman shall be served in the same manner as a party to an action or matter not under any disability; and the like proceedings may be had on such service and with the like effect, as if the married woman were a *feme sole*. J. A. Rule 35. Married Woman.

This *Rule* corresponds with the Chancery Order, No. 613. The Eng. Rule of 1883, R. 50, provides that where the husband and wife are both defendants, they shall both be served unless the Court or a Judge shall otherwise order. The previous Rule of 1875, O. 9, r. 3, was different. If the husband and wife lived together, service on the husband was to be deemed good service on the wife, but the Court or a Judge might order that the wife should be served with, or without, service on the husband. The *Married Women's Acts* here have made a difference; see R. S. O. c. 132, and notes to *Rule* 314, and the above *Rule* 257 is in furtherance of their object.

258. Where the action is in respect of an estate in which an infant is interested, service on the official guardian shall be good service on the infant defendant. Service on official guardian.

(*a*) If in such case there are more than one infant defendant, for whom service is to be made on the Official Guardian, one copy only need be so served.

(*b*) From the time of such service the Official Guardian shall become and be the guardian *ad litem* of the infant, unless and until the Court otherwise orders; and it shall be his duty forthwith to attend actively to the interests of the infant in the action, and for that purpose to communi-

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Rules 259, 260.

cate with all proper parties, including the father or guardian (if any) of the infant, and also the person with whom or under whose care the infant resides, in case such person is not the infant's father or guardian; and the guardian is to make such other inquiries and to take such other proceedings as the interest of the infants may require. J. A. Rule 36, *first part.*

The practice under Eng. R. 1875, O. 9, r. 4, (1883, R. 51) is different.

This *Rule*, in the cases to which it applies, is in substantial accordance with the Chancery Orders 610, 611, as construed in the Court of Chancery, except that those Orders required an *ex parte* order to be taken out for the appointment of the guardian, which order the present *Rule* dispenses with.

The original *Rule* 36 had no application in the cases in which an infant defendant was to be personally served (see *Rule* 259) nor where the infant defendant was not resident in Ontario. It was also held that in an action against an infant for seduction it was not proper to serve the Official Guardian or appoint him guardian for the defendant. In the revision of the *Rules* it is made clear that the cases in which the Official Guardian is to act are to be those which formerly were dealt with in Chancery, viz., where an infant, whether within, or without, the Province, was interested in an estate in question in the suit. In all other cases *Rule* 261 applies, and a guardian is to be appointed as in Common Law actions before the J. A. 1881.

The words in the original *Rule* 36 limiting its scope to cases where the infants reside in Ontario having been omitted and Chy. Orders 610-612 having been abrogated (see *Rule* 3), such cases as *Weatherhead* v. *Weatherhead*, 9 P. R. 96; and *Rew* v. *Anthony*, *Ib.*, 545, are not now to be followed.

The *Rules* as to service in case of infancy apply whether the infant be a sole or joint defendant, and whether sued personally, or in a representative capacity: *Re Jackson*, *Massey* v. *Crookshanks*, 12 P. R. 475.

Service on infant personally.

259. Where an action is brought against an infant defendant for the recovery of lands, goods, or chattels of which he is personally in possession, service shall be made on the infant personally, and one copy of the writ shall also be posted (prepaid) to, or delivered at the office of the Official Guardian. J. A. Rule 37.

This varies from Eng. R. 1875 and 1883, O. 9, r. 4. Personal service on an infant is made in the same manner as upon an adult: Dan. Chy. Prac. (5th ed.) 368, 376.

Where an infant is out of the jurisdiction the Court has the like power to order substitutional service or by publication or otherwise as in the case of an adult: *Duffy* v. *O'Connor*, 1 Chy. Ch. 393.

See also notes to the preceding *Rule*.

Torts.

260. When the action is against an infant in respect of a personal tort or for the mere recovery of money, the infant shall be served as in the case of an adult defendant. New.

See note to *Rule* 258.

261. When the infant is personally served and is not represented by the Official Guardian, there may be a guardian appointed for the infant as in actions at Common Law before the Judicature Act. New. Rules 261-263. Guardian other than official guardian.

See note to *Rule* 258.

The C. L. practice referred to is that by which a real guardian and not a fictitious one was appointed after the time for appearance has expired. If the infant does not appear by guardian an order may be obtained by the plaintiff on motion requiring the infant to appear by guardian or in default that the plaintiff may appoint one for him: *Hyne* v. *Brown*, 13 P. R. 17.

The consent of such guardian named by the plaintiff must be shewn and also that he has no interest adverse to the infant: *Ib.*

262. Any person interested may move before a Judge in Chambers, on such material as he may think proper, for an order appointing a guardian other than the Official Guardian; whereupon such order as may be considered most conducive to the interests of the infant shall be made. J. A. Rule 36, *last part*. Motion for guardian.

This *Rule* is in substantial accordance with Chancery Order 612.

In *Horkins* v. *Harty*, 6 P. R. 200, under the former practice in a redemption suit to which the widow and infant heirs of the mortgagee were parties defendant, a guardian named by the mother was appointed to the infants, it being considered that there was no conflict of interest between the defendants. The present practice is, however, different. In *Hodgins* v. *Hodgins*, (Mr. Dalton, March, 1882), the mother of infant defendants of tender years, who was also their guardian appointed by the Surrogate Court for the purpose of taking proceedings on their behalf for partition of the lands in question under *The Partition Act*, applied to have a guardian other than the Official Guardian appointed. There was no conflict of interest and the action involved a partition of lands inherited by the infants from their grandfather, but the Master in Chambers held that there was no sufficient reason for acting under the power conferred by this *Rule*, and that the policy adopted by the *Rules* of appointing the Official Guardian was not to be departed from without some reason, apart from the wishes of those who naturally have the care of the infants' interests.

On an application at the instance of an infant of 18 who was considered capable of exercising a sound discretion in managing his own affairs and applied with the approbation of his father, a guardian nominated by the infant was appointed under the above clause in the place of the Official Guardian: *McKenzie* v. *Dwight*, 2 C. L. T. 359.

263. Where a lunatic, or [where a person] of unsound mind not so found by inquisition [or judical declaration] is a defendant to the action, service on the committee of the lunatic, or on the person with whom the person of unsound mind resides, or under whose care he or she is, shall, unless the Court or a Judge otherwise orders, be deemed good service on such defendant. J. A. Rule 38. Lunatics.

Same as Eng. R. 1875, O. 9, r. 5 (1883, R. 52), except the words in brackets. The R. S. O. c. 54, s. 8, authorizes the Court or a Judge to declare a person a lunatic without an inquisition.

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Rules 264, 265.

Where a lunatic had no committee, service was, in England, directed to be on the keeper of an asylum where the lunatic was living: *Thorn* v. *Smith*, W. N. 1879, 81; 27 W. R. 617. It is the duty of the keeper of an asylum to allow the writ to be served: *Denison* v. *Hardings*, W. N. 1867, 17, unless the service might be injurious to the lunatic; *Re Mein*, 2 Chy. Ch. 429. Service on the manager of a lunatic defendant's business was held bad: *Forestreet Co.* v. *Durant*, 10 Q. B. D. 471.

By R. S. O. c. 245, s. 53, the Inspector of Prisons and Public Charities is *ex officio*, and by his name of office, the committee of every lunatic who has no other committee, and who is detained in a public asylum, and it presumed that in such case service may be made upon the Inspector.

Guardian *ad litem.*

264. No further proceedings are to be taken against such a defendant who has no committee, until a guardian *ad litem* is appointed. J. A. Rule 39.

See notes to *Rules* 335, 336 (*a*).

(*b*) *Partners.*

See note to *Rule* 317.

Partners.

265. Where partners are sued in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within Ontario of the business of the partnership, upon any person having at the time of service the control or management of the partnership business there; and, subject to the Rules hereinafter contained, such service shall be deemed good service upon the firm. J. A. Rule 40.

Same as the Eng. R. 1875, O. 9, r. 6, (1883, R. 53).

Service on a person who is not a partner may be discharged with costs on the application of the firm: *Nelson* v. *Pastorino*, 49 L. T. N. S. 564.

It has been held that a private partnership does not exist apart from the individuals who compose it, and if they are resident abroad they cannot be served at a place of business of the firm within the jurisdiction, and that therefore this *Rule* must be read so as to refer only to partners of firms subject to the jurisdiction of the English Parliament by being British subjects, or resident within the jurisdiction, unless the subject matter of the action is such as to justify service out of the jurisdiction under *Rule* 271: *Russell* v. *Cambefort*, W. N. 1889, 139; 37 W. R. 701, over-ruling the contrary decision of *O'Neil* v. *Clason*, 46 L. J. Q. B. 191; see also *Nutter & Co.* v. *Messageries Maritimes*, 54 L. J. Q. B. 527. Where, however, one partner of a firm carrying on a business out of the jurisdiction happened to be within the jurisdiction, service upon him of a writ naming the ordinary time for appearance was held good service under this *Rule*: *Pollexfen* v. *Sibson*, 16 Q. B. D. 792: see *Russell* v. *Cambefort*, *supra*. As to what constitutes "having the control or management of the partnership business," see *Baillie* v. *Goodwin*, 33 Ch. D. 604.

Where a partnership, unregistered, existed between A. B. and C. under the style A. & Co. and A. absconded, and three days later C. made a secret assignment of his interest in the business to B., and two days thereafter, before the announcement was made public, C. was served with a writ in an action against the firm by its firm name, of which proceedings B. was aware, it was held that the service was good: *Bank of Hamilton* v. *Blakeslee*, 9 P. R. 130.

Though the partners in such action are to appear individually (*Rule* 288) the judgment is not against them individually, but must follow the writ and be against the firm: *Jackson* v. *Litchfield*, 8 Q. B. D. 474: *Adam* v. *Townsend*, 14 Q. B. D. 103; (see discussion of this case in 17 L. J. 324). **Rules 266, 267.**

266. Where one person carrying on business in the name of a firm apparently consisting of more than one person, is sued in the firm name, the writ may be served at the principal place within Ontario of the business so carried on, upon any person having at the time of service the control or management of the business there; and, subject to any Rules of Court, such service shall be deemed good service on the person so sued. J. A. Rule 41. Person doing business under name of firm.

Same as Eng. Rule of June, 1876, R. 4, (1883, R. 54.)

This *Rule* does not apply where the person so carrying on business has become a lunatic. *Rule* 263 in such case applies: *Fore Street Warehouse Co.* v. *Durrant & Co.*, 10 Q. B. D. 471.

If a business is carried on by a single individual he may be sued in the firm name. *Rule* 266 provides for the service of the writ; *Rule* 288 provides for the defendant's appearance.

See also the notes to the previous *Rule*.

(c) *Corporations.*

267. A writ of summons issued against a corporation aggregate, and, in the absence of its appearance by solicitor, all papers and proceedings in the action before final judgment, may be served on the Mayor, Warden, Reeve, President, or other head officer, or on the Township, Town, City or County Clerk, or on the Cashier, Treasurer or Secretary, Clerk or Agent of such corporation, or of any branch or agency thereof in Ontario; and every person who, within Ontario, transacts or carries on any of the business of, or any business for, any corporation whose chief place of business is without the limits of Ontario, shall, for the purpose of being served with a writ of summons issued against such corporation, be deemed the agent thereof. R. S. O. 1877, c. 50, s. 21. *See* Chy. O. 91, 92. Service on corporations, how effected.

The Eng. Rule of 1883, R. 55, first clause, contains analogous provisions, being a consolidation of the repealed Rule of 1875, O. 9, r. 7, and the provisions of sec. 16 of the C. L. P. Act of 1852.

A foreign corporation which carries on business within Ontario is capable of being treated for the purposes of service as a Provincial corporation resident within the Province: *Haggin* v. *Comptoir, etc.*, 37 W. R. 703, approving of and following *Newby* v. *Von Oppen*, L. R. 7 Q. B. 293, see also *Palmer* v. *Gould's Manufacturing Co.*, W. N. 1884, 63; *per* Lord St. Leonards in *The Carron Iron Co.* v. *Maclaren*, 5. H. L. C. at p. 459. Service under the Eng. Rule 1883, R. 55, was held good on a foreign corporation which had an agency office in London: *Lhoneux & Co.* v. *Hong Kong & Shanghai Banking Co.*, 33 Ch. D. 446. But service on a mere booking clerk of a Scotch railway company at a station on Foreign corporations.

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Rules 268, 269.

an English railway over which the Scotch company had running powers, was held insufficient in *Mackereth* v. *Glasgow and South Western Railway Co.*, L. R. 8 Ex. 149.

Where, by a Statute, service of a writ might be effected by being left at, or sent by post to, the company's office, or given to the secretary or, if no secretary, to a director, and the company had no office, and the action was brought by the secretary, service on a director was held invalid: *Lawrenson* v. *Dublin Metropolitan, etc., Railway*, 37 L. T. N. S. 32.

Service within the Province on the President of a foreign corporation was held bad where it was not shewn that it transacted any business there: *Wilson* v. *Detroit & Milwaukee Ry. Co.*, 3 P. R. 37. Where a foreign Insurance Co. had a head office for the Province in Toronto service, on the local agent of the Co. at Ottawa was held good, notwithstanding the provisions of the Dom. Act, 40 V. c. 42, s. 9: *Wilson* v. *Ætna Life Insurance Co.*, 8 P. R. 131: see now R. S. C. c. 124, s. 13.

A colonial Government: *Sloman* v. *Governor of New Zealand*, 1 C. P. D. 563, and a foreign Government: *Strousberg* v. *Costa Rica*, 29 W. R. 125, have been held not to be corporations.

It has been decided under the English O. 63 of 1875, and s. 100 of the Act of 1873 [see s. 27 of the Ont. Act, and R. S. O. c. 1, s. 8 (13)], that a foreign corporation, though it does not carry on business within the jurisdiction, may be sued there, in cases where an individual foreigner might be sued: see *Westman* v. *Aktiebolaget, etc.*, 1 Ex. D. 237, and *Scott* v. *The Royal Wax Candle Co.*, 1 Q. B. D. 404: and *Royal Mail Steam Packet Co.* v. *Braham*, 2 App. Cas. 381.

Such a corporation might, under the old practice, have been sued in Ontario, and the mode of service in such a case was prescribed by Chy. O. 92, and R. S. O. 1877, c. 50, ss. 50 and 51. Since the Jud. Act a foreign defendant can only be sued where *Rules* 271 to 274 apply.

Services of papers on certain corporations.

268. A writ of summons issued against a railway, telegraph, or express corporation, and all subsequent papers and proceedings, in the event of an appearance not having been duly entered, may be served on the agent of such corporation, at any branch or agency thereof, or on any station master of any railway company, or on any telegraph operator, or express agent having charge of any telegraph or express office belonging to such corporation; and any such station master, operator or express agent shall, for the purpose of being served with a writ of summons issued against such corporation, or any paper or proceeding as aforesaid, in the event of non-appearance, be deemed the agent thereof. R. S. O. 1877, c. 50, s. 22.

See notes to the preceding *Rule*.

Service as provided by any special statute.

269. Where, by any statute, provision is made for service of any writ of summons, bill, petition, or other process upon any corporation, or any society or fellowship, or any body or number of persons, whether corporate or otherwise, every writ of summons may be served in the manner so provided. J. A. Rule 42.

Same as Eng. Rule 1883, R. 55, last clause. **Rule 270.**

A mode of serving companies incorporated by special Act and by letters patent was formerly provided in the case of corporations created by Provincial authority by R. S. O. 1877, c. 149, s. 43, and c. 150, s. 60, but these sections have not been consolidated in the R. S. O. 1887. See R. S. C. c. 118, s. 42; c. 119, s. 62, as to companies incorporated by the authority of the Dominion Parliament; and *Ib.* c. 124, ss. 13 and 16, as to Insurance Companies. See also *White* v. *Land and Water, etc., Co.*, W. N. 1883, 174, and *Harvey* v. *Harvey*, 9 Ont. App. 91. Cos. by letters patent or special Act.

270. In case an action against a corporation is brought in Ontario on a judgment or decree obtained in the Province of Quebec, service of process on the officer or officers thereof named in the Act, incorporating such corporation, or in case there be no officer named in the said Act, then service of process according to the law of the Province of Quebec, shall be held to be personal service. R. S. O. 1877, c. 50, s. 147. Service in actions on Quebec judgments.

See *Court* v. *Scott*, 32 U. C. C. P. 148.

(ii) *Service out of Ontario.*

Comp. R. S. O. 1877, c. 50, s. 48; Eng. R. 1875, O. 2, r. 4 *Ib.*, O. 11, Eng. R., June, 1876, R. 5; Con. *Rules* of 1883, 64; Ont. Chy., Orders 90, 100, 102, 620; Ont. J. A. 1881, *Rules* 45, 47.

Previously to 2 Will. 4., c. 33, a writ from Chancery might be served out of the jurisdiction; but unless the party served chose to appear, the suit could not be proceeded with as against him. The following Statutes and Orders bearing on the subject were subsequently passed in England: 2 Will. 4., c. 33; 4 & 5 Will. 4, c. 82; 3 & 4 Vict. c. 94; 4 & 5 Vict. c. 52; G. O. May, 1845; 15 & 16 Vict. c. 86, s. 3; Consol Orders, Order 10, rr. 6, 7, etc. The practical effect was that in England the Court of Chancery at the time of the passing of the *Judicature Act* of 1873 could sanction service out of the jurisdiction in any suit. By the Provincial Statutes affecting the Court of Chancery, and the Orders made by that Court in this Province, the Court had a like jurisdiction: see Consol Chy. Orders, 90, 101, 102, 620; 12 Vict. c. 64, s. 9; 20 Vict. c. 56, s. 21; C. S. U. C. c. 12, s. 74, (R. S. O. 1877, c. 40, ss. 93, 94, now *Rules* 274, 273.) Jurisdiction before Jud. Act.

In the Common Law Courts, the power of serving a defendant out of the jurisdiction was governed in England by sections 18 and 19 of the C. L. P. Act, 1852, and in this Province by the C. L. P. Act, (R. S. O. 1877, c. 50,) ss. 49, 50 and 51. These sections cover two classes—(1) British subjects resident abroad, and (2) foreigners; and their operation was limited in several respects. The authority given by original J. A. *Rules* 44 and 45 was more extended than that given by the Common Law Procedure Act.

The present *Rules* embrace all the cases in which it seems intended that the jurisdiction of the English High Court should for the present be exercised; and they will probably include all which the Court in Ontario will ordinarily sanction. Jurisdiction under the Jud. Acts.

In England it has been held that the provisions of the new *Rules* are exhaustive, and even though under any former practice process might be served out of the jurisdiction it will not now be allowed unless the case falls within these *Rules*: *Re Eager*, 22 Ch. D. 86.

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Rule 270.

In Ontario, however, the original J. A. *Rule* 47, contemplated the exercise of any other powers theretofore possessed by the Courts. That *Rule* has been omitted in the Consolidation of the *Rules* because all the Acts and *Rules* which conferred jurisdiction or regulated the practice in former Courts have now been consolidated in the R. S. O., or Con. *Rules*: see Act ss. 20, 21, 23, and *Rules* 273 and 274.

The original J. A. *Rule* 45, followed the corresponding Eng. Rules in force prior to 1883. In 1883 the Eng. Rule having been found defective a new *Rule* was passed. No particular inconvenience was experienced in Ontario under *Rule* 45, but in the present Consolidation, the English Rule of 1883 has been adopted instead of J. A. *Rule* 45, as being probably more comprehensive, and for the sake of uniformity. The clause 45 (*e*) which was not contained in the Eng. Rules of either 1875 or 1883 (being taken from R. S. O. 1877, c. 50, ss. 50 and 51), has, however, been dropped in adopting the Eng. Rule: see *Irwin* v. *Brown*, 12 P. R. 639. It had been often usefully applied.

Under Eng. Jud. Act.

The effect of the *Rules* in Ontario is made slightly different from that of the English Rules. Under the latter no writ which, or notice of which, is intended to be served out of the jurisdiction, can be issued without the leave of the Court or a Judge (*Rule* 6). Leave to issue and serve the writ may be asked for on the same motion: *Young* v. *Brassey*, 24 W. R. 110: 1 Ch. D. 277; *Traill* v. *Porter*, 1 L. R. Ir. 60; or separately: *Stigand* v. *Stigand*, 19 Ch. D. 460; and in Chambers: *Ib.* The application is not one which can be entertained by a District Registrar, or a Master, (Eng. Rules 1883, 406 and 745), and has been regarded by one Judge (V.-C. Hall) as of such importance that he directed that in all cases in his Court he should be personally consulted: *Tottenham* v. *Barry*, 12 Ch. D. 798. See, however, *Stigand* v. *Stigand*, *supra*.

An affidavit is necessary in all cases showing the cause of action, where it arose, and affirming the truth of the facts constituting the cause of action: see *Great Australian Mining Co.* v. *Martin*, 5 Ch. D. 1; *Société, etc.* v. *Dreyfus*, 37 Ch. D. 215; and stating the amount or value of the property in question, the place where the defendant may be found, and whether or not the defendant is a British subject.

Practice in Ontario.

Under the Ontario *Rules* it is not necessary to obtain leave to issue or serve the writ (though that course may be pursued), but an order allowing the service, after it has been effected, will be made upon proof that the service was duly made, and that the case was a proper one for service out of the Province under the *Rules*: *Rule* 274.

It was not the practice of the former Court of Chancery to require service in such case to be allowed, but if no answer was filed the plaintiff had to move in Chambers to take the bill *pro confesso*. The affidavit usually necessary on such motion was merely to establish the fact of the service and that the person served was really the defendant. As to the mode of identification: see *Armour* v. *Robertson*, 1 Chy. Ch. 252; *Stilson* v. *Kennedy*, 1 Chy. Ch. 236; *Erle* v. *Hunt*, 2 Chy. Ch. 395.

Affidavit required.

Such an affidavit is still required under the new practice; and the affidavit should also show that *prima facie* the plaintiff has a good cause of action within the *Rules*, as is in England necessary on applying for leave to issue and serve the writ: see *Great Australian Mining Co.* v. *Martin*, 5 Ch. D. 1. Under the analogous practice formerly in a Common Law action of an application for leave to proceed in default of appearance (omitted from, and repealed, by the R. S. O. 1887, and held to be superseded by the original *Rule* 48, now 274, in *London Guarantee Co.* v. *Shields*, Mr. Dalton, 2nd Sept., 1881; *Martin* v. *Lafferty*, 9 P. R. 301); an affidavit was required, to satisfy the Court that the plaintiff had a good cause of action: see R. S. O. 1877, c. 50, ss. 49 and 51.

The affidavit need only establish a *prima facie* case, but it should be "candid": see *Hardingham* v. *Rowan*, 24 Sol. Jour. 309. An order, *ex parte*, allowing service out of the jurisdiction was discharged upon its being shown that the affidavit on which the order was obtained contained misstatements of fact, which had the effect of showing the plaintiffs to have good cause of action: *Republic of Peru* v. *Dreyfus*, 55 L. T. N. S. 802. The affidavit may be made by

the solicitor or any one who has a knowledge of the facts. Identifying a copy of the statement of claim is not enough; the material allegations contained in it as to the contract, etc., must be sworn to: *Great Australian, etc.* v. *Martin, sup.*; *Perkins* v. *Mississippi, etc., Co.*, 10 P. R. 198; *Société, etc.* v. *Dreyfus*, 37 Ch. D. 215. It is not necessary to use the words "there is a cause of action" if the facts sworn to shew it: *Fowler* v. *Barstow*, 30 W. R. 113, 20 Ch. D. 240. **Rule 270.**

An affidavit for leave to serve a writ where the plaintiff prefers that course should be entitled "In the matter of an intended action between, etc.": *Young* v. *Brassey*, 1 Ch. D. 278; *Blake* v. *Lever*, 6 L. R. Ir. 476; and must shew a *prima facie* cause of action within this *Rule*.

What documents or proceedings other than writs of summons may be served out of the jurisdiction was originally left in some uncertainty. It is held in England (under R. S. C. 1883, O. 11, r. 1) that service of an order or notice of an order out of the jurisdiction is a question of jurisdiction, not of practice, and the Court can only order such service under statutory authority or *Rules* having the force of a statute; and that there is no jurisdiction to order service of an originating summons out of the jurisdiction, it being held is the corresponding English Order is the only one dealing with service out of the jurisdiction, and that it applies in terms only to writs of summons: *Re Busfield, Whaley* v. *Busfield*, 32 Ch. D. 123. Leave was on this ground refused, in *Re Brandon*, 54 L. T. N. S. 128, a summons to tax; *Re Anglo African S. Co.*, 32 Ch. D. 348, a notice of motion to wind up a Co.; and *Re Jellard*, 39 Ch. D. 424, a petition under the Trustee Acts for payment of money out of Court. **Service of proceeding other than writs of summons out of the jurisdiction.**

On the other hand the contrary was decided in *Re Pepper*, 32 W. R. 767; 50 L. T. N. S. 580; 53 L. J. Chy. 1054, in the case of an originating summons and it is clear that the *Rules* apply to service of a notice to a "third party" (under *Rules* 328 and 329) if out of the jurisdiction: *Swansea, etc.* v. *Duncan*, 1 Q. B. D. 644; *Dubout* v. *Macpherson*, 23 Q. B. D. 340. In *Colls* v. *Robins*, W. N. 1886, 111, a petition for payment out of Court was allowed to be served on parties out of the jurisdiction, and in *Credit Gerundeuse* v. *Van Weede*, 2 Q. B. D. 171, a claimant out of the jurisdiction was allowed to be served in interpleader proceedings: but in *Re Brandon*, 34 W. R. 352, it was held that this case should not be extended.

Notice of an appointment to settle a list of contributories, in the winding up of a company, served on contributories out of the jurisdiction, by posting to them under the Companies Act was held to be good notice to them: *Re Nathan, Newman & Co.*, 56 L. T. N. S. 95; 35 Ch. D. 1.

Rule 271 has, in the revision of the Rules, been expressed so as to apply to all documents by which a matter or proceeding is commenced. In this respect it differs from the previous *Rule* and the corresponding English Rule of 1883, R. 64.

Leave to serve a counter-claim on a third person out of the jurisdiction was granted in *Re Luckie*, W. N. 1880, 12, but refused in *Potters* v. *Miller*, 31 W. R. 358.

The Court is not bound to allow service in cases within this *Rule*, but has a discretion on a consideration of the merits: *Société Générale de Paris*, v. *Dreyfus*, 37 Ch. D. 215.

If the case is not one in which service should be allowed, the proper course is, not to raise the question by statement of defence, but to move to set aside the service or to rescind the order allowing service if an order has been made: *Preston* v. *Lamont*, 1 Ex. D. 361; *Boyle* v. *Sacker*, 39 Ch. D. 249. **Motion to set aside service.**

Where the order giving leave to serve out of the jurisdiction had been made, a motion against it on the ground of irregularity made after the lapse of a year was held to be too late: *Reynolds* v. *Coleman*, 36 Ch. D. 453.

Where defendant moves against the order or to set aside the service, affidavits are admissible to try the question whether a cause of action arose within the jurisdiction, or other circumstances exist which are necessary under *Rule* 271 to give the Court jurisdiction, though not to try the merits of the case:

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Rule 270. *Fowler* v. *Barstow*, 20 Ch. D. 240; overruling on this point *Great Australian Gold Mining Co.* v. *Martin*, 5 Ch. D. 1; see also *Thomas* v. *Hamilton*, 17 Q. B. D. 592; *Société, etc.* v. *Dreyfus*, 37 Ch. D. 215.

Where a defendant was resident in Scotland or Ireland the omission of any statement that he was a British subject was held immaterial: *Fowler* v. *Barstow, supra.*

Where there has been a conflict of evidence as to whether the cause of action arose within or without the jurisdiction orders have been made similar to that in *Diamond* v. *Sutton*, L. R. 1 Ex. 130, *i.e.*, the service to stand, plaintiff undertaking to be non-suited if no cause of action within the jurisdiction be shewn at the trial: see *O'Donohoe* v. *Wiley*, 43 U. C. Q. B. 350; *Nottage* v. *Aitken*, 71 L. T. Jour. 326, 25 Sol. Jour. 834; see also *Fowler* v. *Barstow*, 20 Ch. D. 240; *Shearman* v. *Findlay*, 32 W. R. 122; *Thomas* v. *Hamilton*, 17 Q. B. D. 592, reversing the judgment of the Court below reported in 55 L. T. N. S. 219; but see *Perkins* v. *Mississippi, supra*, where the practice was disapproved of.

It has been held that an appearance by defendant does not estop him from moving to set aside a writ and service as contrary to this *Rule*: see *White* v. *MacGregor*, Mews Dig. 1882, 342, *sed quære.*

Objection to an order for service was held to have been waived by appearing on a motion for injunction and arguing the merits: *Boyle* v. *Sacker*, 39 Ch. D. 249; by taking out a summons for delivery of a statement of claim: *Fry* v. *Moore*, 23 Q. B. D. 398; and by applying for security for costs: *Lhoneux & Co.* v. *Hong Kong, etc., Corp.*, 33 Ch. D. 446; proceeding to examine witnesses after objection to the jurisdiction over-ruled: *Guy* v. *G T. Ry. Co.*, 10 P. R. 372. See also notes to *Rule* 277.

Substituted service. Under the Irish Rules it is held that a writ intended to be served substitutionally upon a person within the jurisdiction may be issued without leave though the defendant be resident out of the jurisdiction: *Lewis* v. *Herberts*, 16 L. R. Ir. 340; but the contrary has been held in England: *Fry* v. *Moore*, 23 Q. B. D. 395, where it was said that holding otherwise would enable the *Rule* to be evaded, which requires leave to be obtained. Where a writ has been properly issued against a defendant out of the jurisdiction, an order for substitutional service within the jurisdiction may be obtained: *Ford* v. *Shephard*, 53 L. T. N. S. 564.

Probably in Ont. an order for substituted service can only be obtained in case the subject matter of the action makes *Rule* 271 applicable; and the time for appearance, etc., will be the same as if the defendant had been served out of the jurisdiction.

There cannot be substituted service of an ordinary writ on a defendant who cannot be served by reason of his being out of the jurisdiction: *Société Industriale, etc.*, v. *Companhia Portugueza, etc.*, W. N. 1889, 32; *Fry* v. *Moore*, 23 Q. B. D. 399; *Hillyard* v. *Smyth*, 36 W. R. 7; see *Field* v. *Bennett*, 56 L. J. Q. B. 89. *Stewart* v. *Bank of England*, W. N., 1876, 263.

Foreign Corporations. A foreign corporation is within the *Rules* and may be served abroad: *Scott* v. *Royal Wax Candle Association*, 1 Q. B. D. 404; *Westman* v. *Aktiebolaget, etc., Snickarefabrik*, 1 Ex. D. 237, but not a foreign sovereign or state: *Strousberg* v *Costa Rica*, 29 W. R. 125; see also *Sedgwick* v. *Yedras Mining Co.*, 35 W. R. 780.

Notice in lieu of writ. Service of process upon a defendant not a British subject might involve unpleasant questions of jurisdiction. In such a case, therefore, notice of the writ, and not the writ, is served: *Beddington* v. *Beddington*, 1 P. D. 426; *Westman* v. *Aktiebolaget, etc.*, 1 Ex. D. 237; the Court having jurisdiction to so order service: *James* v. *Despott*, 14 L. R. Ir. 71; and that practice applies to the Chancery Division as well as to the other Divisions: *Re Howard. Padley* v. *Camphausen*, 10 Ch. D. 550. Where the writ was served instead of notice thereof, it was held, under the similar practice before the Judicature Act, that this was an irregularity which could not be cured by amendment, and the service was accordingly set aside: *Henderson* v. *Hall*, 8 P. R. 353; in *Heeitson* v. *Fabre*, B. D. 6, such service was held to be a nullity.

271. Service out of the jurisdiction of a writ of summons or notice of a writ of summons [or other document by which a matter or proceeding is commenced] may be allowed by the Court or a Judge whenever—[Eng. R. 1883, 64, (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*)]. Rule 271. Service out of jurisdiction.

The words in brackets are not in the English Rule.

(*a*) The whole subject-matter of the action is land situate within Ontario (with or without rents or profits); or Land in Ontario.

(*b*) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within Ontario, is sought to be construed, rectified, set aside, or enforced in the action; or—[Ont. R. 45 (*a*), altered].

A statement in the nature of slander of title, made out of the jurisdiction, concerning property within the jurisdiction has been held not to be an act or thing affecting such property within the meaning of this clause: *Casey* v. *Arnott*, 2 C. P. D. 24, where the *Rule* was held not to apply in a case in which the defendant in Ireland said that a ship in England was unseaworthy.

A slander not actionable in itself without special damage, spoken out of the jurisdiction, but resulting in special damage within the jurisdiction, was not within the original *Rule*: *Bree* v. *Marescaux*, 7 Q. B. D. 434, and does not seem to fall within any clause of the new *Rule*: see *Kaye* v. *Sutherland*, 20 Q. B. D. 147.

(*c*) Any relief is sought against any person domiciled or ordinarily resident within Ontario; or—

Unless an action for a personal wrong comes within this clause it would not seem to be covered by any of the clauses of this *Rule*.

It has been held in England that an Admiralty writ *in personam* cannot be issued for service abroad in respect of a wrong done on the high seas. The phrase in the English Act corresponding to "within Ontario" is "within the jurisdiction," which was construed to mean "within the territorial jurisdiction": *Re Smith*, 1 P. D. 300; *The Vivar*, 2 P. D. 29; which does not extend beyond low water mark: *Harris* v. *Owners of the Franconia*, 2 C. P. D. 173; see *Reg.* v. *Keyn*, 2 Ex. D. 63.

A company with a registered office in Scotland and branches in England, was held not to be domiciled or ordinarily resident in England: *Jones* v. *Scottish Accident Insurance Co.*, 17 Q. B. D. 421; *sed vide In re Burland*, *Burland* v. *Broxburn Oil Co.*, 41 Ch. D. 542.

(*d*) The action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Ontario; or [New].

Taken from Eng. Rules of 1883, 64 (d).

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Rule 271. (*e*) The action is founded on any breach or alleged breach within Ontario of any contract wherever made, which, according to the terms thereof, ought to be performed within Ontario; or— [Ont. R. 45 (*b*).]

It is not necessary that a contract should expressly state that it is to be performed within the jurisdiction. It is sufficient if this appears from the general terms of the contract having regard to the surrounding circumstances: *Reynolds* v. *Coleman*, 36 Ch. D. 453.

It was held in *Moritz* v. *Stephan*, 36 W. R. 779; 58 L. T. N. S. 850, that an action to enforce a charge obtained by a judgment creditor under a statutory provision (1 & 2 V. c. 110, s. 14), in that behalf, does not fall within this clause, nor any other clause, of this *Rule*, and that therefore service of a writ in such an action out of the jurisdiction is not authorized.

No difficulty can now arise such as used to arise under R. S. O. 1877, c. 50, s. 49, as to the meaning of a "cause of action which arose in Ontario": see *Gildersleeve* v. *McDougall*, 31 C. P. 164, 166. The breach within Ontario is the test of the application of the *Rule*.

Service was allowed.—Where the plaintiff complained of an agreement made in England as infringing on his rights under an agreement made in India, because the action both "affected" a contract made within the jurisdiction, and was in respect of a breach within the jurisdiction, of a contract made abroad: *Harris* v. *Fleming*, 13 Ch. D. 208; where a contract made in England by a defendant resident in Ireland, to pay for a rink constructed in Dublin, was broken by non-payment to the plaintiff in England: *Green* v. *Browning*, 34 L. T. N. S. 760; where delivery of goods, for which payment was sought, was sworn by plaintiff to have taken place in London, by the London house of the plaintiff and not by his Paris house: *Thomas* v. *Hamilton*, 17 Q. B. D. 592; 55 L. T. N. S. 219.

Where goods were furnished by an English firm to defendants in Man and no place for payment was named it was presumed that it was to be in England and the breach therefore took place there: *Robey* v. *Snæfell Mining Co.*, 20 Q. B. D. 152.

Service was not allowed.—Where the writ was indorsed with a claim to restrain a ship-owner from dealing with a ship in port at Cardiff contrary to a charter party entered into in Scotland between a plaintiff and defendant who both resided in Scotland: *Ex parte McPhail*, 12 Ch. D. 632; where the claim was by a *cestui que trust* resident in England for administration of trusts of Scotch property by Scotch trustees: *Cresswell* v. *Parker*, 11 Ch. D. 601; where mortgagees of a ship and her freight in an action against second mortgagees, discovered that some freight had previously to the suit been collected by brokers in Antwerp, who claimed to retain the money against a debt due to them by the second mortgagees. The plaintiffs obtained leave to serve the brokers, but the order was on motion set aside, the Court holding that the right to the freight was claimed by being entitled as mortgagees to take possession of the ship and its earnings, and not by seeking the enforcement of any contract: *McStephens* v. *Carnegie*, 28 W. R. 385; 42 L. T. N. S. 309.

Where by the contract, defendants, a steamship Company, were exempted from liability for damage for loss arising beyond their line of steamships, and there was a breach alleged within Ontario but beyond the said line of steamships, in not delivering the subject of the contract, it was held that as no damage would result from the breach, though the case was technically within this *Rule*, discretion, if any existed, should be exercised in refusing to allow the service: *Perkins* v. *Mississippi*, 10 P. R. 198.

Service was not allowed in an action for wrongful dismissal where the appointment was in Glasgow and the letter of dismissal was posted there. The defendant was a Scotch coal merchant, who verbally appointed the plaintiff commission agent in Ireland. The posting of the letter was held to be the act of dismissal: *Hamilton* v. *Barr*, 18 L. R. Ir. 297.

Under the English Rules of 1875 and 1883, if defendant is resident in Scotland or Ireland, the Court has to consider the comparative cost and convenience of proceeding to England, even where the case otherwise falls within the *Rules*: see *Tottenham* v. *Barry*, 12 Ch. D. 797; *Wood* v. *McInnes*, 4 C. P. D. 67; *Marshall* v. *Marshall*, 38 Ch. D. 330. **Rule 271.**

A foreigner resident in the Province, or a foreign corporation having a place of business in the Province may be served without any leave though the contract was made and breach thereof occurred out of the jurisdiction: see *Palmer* v. *Gould's Manufacturing Co.*, W. N. 1884, 63; and notes to *Rules* 267, 269.

(*f*) Any injunction is sought as to anything to be done within Ontario, or any nuisance within Ontario is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or ——— [Ont. R. 45 (*c*), (*d*).]

In *Tozier* v. *Hawkins*, 15 Q. B. D. 680, it was held under the corresponding English Rule that the Court might allow service out of the jurisdiction of a writ claiming an injunction to restrain the defendant from sending libels to the plaintiff, resident within the jurisdiction, where the defendant does not state on affidavit that he never comes within the jurisdictions.

See also *Lisbon* v. *Heddle*, 52 L. T. N. S. 796; *Speckhart* v. *Campbell*, W. N. 1884, 24.

(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction. New.

Taken from Eng. R. 1883, O. 11, r. 1 (9).

In an action against defendants in London, for breach of warranty of authority, their principals out of the jurisdiction having repudiated a contract abroad as made without authority, it was held that the foreign principals were proper parties and service on them was allowed abroad: *Massey* v. *Heynes*, 21 Q. B. D. 330.

See also *The Steamship Shanemore, Limited* v. *Thompson*, 52 L. T. N. S. 552; *Lisbon, etc.* v. *Heddle*, *Ib.*, 796.

Where the land in question was out of the jurisdiction, but some of the parties within, liberty was granted to serve a defendant out of the jurisdiction: *Jenney* v. *Mackintosh*, 33 Ch. D. 595.

In *Harvey* v. *Dougherty*, 56 L. T. N. S. 322, an action for breach of trust was brought against the executors of a testator dying in England, two of whom were in Ireland and one in England. The action was to compel them to replace assets invested in Ireland. Service of the defendants resident in Ireland was allowed: see also *Re Lane*, 55 L. T. N. S. 149.

In *Lightowler* v. *Lightowler*, W. N. 1884, 8, an order was made where the party out of the jurisdiction was a partner of the defendant already served, and the action was for specific performance of an agreement to convey the partnership property.

On an application to allow service on a party served abroad under this clause, it should be shown that there is some other party within the jurisdiction who has been served and against whom substantial relief is claimed: *Yorkshire Tannery Co.* v. *Eglinton*, 54 L. J. Chy. 81, 36 W. R. 162.

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Rules 272-274. Service of notice in lieu of writ.

272. Notice in lieu of a writ of summons shall be served in the same manner as writs of summons are served. J. A. Rule 49.

See Eng. R. 1875, O. 11, r. 5 (1883, R. 70) and the notes at the beginning of this heading.

Service of the writ instead of the notice thereof was held not to be an irregularity, but a nullity, and the service was set aside: *Hewitson* v. *Fabre*, 21 Q. B. D. 6; also *Henderson* v. *Hall*, 8 P. R. 353. As to when a notice is to be served in lieu of a writ see *supra* p. 302.

Other modes of proceeding against absent defendant.

273. Where a party to any action or matter is absent from the Province or cannot be found therein to be served, the Court may authorize proceedings to be taken against him according to the practice of the Court in the case of a defendant whose residence is unknown, or in any other manner that may be provided or ordered, if the Court, under the circumstances of the case, deems such mode of proceeding conducive to the ends of justice. R. S. O. 1877, c. 40, s. 94.

The Act from which this *Rule* is taken was held to apply to cases where defendants are very numerous or where they reside out of the jurisdiction at a very great distance, or where the residence is not known at all, or where from any other cause it would be difficult or expensive to effect a service: *Pearson* v. *Campbell*, 2 Chy. Ch. 25. Advertising has been dispensed with where it would be useless, and service allowed by mailing to the address of defendant's brother resident in the Province, though not in any way an agent of defendant: *Cooper* v. *Lane* 1 Chy. Ch. 363; see also *Dobson* v. *Marshall*, 9 P. R. 1.

Service made without previous order may be allowed.

274. It shall not be necessary before serving a writ, or notice of a writ [or copy of any other document by which a matter or proceeding is commenced], to apply to the Court or a Judge to allow the service; but in case proof is given to the satisfaction of the Court or Judge that the service was duly made and that the case was a proper one for service out of the Province under the preceding Rules, the service shall be allowed. J. A. Rule 48. R. S. O. 1877, c. 40, s. 93.

The words in brackets are not in the original *Rule*: see note *supra* p. 301.

This *Rule* does not preclude an application for leave to serve the writ, though in ordinary cases a motion to allow a service already effected will be sufficient. See also note to *Rule* 276.

The practice under this *Rule* superseded the former practice, under R. S. O. 1877, c. 50, ss. 49, 51, of applying for leave to proceed where service had been effected out of the jurisdiction: *London, etc., Guarantee Co.* v. *Shields*, Mr. Dalton, 1st Sept., 1881; *Martin* v. *Lafferty*, 9 P. R. 300.

Where an order for leave to serve the writ has been obtained it would appear to be unnecessary to apply after the service has been effected to have it allowed or to obtain any further liberty to sign judgment. A doubt on the point arose in England owing to the language of the form corresponding to Form No. 2.

The latter, however, does not contain the words creating the doubt in England: see *Scott* v. *Royal Wax Candle Co.*, 1 Q. B. D. 404; *Bacon* v. *Turner*, 3 Ch. D. 275; but perhaps on signing judgment an affidavit of identification may be required. **Rules 275, 276.**

4. Appearance, etc.

(i) *General Rules.*

275. When a defendant is served within Ontario, and not in Algoma or Thunder Bay, he shall appear within ten days, including the day of service. Service in Ontario.

(*a*) If served within Algoma or Thunder Bay he is to have thirty days in an action for the recovery of land, and twenty days in other actions, after the service, ~~except~~ where he is served between the first day of November and the 30th day of June, or on either of said days, in which case he shall have an additional period of ten days. 47 V. c. 14, s. 7. Algoma or Thunder Bay.

276. Where a defendant is served out of Ontario he shall have the time following for entering his appearance and delivering his defence and both proceedings shall be taken within the time named. Time for entering appearance and delivering defence.

(*a*) If the defendant is served within any part of the Dominion of Canada (other than Ontario, Manitoba, Keewatin or the North-West Territories, or British Columbia), or within the United States of America, he is to have six weeks after the service.

(*b*) If served within any part of the United Kingdom (including the Isle of Man and the Channel Islands), or of Manitoba, Keewatin or the North-West Territories, British Columbia or Newfoundland, he is to have eight weeks after the service.

(*c*) If served elsewhere than within the limits above designated, he is to have twelve weeks after the service.

(*d*) The writ of summons in such case may be in the form No. 2 in the Appendix, and the statement of claim is to be served therewith. J. A. Rule 46.

This *Rule* varies a little from the former Chy. O. 620, on which it was founded.

On application in Chambers these periods are frequently shortened under *Rule* 485 according to the facilities of communication with the place where a defendant is shown to be residing. Two weeks is ordinarily limited by the

1311 = 276. when a defendant is to be served out of Ontario the writ of Summons may be in the form No 2 in the Appendix, and the statement of claim is to be served therewith, unless the writ is specially indorsed under Rules 245, 246 or 248.

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Rules 277, 278.

Master in Chambers where the defendant resides in Montreal, and three weeks where defendant resides in some place in the United States not far from the border. Where this course is desirable, an application combining a motion for leave to issue and serve the writ, and to shorten the time for appearance and defence, will be a convenient procedure. See Form No. 121 for form of order.

The statement of claim referred to in clause (*d*) means the pleading so called and not any indorsement, however full, upon the writ of the nature of the claim: *Summers* v. *Summers*, Mr. Dalton, 6th Feb., 1882.

By *Rule* 483 no pleadings can be delivered during vacation, except by leave, so that where it is necessary to serve a writ in vacation on a defendant out of the jurisdiction, an application for leave to issue and serve the writ may be conveniently combined with a motion for leave to deliver a statement of claim.

How entered.

277. A defendant shall enter his appearance to a writ of summons by delivering a memorandum in writing, dated on the day of delivering the same, and containing the name of the defendant's solicitor, or stating that the defendant defends in person, to the proper officer in that office in the same County where the writ of summons was issued, in which, by the memorandum subscribed on the writ or by the notice of the writ, the appearance is required to be entered, except where by any Rule of Court it may be otherwise provided, or where the Court or a Judge otherwise directs. *See* J. A. Rules 51, 546.

Taken from Eng. R. April, 1880, R. 6 (first part). See Eng. R. 1875, O. 12, r. 5, (1883, R. 77).

The form of the memorandum is given in App. No 93. See *Rule* 286.

An appearance entered by two solicitors for one defendant is not a nullity, but is irregular: see *Williams* v. *Williams*, 10 M. & W., 178; *Walton* v. *Thompson*, L. R. 6 Eq. 7. If sued in a wrong name defendant should appear by the right one, stating that he was sued by the wrong name: *Lomax* v. *Kilpin*, 4 D. & L. 295; *Hobson* v. *Wadsworth*, 8 Dowl. P. C. 601, otherwise the plaintiff may proceed against him by the wrong name: *Clark* v. *Baker*, 13 East, 273; *Williams* v. *Bryant*, 5 M. & W. 447.

An appearance usually operates as a waiver of an irregularity in the proceedings taken against the defendant: see *Oulton* v. *Radcliff*, L. R. 9 C. P. 189; *Preston* v. *Lamont*, 1 Ex. D. 362; *Diamond* v. *Sutton*, L. R. 1 Ex. 131; *Boyle* v. *Sacker*, 39 Ch. D. 249. *Dart* v. *Citizens Ins. Co.*, 11 P. R. 513. See, however, *Benecke* v. *Frost*, 1 Q. B. D. 421.

Two or more defendants, etc.

278. If two or more defendants in the same action appear by the same solicitor and at the same time, the names of all the defendants so appearing shall be inserted in one memorandum. J. A. Rule 59.

Same as the Eng. R. 1875, O. 12, r. 13, (1883, R. 87) and as Rule of T. T. 1858, 2.

Where several defendants represent one interest (*e.g.* trustee and *cestui que trust*, mortgagee and mortgagor, partners, etc.,) they should appear by the same solicitor, and if they do not, will be allowed only one set of costs: Morgan & Davey, 87; see also *Barrett* v. *Campbell*, 7 P. R. 150; but where a trustee has really a separate interest as where he claims that a co-trustee is liable, he may receive a separate set of costs: *Webb* v. *Webb*, 16 Sim. 55.

Rules 279-281. Appearance, where entered.

279. All proceedings in actions to final judgment shall be carried on in the office in which the appearance is to be entered. J. A. Rule 546.

The Eng. Rule 1875, O. 22. r. 5; 1876, r. 5; 1883, R. 77, are different.

Issue to be filed.

280. When an issue is directed to be tried it shall be filed as soon as settled, and may be filed in the county in which it is directed to be tried, and thereafter the proceedings in the issue shall be carried on in the said county in the same manner as the proceedings in an action commenced in such county. But the Court or a Judge may order otherwise, and may change the place of trial in the same manner and subject to the same rules as in an action. New.

When appearance may be entered, and when notice is to be given.

281. A defendant may appear at any time before judgment. If he appears at any time after the time limited for appearance [he shall, on the same day, give notice thereof to the plaintiff's solicitor, or to the plaintiff himself if he sues in person, and] he shall not, unless the Court or a Judge otherwise orders, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ (*a*); and if the defendant appears after the time appointed by the writ, and omits to give such notice of his appearance, the plaintiff may proceed as in case of non-appearance. J. A. Rule 61.

(*a*) The *Rule* up to this point is identical with Eng. R. 1875, O. 12, r. 15, (1883, R. 92). The remainder of the *Rule* is taken from R. S. O. 1877, c. 50, s. 60, latter part. The words in brackets are not in Eng. Rule of 1883, R. 92.

For the time limited for appearance: see note to *Rule* 286.

A form of notice of appearance will be found in App. Form No. 13.

An appearance entered while the plaintiff is signing judgment is in time: *Harris* v. *Andrews*, 3 U. C. L. J. 31. See also note to *Rule* 9, p. 134.

If an appearance has been entered, but the plaintiff nevertheless proceeds as if none had been entered, the proceedings are not null, but merely irregular, and the irregularity may be waived: see *Alsager* v. *Crisp*, 9 Dowl. 353; *Strange* v. *Freeman*, 5 Dowl. 407; *Maple* v. *Woodgate*, 1 B. & C. 79; but, under this *Rule*, where notice of an appearance, entered after the proper time was not given, judgment signed disregarding the appearance was upheld: *Smith* v. *Dobbin*, 3 Ex. D. 338: see also *Hunter* v. *Wilcockson*, 9 P. R. 305.

In an action for recovery of land, an appearance by the original defendant, after the landlord had intervened and appeared, so as to join with the landlord in a statement of defence, was held regular: *Goring* v. *Cameron*, 10 P. R. 496.

Although an appearance may, under this *Rule*, be entered at any time before judgment, yet the defendant may be precluded from putting in a defence after the proper time, by the plaintiff noting the pleadings closed under *Rule* 393.

See *Leader* v. *Hayes*, 54 L. T. N. S. 204.

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Rules 282-285. Address of Solicitor.

282. The solicitor of a defendant appearing by a solicitor shall state in the memorandum his place of business. J. A. Rule 52.

Identical with first part of Eng. R. 1875, O. 12, r. 7, (1883, R. 80).

Solicitor's undertaking.

283. A solicitor not entering an appearance in pursuance of his written undertaking so to do on behalf of any defendant, shall be liable to an attachment. J. A. Rule 60.

This is the same as Eng. R. 1875, O. 12, r. 14, (1883, R. 88), and also as the Ontario Rule 3 of T. T., 1856. The plaintiff may also proceed as on default of appearance. *Rule* 252 provides that no service of writ shall be required where the defendant by his solicitor accepts service, and undertakes to appear.

If a solicitor enters an appearance without authority it may be discharged with costs, to be paid by him: *Re Lloyd*, 12 Ch. D. 449. See also cases in the note to *Rule* 250, p. 287.

Proceedings by attachment to compel an appearance to be entered, may perhaps be usefully adopted where it is desired to obtain from defendant a waiver of some irregularity: see *Carrick* v. *Young*, Jac. 524, or to prevent a relitigation of the matter in an action on the judgment in another country. The plaintiff should request the defendant's solicitor to enter the appearance before moving to attach: *Jacobs* v. *Magnay*, 7 Jur. 326.

See also as to the enforcement of an undertaking by a solicitor given out of Court: *Woodfin* v. *Wray*, 51 L. J. Chy. 427.

Address of defendant in person.

284. A defendant appearing in person shall state in the memorandum his address; and if he resides more than two miles from the office from which the writ of summons was issued, he shall state in such memorandum a place to be called his address for service, which shall not be more than two miles from such office. J. A. Rule 53.

Varies, as regards distance, from Eng. R. 1875, O. 12, r. 8, (1883, R. 81).

Where a party who appears in person subsequently appoints a solicitor, the practice in Ireland is to enter the solicitor's name on the record by side bar rule for that purpose before any proceeding is taken by such solicitor: *Johnston* v. *Coleman*, 8 L.R. Ir. 148.

Where at an address for service given by a defendant in person, no one was found but a housekeeper who refused to receive documents, service of a summons under *Rule* 739 by putting it into the letter box was held not sufficient: *Jiminey* v. *Owen*, 28 Sol. Jour. 165.

Where no address or improper address given.

285. If the memorandum does not contain the address of the solicitor or the defendant (as the case may be) as required by the preceding Rules, the memorandum shall not be received; and if such address is illusory or fictitious, the appearance may be set aside by the Court or a Judge, on the application of the plaintiff; and the plaintiff may be permitted, by the Court or a Judge, to proceed by post-

ing up the proceedings in the office where the appearance is required to be entered. J. A. Rule 54. Rules 286-288.

See Eng. Rule 1875, O. 12, r. 9 (1883, R. 82).

Where a defendant gives an address for service at which he is not to be found, and there is no person authorized to take in or forward documents, such address is illusory and the appearance will be set aside: *A.* v. *B.*, W. N. 1883, 174; W. N. 1884, 241; *Edell* v. *Cave* (probably *S. C.*), 51 L. T. N. S. 621; 33 W. R. 208; *E.* v. *C.* 54 L. J. Chy. 308.

286. The Memorandum of Appearance may be in the Form No. 93, in the Appendix, with such variations as the circumstances of the case may require. Form of memorandum.

The Eng. R. 1875, O. 12, r. 10 (1883 R. 83), has the word "shall" instead of "may," in the first line.

The time for appearing is ten days after the service, in the case of service within the jurisdiction, and the day of service is inclusive: see Form No. 1, *Rules* 233, 275, and *Cornish* v. *Manning*, 18 C. L. J. 76, 143; 2 C. L. T. 105. In case of service out of the jurisdiction the time will be in accordance with *Rule* 276, or any special order in the action. In case of service by advertising the time dates from the last publication according to the order: *Crane* v. *Jullion*, 2 Ch. D. 220.

(*a*) In case a defendant does not require the plaintiff to deliver a statement of claim he shall so state in his memorandum of appearance, and in that case shall serve a copy of such appearance on the plaintiff. J. A. Rule 55.

See Eng. Rules 1880, r. 6 (1883, R. 225.)

287. Upon receipt of a Memorandum of Appearance, the officer shall forthwith enter the appearance in the Procedure Book. J. A. Rule 56. Rules T. T. 1856, 1. Entry of memorandum.

See Eng. R. 1875, O. 12, r. 11 (1883 R. 83) in which the Book is called the Cause Book.

(ii) *Partners.*

288. Where partners are sued in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm. J. A. Rule 57. Partners.

Same as Eng. R. 1875, O. 12. r. 12 (1883 R. 85).

For the provisions for ascertaining who are the partners in a firm: see *Rule* 317; and see R. S. O. c. 130.

If one of several partners does not appear, judgment cannot be entered against him individually. Judgment if recovered must follow the writ and be against the firm: *Jackson* v. *Litchfield*, 8 Q. B. D. 474; *Adams* v. *Townend*, 14 Q. B. D. 103. Execution, however, may be issued under *Rule* 876 against individual partners.

Where an action was brought against a firm, and one of the partners individually, and the partner only appeared, but separate defences were afterwards

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delivered by the partner and the firm, it was held that the defence of the firm could not be struck out, for the present *Rule* does not give power to the firm to enter an appearance: *Taylor* v. *Collier & Co.*, 30 W. R. 701; W. N. 1882, 83; 51 L. J. Chy. 853.

In *Munster* v. *Railton*, 10 Q. B. D. 475, 11 Q. B. D. 435 (affirmed in the House of Lords, 10 App. Cas. 680) an action was brought against a firm, "R. & Co."; R. appeared individually and the plaintiff then delivered a statement of claim against "R. sued as R. & Co." and obtained judgment. Afterwards discovering that C. was a member of the firm of "R. & Co." plaintiff was not allowed to amend his judgment to make it conform to the writ and be a judgment against the firm, as he had chosen to sue R. individually.

See also notes to *Rules* 265, 317 and 876.

Appearance by person sued under firm name.

289. Where any person carrying on business in the name of a firm apparently consisting of more than one person is sued in the name of the firm, he shall appear in his own name; but all subsequent proceedings, shall, nevertheless, continue in the name of the firm. J. A. Rule 58.

Same as Eng. R. June 1876, R. 6; (1883, R. 86.)

See notes to *Rules* 265, 288, 317 and 876.

(iii) *Dower.*

Defendant may file appearance and acknowledge tenancy.

R. S. O. c. 56.

Judgment of seisin and writ of assignment thereon.

290. Any defendant named in the writ, in an action for dower, may, within the time appointed, file an appearance and acknowledgment that he is tenant of the freehold of the land named in the writ, together with his consent that the plaintiff may have judgment for her dower therein and may take the proceedings authorized by *The Act respecting Dower* to have the same assigned to her, unless the parties otherwise agree, and he shall forthwith serve the plaintiff or her solicitor with a copy of such appearance and acknowledgment and consent, together with an affidavit of the day of the entering and filing the same in the proper office; and in every such case when the defendant so admits the right to recover, the plaintiff may enter judgment of seisin forthwith, and may obtain a writ of assignment of dower, but shall not be entitled to tax or recover the costs of suit or of entering such judgment against the defendant. R. S. O. 1877, c. 55, s. 20.

(*a*) In case the plaintiff claims arrears of dower or damages for detention of her dower, neither the entry of a judgment of seisin nor the taking of proceedings for the assignment of her dower thereunder shall prevent her from proceeding with the action for the recovery of such arrears or damages. New.

This sub-clause has been introduced to meet the decisions of *Linfoot* v. *Duncombe*, 21 C. P. 484, and *Cameron* v. *Gilchrist*, 7 P. R. 184, which decided that judgment of seisin is conclusive, and when signed the defendant cannot be proceeded against for damages: see also *Harvey* v. *Pearsall*, 31 C. P. 239. Those cases are therefore no longer to be followed. Rules 291-293.

It was held in *Ryan* v. *Fish*, 4 Ont. 335, that a dowress may recover damages as well for *mesne* profits as for detention against all persons, and in all cases where they were recoverable before Aug. 10th, 1850. By R. S. O. 1877, c. 55, sec. 45, the procedure before that date was made applicable to all cases not provided for by the Act. This sec. 45 in the Consolidation of 1887 has been omitted as "effete," because the procedure in an action for dower is under the Jud. Act to be the same as in other actions for recovery of land. No doubt the right to damages has not been affected by the change in the mode of procedure to obtain them: but see *Giles* v. *Morrow*, 1 Ont. 527. Costs are not given unless a demand for dower was made: *Losee* v. *Armstrong*, 11 Gr. 517.

A widow is not entitled to damages for detention of dower till after demand: *Ryan* v. *Fish*, 4 Ont. 335; nor to either arrears of dower or damages for detention unless her husband died seised: *Losee* v. *Armstrong*, 11 Gr. 517; *Morgan* v. *Morgan*, 15 Ont. 194, even though demand made *Morgan* v. *Morgan*, *supra*.

As to whether damages are to be computed against the tenant of the freehold from the death of the husband, or the date of demand, *quære*: see *Ryan* v. *Fish*, *supra*.

For form of writ of assignment of dower, see Form No. 201.

291. In case the defendant has filed and served an acknowledgment and consent under the preceding Rule, and the plaintiff does not within 3 months thereafter sue out and cause to be executed a writ of assignment of dower, the defendant may, by leave of the Court or a Judge, sue out such writ; and the writ shall be, as nearly as may be, in the same form as a writ sued out by the plaintiff, and the like proceedings shall be had thereon. R. S. O. 1877, c. 55, s. 21. Case wherein defendant may sue out execution, if plaintiff does not.

See Form No. 201.

292. In an action for dower the landlord or other person under whom a tenant in possession, who is not also tenant of the freehold, holds or entered into possession, may, if he has not been served with the writ, without leave, appear and defend, by filing with his appearance an affidavit that he is tenant of the freehold, and is advised and believes that there is good ground for disputing the plaintiff's claim to dower. R. S. O. 1877, c. 55, s. 14. Landlord be substituted as defendant.

(iv) *Recovery of Land.*

293. Any person not named as a defendant in a writ of summons for the recovery of land, may, without leave, appear and defend, by filing with his appearance an affidavit stating that he is in possession of the land Appearance without leave by person not named as a defendant.

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Rules 294-296.

either by himself or his tenant (as the case may be), and stating further, in case the possession is by his tenant, that the defendant named in the writ is his tenant. The affidavit may be in the form of affidavit numbered 47, in the Appendix. J. A. Rule 62.

No corresponding English Rule.

The intention would appear to be that in simple cases in which leave would have been given under the former practice as of course, and an affidavit in the form given can be made by the defendant, no leave need be applied for. Under s. 10 of the Ejectment Act (R. S. O. 1877, c. 51) it was often a question whether a person could be said to be in possession by himself or his tenant within the meaning of that section; for example a mortgagee out of possession in an action against his mortgagor: *McDermott* v. *Keeling*, 7 U. C. L. J. 150; see also *Morris* v. *Smythe*, 2 U. C. L. J. 212. In such cases it will be necessary to apply for leave under *Rule* 294.

Appearance by landlord in action for land.

294. [Where such affidavit is not filed,] any person not named as a defendant in a writ of summons for the recovery of land, may, by leave of the Court or Judge, appear and defend, on filing an affidavit shewing that he is in possession of the land, either by himself or his tenant. J. A. Rule 63.

Except the words in brackets, the *Rule* is the same as Eng. R. 1875, O. 12, r. 18 (1883, R. 95).

For cases under the former practice see Harrison's C. L. P. Act, 518. See also notes to the preceding *Rule*, and *Leader* v. *Hayes*, 54 L. T. N. S. 204.

The Court will not on the application consider nice questions as to the right of possession: see *Croft* v. *Lumley*, 4 E. & B. 614, and *Thompson* v. *Tomkinson*, 11 Ex. 442. In *Longbourne* v. *Fisher*, W. N. 1878, 28, an equitable tenant for life was given leave to defend an action of ejectment in the place of her trustees, using their names and indemnifying them.

Form of appearance by landlord.

295. Any person appearing to defend an action for the recovery of land as landlord, in respect of property whereof he is in possession [in person or] by his tenant, shall state in his appearance that he appears as landlord. J. A. Rule 64.

Same as R. S. O. 1877, c. 51, s. 12. The English Rule 1875, O. 12, r. 16; (1883, R. 96), has the word "only" instead of the words in brackets.

Notice of appearance by person not named as a defendant in writ.

296. Where a person not named as defendant in a writ of summons for the recovery of land enters an appearance according to either of the foregoing Rules, the appearance shall be entitled in the action against the party or parties named in the writ as defendant or defendants; and the person so entering an appearance shall forthwith give notice thereof to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall in all subsequent proceedings

be named as a party defendant to the action (*a*); and if such person appears and omits to give notice of his appearance, the plaintiff may proceed as in case of non-appearance. J. A. Rule 65. Rules 297-299.

(*a*) The preceding part of the *Rule* corresponds with Eng. R. 1875, O. 12, r. 20 (1883, R. 97); what follows has been taken from R. S. O. 1877, c. 50, s. 60.

A form of notice of appearance will be found in the App. No. 13.

297. Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance, or in a notice intituled in the cause and signed by him or his solicitor, such notice to be served within four days after appearance [upon the solicitor whose name is indorsed on the writ, if any; and if none, then filed in the proper office]; and an appearance where the defence is not so limited shall be deemed an appearance to defend for the whole. J. A. Rule 66. Limited appearance in action for land. Notice.

The Ejectment Act, R. S. O. 1877, c. 51, s. 13, did not provide for the alternative of the notice being in the memorandum of appearance; and Eng. R. 1875, O. 12, r. 21 (1883, R. 98) does not contain the words in brackets, these being taken from R. S. O. c. 51, s. 13.

This *Rule* has been held to be applicable in an action of Dower: *Cunningham* v. *Pearce*, Mr. Dalton, 21st Sept., 1881; see also *McCulloch* v. *McCulloch*, 4 C. L. T. 252, and the notes to *Rule* 341. Better particulars may be obtained where there is a want of "reasonable certainty": *Watson* v. *Brewer*, 4 P. R. 202.

298. The notice to be served as mentioned in the last preceding Rule may be in the Form No. 14 in the Appendix, with such variations as circumstances may require. J. A. Rule 67. Form of notice.

Same as Eng. R. 1875, O. 12, r. 22 (1883, R. 99).

(v) *Limited defence.*

299. Any person appearing to a writ of summons in other cases may limit his defence to the question of the amount to which the plaintiff is entitled, and in that case may in his appearance, or, by notice served within four days thereafter, state that he disputes only the amount claimed by the plaintiff; and he need not file any further defence for the purpose of disputing such amount; and the plaintiff is to proceed as if the defendant had filed a defence disputing the amount of the claim. The notice disputing Limitation of defence to question of amount only.

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Rule 300. the amount of the claim may be in the Form No. 15, in the Appendix, with such variations as circumstances may require. J. A. Rule 68.

A similar notice was provided for by Chy. Gen. Order 436, in mortgage suits, and entitled the defendant to four days' notice of the taking of the plaintiff's account. The extension of the practice by the Jud. Act 1881, *Rule* 68, to suits was new.

In a foreclosure suit, an appearance was entered limiting defence to one item of the mortgage account and it was held that no statement of defence was necessary as this *Rule* supersedes the necessity for either statement of claim or defence, and points out to the plaintiff another way of proceeding; a judgment by default of defence was therefore set aside with costs: *Peel* v. *White*, 11 P. R. 177.

Under the former Chy. Prac., by reason of the notice indorsed on a bill, in the event of a dispute note only being filed in a mortgage action, the plaintiff was entitled to get judgment on *præcipe*; but original *Rule* 78, which continued that practice, is now embodied in *Rule* 718, under which it is not clear whether the plaintiff can obtain judgment in such a case on *præcipe*. This *Rule* provides that the plaintiff is to proceed "as if the defendants had filed a defence disputing the amount of the claim." It may be that a note disputing the claim does not, under *Rule* 403, admit the execution of the mortgage and the other facts entitling the plaintiff to judgment, and therefore *Rule* 718 does not apply to such a case—and that it is therefore necessary for the plaintiff to move for judgment on notice to the defendant: *Dominion Bank* v. *Doddridge*, 12 P. R. 655, in the same way as in any other kind of action, under *Rule* 748, or under *Rules* 739, 745 or 756 in the cases to which those *Rules* apply: see *Crawford* v. *Gemmell*, 7 C. L. T. 117; *Williamson* v. *Ewing*, 27 Gr. 596. In the case of a motion under *Rule* 748 the filing of a statement of claim would not seem to be necessary; but see *Hunter* v. *Wilcockson*, 9 P. R. 305; *McLeod* v. *Sexsmith*, 12 P. R. 696.

It has been decided that a defendant filing a disputing note in a mortgage suit may on the taking of the accounts shew that the Statute of Limitations applies so as to prevent the recovery of more than six years' arrears of interest: *Wright* v. *Morgan*, 1 Ont. App. 613, overruling the decision reported, 24 Gr. 457. But the Statute must be pleaded if the defendant wishes to set it up as a bar to the suit: *Cattanach* v. *Urquhart*, 6 P. R. 28, explained, 1 Ont. App. 616; see also notes to *Rule* 402.

It was held also under the former Chancery practice that a disputing note was not an answer, and therefore Gen. Order 134 (see *Rule* 508) allowing a defendant after answer to obtain on præcipe an order for production, did not apply: *Richardson* v. *Beaupre*, 2 Chy. Ch. 54.

5. PARTIES.

(i) *Generally.*

Who may be joined as plaintiffs.

300. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And, without any amendment, judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to. J. A. Rule 89, part.

Same as Eng. R. 1875, O. 16, r. 1 (1883, R. 123).

The changes introduced into England by *The Judicature Act* were very material changes. Most of them had in Ontario been already made part of the jurisdiction and practice of the Common Law Courts by *The Administration of Justice Act*, R. S. O. 1877, c. 49, s. 5, which provided that— Rule 300.

"5. For the purpose of carrying into effect the objects of this Act, and for causing complete and final justice to be done in all matters in question in any action of law, the Court or a Judge thereof, according to the circumstances of the case, may, at the trial or at any other stage of an action or other proceeding, pronounce such judgment, or make such order or decree as the equitable rights of the parties respectively require, and may make such rule or order as to adding third persons as parties to any proceeding, striking out parties, or treating parties named plaintiffs as defendant, or parties named defendants as plaintiffs, and as to costs, and may direct such inquiries to be made and accounts to be taken as seem reasonable and just; and may as fully dispose of the rights and matters in question as a Court of Equity could." R.S.O. 1877 c. 49, s. 5.

The Judicature Act extends the jurisdiction of the Court still further in the same direction, so as to do complete justice in one suit.

Previous to *The Administration of Justice Act* in Ontario, and to *The Judicature Acts* in England, the contrast between Common Law and Chancery procedure was very great.

Subject to a few exceptions, the Common Law Courts were tied down to disposing of claims arising between exactly the same parties upon each side, and in the same right. They could give a judgment against the defendants generally, but they could not give relief of one sort against one defendant, and of another sort against another defendant; nor could they give relief of one kind to one plaintiff, and of another kind to another plaintiff, or of one kind to two plaintiffs jointly, and another to one of them separately. All the plaintiffs, if more than one, had to be jointly entitled, and all the defendants jointly liable, with respect to every matter upon which the Court was asked to adjudicate.

In Chancery, on the other hand, the course was to deal with the controversy or transaction forming the subject matter of the suit as a whole, and endeavor to do complete justice with respect to it; and for that object the Court formerly insisted on all the parties interested in the subject matter being brought before it. The extreme strictness of this rule had been usefully relaxed from time to time, but in the main it had not been departed from.

The result had been, that a Court of Law could not handle the matter as a whole, however desirable it might be to do so; but was obliged to confine itself to the specific claim of one person against another: while a Court of Equity could *only* deal with the matter as a whole, whether that were really necessary or not, and could not dispose of the mutual rights of particular persons singly, however convenient it might be to do so.

The Judicature Act and *Rules*, give a very wide latitude as to the matters which may be disposed of in an action, the mode in which a case may be dealt with, and the persons who may be made parties to it. Parties. Plaintiffs.

A plaintiff may in any suit enforce any claim, whether legal or equitable, the defendant may raise any defence which is good, either at law or in equity, and may also set up, not merely a pecuniary set-off, but, by way of counter-claim, anything that formerly he could have made the subject of a cross action or suit. And he may make such counter-claim, not only against the plaintiff, but against any third person, if only it be connected with the subject of the action.

The Court in its turn is bound to "grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be

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Rule 300. completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided": Jud. Act, s. 52, (12.)

On the other hand, no action is to be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matters in controversy so far as regards the rights and interests of the parties actually before it.

Parties plaintiff, who may be joined.

The provisions under this head of "Parties" and those of *Rule* 340, *et seq.*, relating to the joinder of various claims in the same action and in the same pleadings, were framed so as to give effect to these provisions. All persons claiming any relief, *jointly, severally, or in the alternative*, may be made plaintiffs. All persons against whom any relief is claimed, *jointly, severally, or in the alternative*, may be made defendants. And the defendants need not all be interested in all the relief claimed, or in all the causes of action. It is not necessary that either plaintiff or defendant should be concerned in all the matters in question in the same capacity; subject to a few qualifications, either may be concerned partly in a representative capacity, partly personally.

The defendant may also bring before the Court persons not already parties against whom he seeks any relief relating to or connected with the subject matter of the suit.

In short, all parties may be added that may be necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action.

The present *Rule*, it will be observed, authorizes the joinder as plaintiffs, not only of persons claiming jointly or in the alternative, but of persons claiming severally. Accordingly, where eight persons brought an action of libel, it was held that they might rightly join, though no joint injury was shewn, and though they would before the Act have had to bring eight actions: *Booth* v. *Briscoe*, 2 Q. B. D., 496; and see *Viscount Gort* v. *Rowney*, 17 Q. B. D. 625. In such case, of course there is no joint damages. Each has a separate cause of action and the assessment of damages or the award of any other relief should be separate. But in *Booth* v. *Briscoe*, the damages having been jointly assessed, it was held that the defendants could not complain.

Appleton v. *Chapel Town Paper Co.*, 45 L. J. Chy. 276, does not appear to be quite consistent with this. There the owners of two separate bleach works joined as plaintiffs in a suit to restrain the pollution of a stream used by both of their works, and the case was tried by consent, as if two separate bills had been filed, but it seems to have been considered by the Judge that the plaintiffs could not sue together in one action for distinct nuisances.

One of several mortgagees may bring a foreclosure action, making his co-mortgagees defendants, if they will not join as plaintiffs: *Luke* v. *South Kensington Hotel Co.*, 11 Ch. D. 121.

Where two or more plaintiffs sue for a joint claim, the defendant may set up a separate counter-claim against each plaintiff: *Manchester, etc., Ry.* v. *Brooks*, 2 Ex. D. 243.

Where two plaintiffs join in an action and one is successful and the other unsuccessful, the successful plaintiff was held to be chargeable with the costs of joining the unsuccessful plaintiff: *D'Hormusjee & Co. and Isaacs & Co.* v. *Grey*, 10 Q. B. D. 13; 52 L. J. Q. B. 192; but in *Viscount Gort* v *Rowney supra*, where costs had been ordered "to abide the event," it was held that the unsuccessful plaintiff only was liable for the costs occasioned by his being joined in the action.

Where some plaintiffs were successful but some were absent at the trial from illness and gave no evidence, the latter were ordered to pay defendants the costs occasioned by their being joined as plaintiffs, without prejudice to their bringing a fresh action: *Arnison* v. *Smith*, 41 Ch. D. 348.

One of several joint owners of a patent may sue for a recovery of profits due for the use of the patent without joining the other owners: *Sheehan* v. *G. E. Ry. Co.*, 16 Ch. D. 59.

301. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And, without any amendment, judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities. J. A. Rule 91.

Rule 301. Who may be joined as defendants.

Same as the Eng. R. 1875, O. 16, r. 3, (1883 R. 126).

This *Rule*, which is the converse of *Rule* 324, must be read with the latter: *Edwards* v. *Lowther*, 24 W. R. 434.

Parties, defendants.

What is said here as to defendants is analogous to *Rule* 300 as to plaintiffs; and the two *Rules* have received a similar construction. This *Rule* is not confined to cases in which the alternative relief asked by a statement of claim against one defendant is consistent with that asked against another: *Honduras Ry. Co.* v. *Tucker*, 2 Ex. D. 301; *Child* v. *Stenning*, 5 Ch. D. 695; and a plaintiff may rely upon different rights alternatively though they may be inconsistent: *Philips* v. *Philips*, 4 Q. B. D. 134. It would seem, however, that this construction of the *Rule* applies to a statement of claim only, and where by a counter-claim relief was sought against a party in one of two inconsistent alternatives a demurrer was allowed: *Evans* v. *Buck*, 4 Ch. D. 432.

If the defendant can show that there is inconvenience or additional expense in trying both the claims at the same time, or that the disposition of one will render the trial of the other unnecessary, he may apply under *Rule* 346 for the trial of one issue before the other is approached: *Bagot* v. *Easton*, 7 Ch. D. 1. In *Honduras Ry. Co.* v. *Tucker*, 2 Ex. D. 301, the plaintiffs sought to enforce a contract against the defendant on the ground that the person by whom it was made was the defendant's agent to make it. The Court of Appeal, affirming the Exchequer Division, ordered the alleged agent to be added as a defendant; the plaintiff claiming to recover against him, in the alternative of his not having had authority to contract. In *Child* v. *Stenning*, 5 Ch. D. 695, the action was for trespass to land, of which the plaintiff was lessee. The defence was a right of way granted by the lessor, and it was held that the plaintiff might amend his claim by adding the lessor as a defendant, claiming against him, in case the right of way was established, damages for breach of covenant for quiet enjoyment. See also *Edwards* v. *Lowther*, 45 L. J. C. P. 417; 24 W. R. 434, and *Bagot* v. *Easton*, 7 Ch. D. 1, where, however, the alternative claims were not considered inconsistent.

Where the plaintiff succeeds against one defendant, but not against another: the cost of the successful defendant must be born by the plaintiff, and not by the unsuccessful defendant, unless the Court orders otherwise: see *Child* v. *Stenning*, 7 Ch. D. 413; 11 Ch. D. 82, and *Bingham* v. *Alexander*, cited Charley's Judicature Act, 3rd ed. 455.

Rules 302 and 303 seem to be applications of the principle of the present *Rule*.

If a plaintiff brings separate actions against a number of persons whom he might have joined as defendants in one action he may have to pay the defendants' extra costs: *Guéret* v. *Young*, W. N. 1883, 216.

It is not proper to make individual corporators defendants for the sole purpose of making them pay costs: *Atty-Gen.* v. *Vestry of Bermondsey*, 23 Ch. D. 60. See also *Matthias* v. *Yetts*, 46 L. T. N. S., 497; *Barnes* v. *Addy*, L. R. 9 Chy. 244, 255, 256; *Burstall* v. *Beyfus*, 26 Ch. D. 35; *Amos* v. *Herne Bay*, 80 L. T. Jour. 356, for what was formerly known in Chy. as the *Rule* of the three A's, and for observations on the practice of making attorneys, agents and arbitrators parties to suits, alleging against the principal defendants fraud in which the co-defendants are not implicated.

As to adding a party for discovery only: see *Symonds* v. *City Bank*, 79 L. T. Jour. 175.

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Rule 302.

In *Head* v. *Bowman*, 9 P. R. 12, the plaintiff sued in respect of the flooding of land by a milldam. The G. W. Ry. had turned the waters of the stream into another channel, which was not deep enough to carry off all the water, even though the defendant's dam were removed, so that complete relief could not be given, even though the plaintiff were successful against the defendant. The plaintiff was therefore allowed under this *Rule*, and *Rule* 324, to add the G. W. Ry. Co. as defendants.

In *Heatley* v. *Newton*, 51 L. J. Chy. 225, an action by a purchaser for rescission of a contract of sale and costs, auctioneers were made co-defendants with the vendors, the plaintiff alleging that they and the vendors had joined in a fraud whereby the plaintiff was induced to pay too high a price. It was held that the auctioneers were rightly joined and could not claim to be dismissed merely on payment of the deposit into Court, and costs to the date of the order.

If alternative cases are alleged the facts ought not to be mixed up, but should be stated so as to shew on what facts each alternative of the relief sought is founded : *Davy* v. *Garrett*, 7 Ch. D. 489.

In an action to recover the value of goods (an engine and boiler), a person who had notified the plaintiff not to remove the goods, which had not been paid for, and the property in which had not passed, was made a defendant in the action : *Polson* v. *DeGeer*, 12 Ont. 275.

An action against four independent saw-mill owners, from whose mills sawdust and refuse matter were carried down the River Ottawa and lodged upon and in front of the plaintiff's land, was held to have been properly brought against all four owners as defendants : *Ratté* v. *Booth*, 10 P. R. 649.

Where a restrictive covenant in a lease is omitted in a sub-lease, both lessee and sub-lessee are properly made defendants in an action for breach of covenant : *Tritton* v. *Bankart*, 35 W. R. 474 ; 56 L. T. N. S. 306 ; 56 L. J. Chy. 629.

In an action by a creditor to recover a debt, persons to whom the debtor has made an alleged fraudulent conveyance of his property, which the plaintiff claimed to have set aside, were held to be properly joined as defendants : *Heaton* v. *McKellar*, 13 P. R. 81.

In an action by a simple contract creditor claiming merely to set aside a conveyance as fraudulent against creditors, the debtor and grantor is a necessary party as well as the grantee : *Gibbons* v. *Darvill*, 12 P. R. 478.

See *Rules* 308 and notes.

Where defendant not interested in all the relief prayed.

302. It shall not be necessary that every defendant to an action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the Court or a Judge may make such order as may appear just, to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in the action in which he may have no interest. J. A. Rule 92.

Same as Eng. R. 1875, O. 16, r. 4, (1883, R. 127).

See *Cox* v. *Barker*, 3 Ch. D. 359, where this *Rule* was considered and given a liberal construction. The judgment of V.-C. Bacon, which was affirmed on appeal, contains the following passages :—"I take it that it was the intention of the Legislature, when any question of any sort, or any set of questions, arose, to endeavour by one hearing and one decree to dispose of all matters in litigation between all the parties who were interested in the subject of the litigation. The Act of Parliament, at the same time that it has enabled any person stating a claim to bring before the Court all persons interested in that claim, and to include in the claim every question that can belong to it, or arise

out of it, has, at the same time, carefully provided that no one shall be prejudiced by the fact of his being joined. The *Rules* are distinct on the subject." **Rules 303, 304.**

See cases cited in note to *Rule* 302 *supra*.

303. The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes. J. A. Rule 93. All or any parties liable on one contract may be joined.

Same as Eng. R. 1875, O. 16, r. 5, (1883, R. 128).

By R. S. O. 1877, c. 50, s. 134, it was provided that all the parties to a bill or note might be joined in one action; but by sec. 135 the non-joinder of any joint drawer, maker, indorser, or acceptor might be pleaded in abatement.

By the present *Rule* it is optional with the plaintiff in actions on bills and notes, as well as in actions on any other contract, to proceed against any one or more of the parties jointly or severally liable: see *Re Arcedeckne, Atkins* v. *Arcedeckne*, 24 Ch. D. 709; *Murray* v *Gillett*, 18 C. L. J. 78; but one of such parties if sued alone is entitled to have his co-contractors joined: *Pilley* v. *Robinson*, 20 Q. B. D. 155.

Under Chy. Gen. Order 62, a plaintiff might select one or more of several persons liable. Under the corresponding English Con. Order (VII. R. 2), it was held in *Smith* v. *Horsfall*, 24 Beav. 331, that if the plaintiff chose to sue all or some of them, and the suit became defective or abated by reason of a transmission of the interest of one of them, he could not afterwards proceed against the other. This gloss on the Order was described as highly technical: *Gray* v. *Lewis*, L. R. 8 Chy. 1035, 1052, and will not be imported by analogy into the present *Rule*: *Lloyd* v. *Dimmock*, 7 Ch. D. 393. In the latter case two of five defendants became bankrupt, and it was held that the action might proceed against the other three without bringing the trustees of the bankrupts before the Court. For other restrictions upon the application of Chy. G. O. 62, see Lewin, 6th ed. 807. See also *Wilson* v. *Rhodes*, 8 Ch. D. 777.

304. Where any person is surety for the payment of a mortgage debt, such person may be made a party to an action for the sale of the mortgaged property. Chy. O. 427. Surety may be joined with mortgagor, and relief obtained against both.

Under this *Rule* an assignee of the mortgagor who had covenanted with the mortgagor to pay the mortgage debt, could not formerly have been ordered to pay the mortgagee, to whom he was under no legal liability: *Turnbull* v. *Symmonds*, 6 Gr. 615; *Clarkson* v. *Scott*, 25 Gr. 373; and see other cases noted: *Rule* 347. And where the original mortgagee had assigned the mortgage to the plaintiff, and covenanted for payment, it was held that he was not a surety within the meaning of this *Rule*, but that the contract amounted merely to a guaranty, to enforce which, a separate action must be brought: *Clarke* v. *Beal*, 8 Gr. 7. But it would seem that in such cases the appropriate relief as between the plaintiff and defendants, and between the defendants *inter se*, may now be granted in the same action. See also *Campbell* v. *Robinson*, 27 Gr. 634; *Chamberlain* v. *Sovais*, 28 Gr. 404. Liability of assignee of mortgagor. Of assignor of a mortgage on covenant for its payment.

Where the surety had given a mortgage on his own property, the principal debtor was formerly a necessary party to an action for foreclosure, or sale thereof: *Seidler* v. *Sheppard*, 12 Gr. 456. Principal when a necessary party.

A surety cannot be required to pay the amount of a judgment which it has been agreed shall stand as security for the deficiency on a mortgage, until the security has been realized and the deficiency ascertained: *Teeter* v. *St. John*, 10 Gr. 85. Liability of surety for deficiency.

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Rule 305.

Where relief is sought subject to prior mortgage, prior mortgagee an unnecessary party.

305. Where the plaintiff prays a sale or foreclosure, subject to a prior mortgage, the prior mortgagee is not to be made a party either originally or in the Master's office, except under special circumstances to be alleged in the statement of claim. Chy. O. 440.

This *Rule*, it will be noticed, is confined to cases where the plaintiff claims relief subject to the prior mortgage; where he seeks to redeem or in any way bring in question the right of the prior mortgagee the latter must be made a defendant by writ.

Formerly Chy. O. 439 provided that where a bill was filed by a subsequent incumbrancer seeking relief against a prior mortgagee, such mortgagee must be made a party previous to the hearing of the cause; but that Order has been omitted from these *Rules* as being no longer necessary.

Subsequent incumbrancer, action for redemption by.

An action for redemption by a subsequent, against a prior mortgagee, will not lie, unless the prior mortgage, and that of the plaintiff, are both overdue: *Parsons* v. *Bank of Montreal*, 15 Gr. 411; *Long* v. *Long*, 16 Gr. 239. The owner of the equity of redemption is a necessary party to such an action. *Ib.*

A bill, by a subsequent incumbrancer, against a prior mortgagee, claiming the right of redemption, but not offering to redeem him, was not demurrable: *Pearson* v. *Campbell*, 2 Chy. Ch. 12; (but see *Rogers* v. *Lewis*, 11 Gr. 257;) and it would probably now be held that a statement of claim, omitting an offer to redeem, would not be demurrable under the present practice: see *National Bank* v. *United Hand in Hand Co.*, 4 App. Cas., at p. 400.

Not entitled to a sale.

In default of payment.

A subsequent incumbrancer, bringing an action against a prior mortgagee, is not entitled to a sale: *McDougall* v. *Campbell*, 6 S. C. R. 502; unless the prior incumbrancer consent, or do not object, to a sale: *Grange* v. *Barber*, 2 Chy. Ch. 189; he is only entitled to judgment for redemption, and in default of redemption he is foreclosed: see *Rule* 362, or the action is dismissed, as against both mortgagee and mortgagor with costs: *Hallet* v. *Furze*, 54 L. T. N. S. 12, which is equivalent to a foreclosure of the plaintiff: *Cornwall* v. *Henriod*, 12 Gr. 338; *Inman* v. *Wearing*, 3 D. G. & Sm. 734; except in the case of an equitable mortgage by deposit: *Marshall* v. *Shrewsbury*, L. R. 10 Chy. 250.

In an action by a subsequent incumbrancer, to redeem, he may also impeach transactions by the prior mortgagee in reference to the mortgaged estate: *McLaren* v. *Fraser*, 15 Gr. 239.

Prior mortgagee, when he may be made a defendant.

Although a prior mortgagee can, ordinarily, only be made a party to an action by a subsequent incumbrancer, for the purpose of redeeming him, yet where the prior security is created by a deed absolute in form, a subsequent incumbrancer is at liberty to bring him before the Court for the purpose of showing his interest to be redeemable, without offering to redeem him: *Moore* v. *Hobson*, 14 Gr. 703; and see *Rogers* v. *Lewis*, 12 Gr. 257. To such an action the execution creditors of the alleged mortgagee are necessary parties: *Glass* v. *Freckleton*, 10 Gr. 470; and see *Darling* v *Wilson*, 16 Gr. 255, 257.

Subsequent incumbrancer obtaining sale has no priority for costs.

Where a prior incumbrancer is made a party to any action by a subsequent incumbrancer, and a judgment for sale is obtained by consent, or without objection on the part of the prior incumbrancer, the proceeds of the sale must be distributed in payment of the claims of the incumbrancers according to their priorities, and in such a case the plaintiff is not entitled to any priority in respect of his costs, even though the fund prove insufficient: *Grange* v. *Barber*, 2 Chy. Ch. 189.

Assignee equity of redemption, when entitled to attack prior mortgage for fraud.

Where the equity of redemption was valueless, and an assignment thereof was made merely for the purpose of enabling the assignee to impeach a prior mortgage on the ground of fraud for the benefit of the assignor, the assignment was held to savour of champerty, and no relief was granted to the assignee, even though he asked in the alternative for redemption: *Muckall* v. *Banks*, 10 Gr. 25; and see *Little* v. *Hawkins*, 19 Gr. 267; *Wigle* v. *Setterington*, *Ib.*, 512; *Bell* v. *Walker*, 20 Gr. 558; *Hilton* v. *Woods*, L. R. 4 Eq. 432. But where the assignee

takes beneficially, and the assignment is not made merely to enable him to sue in respect of the alleged fraud, it would seem that he may maintain the action: *Sears* v. *Lawson*, 15 Ch. D. 426: *Dickinson* v. *Burrell*, L. R. 1 Eq. 337. **Rule 306.**

A subsequent incumbrancer may, in the same action, obtain relief against the mortgagor, and incumbrancers subsequent to himself—consequent on his redeeming the prior mortgagee: *Rogers* v. *Lewis*, 12 Gr. 257; *McLaren* v. *Fraser*, 15 Gr. 239. Relief against other incumbrancers.

A prior mortgagee in possession, who is also the owner of the equity of redemption, is only bound to account to a subsequent incumbrancer for rents and profits, on the footing of a mortgagee in possession, until his mortgage is paid off, any subsequent receipts he is entitled to retain without account as owner: *Steinhoff* v. *Brown*, 11 Gr. 114. Prior mortgagee owning eq. of red., account for rents by.

306. Where it appears conducive to the ends of justice that parties interested in the equity of redemption should be allowed to be made parties in the Master's Office, by reason of the parties so interested being numerous or otherwise, the Court may direct that parties so interested be made parties in the Master's Office, upon such terms as to the Court or a Judge seems fit; such order to be made only where one or more parties interested in the equity of redemption are already before the Court. Chy. O. 488. Parties interested in equity of redemption may be allowed to be added in the Master's office.

The words "parties interested in the equity of redemption" in this *Rule* are intended to apply to persons interested in the ultimate equity of redemption, *i.e.*, the mortgagor or any one standing in his place. As a general rule, all parties interested in the ultimate equity of redemption in mortgaged property, ought to be made original defendants in an action to enforce the mortgage, by sale, or foreclosure: *Paterson* v. *Holland*, 8 Gr. 238; *Buckley* v. *Wilson*, 8 Gr. 566; but not *mesne* incumbrancers, or execution creditors, who are always added in the Master's office: see *Rule* 126. Parties to whom *Rule* applies.

This *Rule* makes an exception to the general rule, and enables the Court to direct, that parties interested in the ultimate equity of redemption, may be made parties in the Master's office. This may be done, either upon a motion for judgment: *Jones* v. *Bank of Upper Canada*, 12 Gr. 429; *Faulds* v. *Harper*, 2 Ont. 405; or upon a subsequent application for the purpose in Chambers: see cases *infra*. Such a direction, however, cannot be inserted in a judgment obtained on *præcipe*.

Where the grounds upon which it is sought so to add parties interested in the equity of redemption in the Master's office, appear in the statment of claim it may possibly be still the proper course to move for judgment, in order to obtain the direction of the Court to add the parties; but where the necessity for the order does not appear until after judgment has been obtained on *præcipe*, then the motion may be made in Chambers. The parties already before the Court are entitled to notice, but not those intended to be added: *Penner* v. *Canniff*, 1 Chy. Ch. 351; *Harrison* v. *Greer*, 2 Chy. Ch. 440; *Rumble* v. *Moore*, 1 Chy. Ch. 59; but see *Cummins* v. *Harrison*, 1 Chy. Ch. 369, where the order was granted *ex parte*. But after a final order of foreclosure, or sale, the application is in general too late: see *Orford* v. *Bayley*, 1 Chy. Ch. 272; *Street* v. *Dolan*, 3 Chy. Ch. 227. And where the plaintiff had not acted with reasonable diligence in framing his suit, the order was refused: *Portman* v. *Paul*, 10 Gr. 458. When order to add parties interested in the equity of redemption, in the M. O. may be obtained.

When an order of this kind has been obtained in Chambers, any motion to set it aside must be made to the Court upon petition: *Tice* v. *Myers*, 3 C. L. J. 102. Setting aside orders.

Wherever the party added, claims paramount to the plaintiff, he may move to discharge the order adding him as a party: *Montgomery* v. *Shortis*, 3 Chy. Ch. 69; but see note to *Rule* 127.

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Rules 307, 308.

Occasionally it happens that the plaintiff is unable to determine which of the defendants is entitled to the equity of redemption, or there may be a conflict between defendants on this point *inter se*. The Court will not however determine such questions *ex parte*, even against defendants who have not appeared, but will pronounce the usual judgment directing all the defendants to redeem, leaving them to settle their rights *inter se* by a separate proceeding: *Robinson* v. *Dobson*, 11 Gr. 357, and see *Ramsey* v. *Thompson*, 8 Gr. 372; or may direct the Master to inquire as to the point: *Cayley* v. *Hodgson*, 13 Gr. 433. But latterly any such reference if ordered has been directed as a separate reference from the general reference in the cause, and so as the plaintiff may not be put to expense, or delay, thereby: see decree in *Johnson* v. *Nesbet*, D. B. 27, fo. 150. Under the *Rules* it would seem that whenever any question arises between co-defendants, the defendant raising the question must deliver his statement of defence both to the plaintiff, and defendant as to whom the question is raised; and on the plaintiff moving for judgment, the defendant claiming relief against the co-defendant should be prepared to show that the action is also ripe for trial on the question raised between himself and co-defendant: *Rule* 328; and see *Steel* v. *Dickson*, 42 L. T. N. S. 765; *Furness* v. *Booth*, 4 Ch. D. 586.

Conflict between co-defendants as to equity of redemption, how determined.

Officers of corporations not to be made defendants merely for discovery.

307. Where an action is brought against a corporation aggregate, no officer of the corporation is to be made a defendant for discovery only. Chy. O. 63.

Discovery may now be obtained by the examination of persons who are or have been officers of a defendant corporation aggregate under *Rule* 487, and where production of documents is required from such defendants, the affidavit on production is to be made by one of the officers of the corporation: see *Rule* 511.

Officers may be parties when charged with wrongful acts.

This *Rule* applies to cases where the officers are made parties for "discovery only," but where the plaintiff charges the officers of a corporation with collusion and conspiracy, to deprive plaintiff of his rights, or damages are claimed against them for wrongful acts, such officers may be properly made defendants notwithstanding this *Rule*: *Cuthbert* v. *The Commercial Travellers' Association*, 24 Gr. 531; *Cline* v. *The Mountainview Cheese Factory*, 20 Gr. 227; *Betts* v. *Neilson*, L. R. 3 Chy. 429; 5 L. R. H. L. 1.

Several defendants in cases of doubt.

308. Where in any action the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action. J. A. Rule 94.

Identical with Eng. R. 1875, O. 16, r. 6, (1883, R. 129).

This *Rule* is applicable to actions which have been already commenced, as well as to those in which the plaintiff is in doubt at the commencement of action: *per* Cockburn, C.J., in *Honduras, etc.* v. *Tucker*, 2 Ex. D. 305. There the plaintiffs claimed against L. specific performance of a contract alleged to have been made by T., the authorized agent of L., they afterwards alleged that L. denied that T. was his authorized agent, and were therefore in doubt as to who was liable, and they obtained leave to add T. as defendant, claiming that if he was not the authorized agent of L. he was liable as principal.

This *Rule* was applied in *Harvey* v. *G. T. Ry. Co., & G. W. Ry. Co.*, 9 P. R. 80, affirmed on appeal, 7 Ont. App. 715, where injury was done to goods carried by two Railway Companies, but the plaintiff was not able to ascertain

which line of Railway the goods were on at the time of the injury. The plaintiff was held entitled to join both Companies as defendants. **Rule 309.**

In an action brought against an Irish Railway Company claiming damages for breach of contract in not carrying certain pigs from a station in Ireland to Liverpool, and for trover and conversion of the pigs. The Company having stated in answers to interrogatories, that some of the pigs were sold by the L. & N. W. Ry. Co., on whose line part of the journey had to be performed, but without communication with the defendants, leave was given to add the L. & N. W. Ry. Co. as defendants: *Creaton* v. *Midland, G. W. Ry. Co.*, 10 L. R. Ir. 74.

As to the person by whom the costs of a successful defendant are to be borne see notes to *Rules* 301 and 1171.

309. Trustees, executors, and administrators may sue and be sued on behalf of, or as representing, the property or estate of which they are trustees or representatives, without joining any of the parties beneficially interested in the trust or estate, and shall be considered as representing such parties in the action; but the Court or a Judge may, at any stage of the proceedings, order any of such parties to be made parties to the action, either in addition to, or in lieu of, the previously existing parties thereto. J. A. Rule 95. Trustees, executors and administrators.

Identical with the Eng. R. 1875, O. 16, r. 7, (1883, R. 130).

Chy. O. 61 (Holmested's R. & O. 49) provided that in all suits concerning real or personal estate vested in trustees under will, settlement or otherwise, the trustees should sufficiently represent the beneficiaries subject to the power of the Court to add the beneficiaries or any of them at the hearing. This *Rule* is an extension of that Chancery Order.

See *Meldrum* v. *Scorer*, 56 L. T. N. S. 471.

The effect of *Rule* 309 is that in litigation with strangers, trustees and executors represent their *cestuis que trustent*: *Re Cooper, Cooper* v. *Vesey*, 20 Ch. D. 611; *Bulley* v. *Bulley*, 8 Ch. D. 489; *Brooke* v. *McLean*, 5 Ont. 209; thus in a suit for redemption a trustee of the equity of redemption has been held to sufficiently represent the trust estate: *Mills* v. *Jennings*, 13 Ch. D. 639; 6 App. Cas. 698, sub. nom. *Jennings* v. *Jordan*; see *Day* v. *Radcliffe*, 24 W. R. 844; so trustees of real estate, in a partition suit under *The Partition Act*: *Stace* v. *Gage*, 8 Ch. D. 451; *Simpson* v. *Denny*, 10 Ch. D. 28; *Goodrich* v. *Marsh*, W. N. 1878, 186.

Where the subject of a settlement was an equitable chose in action, and the legal estate was not in the trustees of the settlement, but in the trustees under a prior will who were charged with misapplication of the fund, the *cestui que trust* was held entitled to institute the suit: *Pigot* v. *Stewart*, W. N. 1875, 69.

A *cestui que trust* may probably also still be properly joined where the chief object of the suit is to affect the right of the *cestui que trust*: *Liddell* v. *Deacon*, 20 Gr. 72: *Day* v. *Radcliffe*, 24 W. R. 844; or the trustee has an adverse interest: *Payne* v. *Parker*, L. R. 1 Chy. 327; or there is a question of fraud: *Read* v. *Prest*, 1 K & J. 183.

A plaintiff may sue as administrator though not appointed before suit. It is sufficient if he be duly qualified to act before the trial: *Trice* v. *Robinson*, 16 Ont. 433.

Decisions on the practice under Chy. O. 61.—The following summary of decisions under the former Chy. O. may still be useful:—

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Rule 309.

Since Chy. O. 61 Court may proceed in all cases without *s. q. t.*

Prior to Chy. O. 61, in suits adverse to the *cestui que trust*, the latter was a necessary party, and the Court had no jurisdiction to pronounce a decree in his absence: see *Cleveland* v. *McDonald*, 1 Gr. 415; *Rogers* v. *Rogers*, 2 Gr. 137. After that Order, however, the Court had jurisdiction in all cases in which the estate was vested in a trustee who was before the Court, to proceed in the absence of the *cestui que trust*, and even to decree a trust deed void in the absence of the beneficiaries: *King* v. *Keating*, 12 Gr. 29; *Thompson* v. *Dodd*, 26 Gr. 381. The question of the beneficiaries being parties, or not, is now entirely in the discretion of the Court, see *Jennings* v. *Jordan*, 6 App. Cas. 698; 45 L. T. N. S. 593; but this discretion has not always been uniformly exercised. In some cases it has been laid down that in the exercise of this discretion, wherever the suit is to set aside the trust, or is adverse to the rights of the beneficiaries, the Court should still require one or more of the beneficiaries to be made parties: *Read* v. *Prest*, 1 K. & J. 183; *Baker* v. *Trainor*, 15 Gr. 252; and see *Thomas* v. *Torrance*, 1 Chy. Ch. 46, and *Clarke* v. *Cooke*, 23 Gr. 110.

But trust estate must be vested in trustee.

In a suit by one of two creditors (both of whom claimed payment out of the trust estate in priority to other creditors), against the representatives of the deceased trustee, and one of several creditors who claimed that all creditors should be paid *pari passu*, it was held that all parties interested were sufficiently represented: *Wigle* v. *McLean*, 24 Gr. 237. In order that the Court might act under Chy. O. 61 it was necessary that the trust estate should be vested in the trustee, an executor with a mere implied power of sale over the realty was not a trustee within the meaning of the order: *Bolton* v. *Stannard*, 6 W. R. 570. *Rule* 309, however, is not so restricted in its terms, Chy. O. 61 provided that the trustee shall represent the *cestui que trust* to the same extent that executors in suits concerning personal estate, represent the persons beneficially interested, and it would seem that notwithstanding the general terms of *Rule* 309, that it is only where the trustee has the like absolute control over the trust estate which an executor has over personalty, that he can, in general, be said to sufficiently represent his *cestui que trust*: *Cox* v. *Barnard*, 5 Hare, 253. As to the extent to which the personal representative prior to *The Devolution of Estates' Act* represented those interested in the realty, see *Eccles* v. *Lowry*, 23 Gr. 167. Under *The Devolution of Estates' Act* (R. S. O. c. 108), ss. 3, 4, the personal representative may, if his letters of administration extend to the realty, as fully represent those interested in the realty as he does those interested in the personalty: see *Malone* v. *Malone*, 17 Ont. 101.

It is difficult to harmonize all the decisions which have been pronounced under the English Chancery Act 15 & 16 Vict. c. 86, s. 42, from which Chy. Ord. 61 was taken.

Cases where *c. q. t.* required to be added.

Cases where cestui que trust required to be added.—In a suit for foreclosure, where the equity of redemption was vested in trustees under a settlement, some of the beneficiaries were required to be added: *Goldsmid* v. *Stonehewer*, 9 Hare, App. xxxviii; *Cropper* v. *Mellersh*, 3 W. R. 202; (but see *contra Wilkins* v. *Reeves*, 3 W. R. 306; *Jennings* v. *Jordan*, 6 App. Cas. 698; 45 L. T. N. S. 593); but not where the trustees were also executors of the deceased mortgagor, and had the control of the whole estate out of which the mortgage debt could be paid: *Hanman* v. *Riley*, 9 Hare, App. xl.; *Sale* v. *Kitson*, 3 D. M. & G. 119; nor where the *cestuis que trustent* were infants, but in such case, the Master was directed to inquire whether a sale or foreclosure, would be more for the benefit of the infants, and the decree directed him, if he thought fit, to add the infants as parties in his office. Where the interest of the trustee who was called on to account, was in conflict with that of his *cestui que trust* the latter was added: *Payne* v. *Parker*, L. R. 1 Chy. 327. Where the trustee disputed the rights of certain of the *cestuis que trustent* to share in the trust funds, he was held not sufficiently to represent those whose rights he disputed: *Liddell* v. *Deacon*, 20 Gr. 72. So, also, where the trustee had disclaimed: *Young* v. *Ward*, 10 Hare, App. lviii. In a redemption suit some of the beneficiaries entitled to the mortgage money were required to be added: *Stansfield* v. *Hobson*, 16 Beav. 189, but see *Mills* v. *Jennings*, 13 Ch. D. 639; *Jennings* v. *Jordan*, 6 App. Cas. 698; 45 L. T. N. S. 593; *contra*.

In a suit for administration, by a plaintiff claiming as a beneficiary under a will, but whose title was doubtful, one of the *cestuis que trustent* was required to be added as a party before the hearing, in order to have an opportunity to argue the question of the plaintiff's title: *Day* v. *Radcliffe*, 24 W. R. 844. In a suit for sale of mortgaged property, where the legal estate was in the heirs, but the executrix had an implied power of sale, it was held that she did not sufficiently represent the *cestuis que trustent*, as the estate was not "vested" in her: *Bolton* v. *Stannard*, 6 W. R. 570, but *secus* where the executor had an express power of sale: *Shaw* v. *Hardingham*, 2 W. R. 657. In a suit to execute the trusts of a will, where the trustee had only a power of sale on the death of tenants for life who were still living, the parties interested in remainder were ordered to be added: *Cox* v. *Barnard*, 5 Hare, 253; where the plaintiff claimed under an assignment, the validity of which was denied by the trustee, who set up that the heir of the assignor was entitled to the trust estate, the heir was required to be added: *Miller* v. *Ostrander*, 12 Gr. 349. **Rule 309.**

Cases where cestui que trust was not required to be added.—In a redemption suit by a trustee: *Jennings* v. *Jordan*, 6 App. Cas. 698; 45 L. T. N. S. 593; *Mills* v. *Jennings*, 13 Ch. D. 639; 6 App. Cas. 698; but see *Stansfield* v. *Hobson*, 16 Beav. 189. Cases where *c. q. t.* not required to be added.

In a redemption suit against trustees, where the estate was vested in them by a deed absolute in form, though intended as a mortgage, one of the trustees being also beneficially interested: *Kerr* v. *Murray*, 6 Gr. 343, and see *O'Connell* v. *Charles*, 2 Gr. 489. Mortgage cases.

In a foreclosure suit by an executor of a deceased mortgagee: *Lawrence* v. *Humphries*, 11 Gr. 209: the heirs, or persons beneficially interested, required to convey, may be added in the Master's office (*Ib.*), but see now R. S. O. c. 108, ss. 4, 9; *Dilk* v. *Douglas*, 26 Gr. 99, as to power of personal representative to convey realty of a testator or intestate.

In a foreclosure suit by a trustee of a mortgage made for the benefit of creditors: *Fraser* v. *Sutherland*, 2 Gr. 442, or for the benefit of a firm where one of the partners was dead: *Stephens* v. *Simpson*, 12 Gr. 493; 15 Gr. 594.

In a foreclosure suit against a trustee: *Shaw* v. *Liddell*, 1 U. C. L. J. 57; *Wilkins* v. *Reeves*, 3 W. R. 305; *Hannan* v. *Riley*, 9 Hare, App. xl.; *Sale* v. *Kitson*, 3 D. M. & G. 119; but see *Tudor* v. *Morris*, 22 L. J. Chy. 1051; *Cropper* v. *Mellersh*, 1 Jur. N. S. 299; *Dickson* v. *Draper*, 11 Gr. 362. In the latter case an inquiry was directed whether a sale or foreclosure would be more beneficial for the infant *cestuis que trustent*, and they were directed to be made parties, if the Master should think fit to add them in his office.

In a suit against a trustee to enforce a trust for benefit of creditors: *Bateman* v. *Margerison*, 6 Hare, 496; *Wood* v. *Brett*, 9 Gr. 78; and see *Pare* v. *Clegg*, 29 Beav. 589. Suits against trustees.

In a suit against executors and trustees to enforce a contract made by the testator in his lifetime: *Deliste* v. *McCaw*, 22 Gr. 254.

In a suit by a trustee against representatives of a deceased trustee to recover moneys misappropriated by the latter: *Re Cross-Harston* v. *Tenison*, 45 L. T. N. S. 777.

In a suit by one *cestui que trust* against executors and trustees, to recover trust property wrongfully alienated by one of them, the other *cestuis que trustent* were held to be unnecessary parties: *Ryckman* v. *Canada Life Assurance Co.*, 17 Gr. 550.

In an action for partition, where the shares of some parties were vested in trustees: *Simpson* v. *Denny*, 10 Ch. D. 28; *Goodrich* v. *Marsh*, W. N. 1878, 186, and in such a case it is not necessary to serve the *cestuis que trustent* with the judgment, or to prosecute any inquiry as to them before the Master: *Ib.* Action for partition.

In a suit for the construction of a will, and to determine whether or not there had been a forfeiture, the persons entitled under the gift over, being a class, some of whom were not ascertained, but one of whom was a party; Suit for construction of will.

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the trustee was held sufficiently to represent those unascertained: *White* v. *Chitty*, 14 W. R. 366; and see now *Rule* 316.

Effect of representation of *c. q. t.* by trustee.

Effect of representation.—Where the action is brought by, or against, a trustee without adding the *cestuis que trustent* as parties, if the question in issue has been fairly tried, all parties represented by the trustee would, generally speaking, seem to be concluded by the judgment, but not otherwise: *Eccles* v. *Lowry*, 23 Gr. 167. Thus a decree made after replication filed, dismissing a bill brought by an official assignee, was, in the absence of fraud, conclusive against the creditors of the estate of which he was assignee: *Morrison* v. *Robinson*, 19 Gr. 480. and see *Jardine* v. *Wood*, 19 Gr. 617.

Where, however, a suit by trustees had failed for want of evidence, it was held that a subsequent suit might be maintained for the same purpose by the *cestui que trust* on the discovery of new evidence: *Pierce* v. *Brady*, 2 Jur. N. S. 772. See, however, *Commissioners, etc., of London* v. *Gillatly*, 24 W. R. 1059; *Morrison* v. *Robinson*, 19 Gr. 480.

If a deceased person has no personal representative, proceedings may go on, or the Court may appoint a representative.

310. Where, in any action or other proceeding, it is made to appear that a deceased person who was interested in the matters in question has no legal personal representative, the Court or a Judge may either proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent such estate for all the purposes of the action or other proceeding, on such notice to such person or persons, if any, as the Court thinks fit, either specially or by public advertisement, and notwithstanding that the estate in question may have a substantial interest in the matters, or that there may be active duties to be performed by the person so appointed, or that he may represent interests adverse to the plaintiff, or that there may be embraced in the matter an administration of the estate whereof representation is sought; and the order so made and any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly appointed legal personal representative of such person, and such legal personal representative had been a party to the action or proceeding, and had duly appeared and had submitted his rights and interests to the protection of the Court. R. S. O. 1877, c. 49, s. 9.

Chy. Gen. Ord. 56 (corresponding to Imp. Act 15 & 16 V. c. 86, s. 44) gave the Court a wide discretion to appoint a representative of the estate of a deceased person for the purposes of an action, or to dispense with a representative, wherever it considered that the estate in question was sufficiently represented: *Joint Stock Discount Co.* v. *Brown*, L. R. 8 Eq. 376, but the Order was only acted on where the interest of deceased was of little consequence, and it was held not to apply where the estate had a substantial interest: *Sherwood* v. *Freeland*, 6 Gr. 305; *Toronto Savings Bank* v. *Canada Life Ass. Co.*, 13 Gr. 171; *Re Tobin*, 6 P. R. 40, or where the personal representative would have active duties to perform: *Fowler* v. *Bayldon*, 9 Ha. App. 78, or would represent interests adverse to the plaintiff: *Headden* v. *Emmott*, 22 L. T. Jour. 166: *Dean of Ely* v. *Gayford*, 16 Beav. 561, or where the object of the suit was to administer the estate: *Silver* v. *Stein*, 1 Dr. 294.

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It was also held that an appointment would not be made where an administrator *ad litem* appointed by the Probate Court would not suffice, and that an administrator *ad litem* does not sufficiently represent the estate where a general administration of the estate is necessary: *Dowdeswell* v. *Dowdeswell*, 9 Ch. D. 294; see also Dan. Pr. 5th ed. 181; 6th ed. 208, Morgan Chy. Orders 201, *Webster* v. *British Empire Co.*, 15 Ch. D. 169; *Curtius* v. *Caledonia, etc., Ins. Co.*, 19 Ch. D. 534.

Chy. Order 56 was therefore extended to meet the above decisions, by R. S. O. c. 49, s. 9, from which the above *Rule* is taken.

This *Rule* has still however a comparatively limited scope, as the representation which may be ordered under it is only of a deceased person "who was interested in the matters in question." A person, the administration of whose estate is the subject of the action, is not a deceased person "interested in the matters in question," within the meaning of the *Rule*. He must in his lifetime have been interested in the matters in question: *Hughes* v. *Hughes*, 6 Ont. App. 373; *sed vide Webster* v. *The British Empire Ins. Co.*, 15 Ch. D. 169. The legal personal representative of deceased must in such case be a party to properly constitute the action: see *Ib.* and *Rowsell* v. *Morris*, L. R. 17 Eq. 20; *Outram* v. *Wyckoff*, 6 P. R. 150; *Leonard* v. *Clydesdale*, 6 P. R. 142; *Toronto Savings Bank* v. *Canada Life Ass. Co.*, 13 Gr. 171; unless *Rule* 312 applies there being an executor *de son tort*.

The *Rule* enables the Court to take one of two courses, either (1) to proceed without a representative of the personal estate of a deceased person who may have been interested in the matters in question; or, (2) to appoint some person to represent such deceased person's personal estate for the purposes of the action.

Where the Court makes an order adopting either of these courses, the estate in question is bound and concluded by the proceedings as though it had been represented in the litigation by a duly appointed legal personal representative.

No authority to appoint any one to represent realty.

Whenever, therefore, it is necessary that the real estate of a deceased person should be represented in any action or proceeding, the Court had no power, before *The Devolution of Estates Act*, under this *Rule* to proceed in the absence of the real representative, or to appoint any person to represent such estate, so as to bind it by the proceedings. But in the case of the estates of persons dying after the 1st of July, 1886, the personal representative is also the representative of the realty: R. S. O. c. 108, s. 4; *sed vide*. R. S. O. c. 60, s. 58.

Further provisions are made by *Rules* 316, 324 to enable actions to be prosecuted in the absence of persons who according to the ordinary practice should be joined as parties.

Application under statute, how made.

The application under the *Rule* is usually made by *ex parte* motion in Chambers, but the order may be made at the trial of the action: *Mendes* v. *Guedalla*, 10 W. R. 485; *Hewiston* v. *Todhunter*, 22 L. J. Chy. 76; *Re Peppitt*, 4 Ch. D. 230; or on a motion for judgment: *Gairdner* v. *Gairdner*, 1 Ont. 184, and see *Curtius* v. *Caledonian Fire and Life Ins. Co.*, 19 Ch. D. 534; or at a subsequent stage of the action where the party whose estate is to be represented, dies after the trial: *McCarthy* v. *Arbuckle*, 31 C. P. 48. Before the order is made notice is sometimes required to be given to the person, if any, who would be entitled to letters of administration: *Curtius* v. *Caledonian Fire and Life Ins. Co.*, *supra*.

Discretion of Court.

The Court has a wide discretion either to appoint a representative, or to proceed without any representation if it considers the estate in question sufficiently protected: see *Joint Discount Co.* v. *Brown*, L. R. 8 Eq. 380; *Turratt* v. *Lloyd*, 2 Jur. N. S. 371; *Hewitson* v. *Todhunter*, 22 L. J. Chy. 76.

Cases when representative dispensed with.

Representation of the estate has been dispensed with, where the deceased person was in the same interest as the plaintiff: *Cox* v. *Taylor*, 22 L. J. Chy. 910; or where other persons of the same class were before the Court: *Abrey* v. *Newman*, 17 Jur. 153; and a representative of the estate of one of two executors who had died insolvent, and to which representation could not be obtained was also dispensed with: *Moore* v. *Morris*, L. R. 13 Eq. 139; *Bund* v. *Randle*, 2 W. R. 331; *Rogers* v. *Jones*, 1 Sm. & G. 17; and where the deceased person's interest was very small: *Montgomery* v. *Douglas*, 14 Gr. 268; and where his estate was insolvent and his next of kin refused to take out letters of administration and

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the estate appeared to have no substantial interest in the fund sought to be recovered by the plaintiff, representation was dispensed with: *Curtiss* v. *Caledonian Fire and Life Ins. Co.*, 19 Ch. D. 534; *Webster* v. *The British Empire Ins. Co.*, 15 Ch. D. 169; and even where the deceased party was sole plaintiff and tenant for life, and an arrear of income remained due to him, an administration suit instituted by him, was, on the application of the defendants, revived without any representative of the original plaintiff, whose executor had died without proving his will, but without prejudice to the right of the personal representative of the original plaintiff to intervene: *Hayward* v. *Pile*, L. R. 7 Chy. 634, but see *Bank of Montreal* v. *Wallace*, 1 Chy. Ch. 261.

Where a deceased person had by an instrument *inter vivos* made over his property to the defendant, who became bound to pay his grandchildren $400 each after the death of the settlor, the Court dispensed with a personal representative of the settlor, in a suit by one of the grandchildren to enforce payment of the $400: *Mulholland* v. *Merriam*, 19 Gr. 288, *S. C.* 20 Gr. 152.

Where an estate had been administered, and pending the suit for administration, the personal representative died, and all that remained to be done was for the Master to make his report, and it appeared that the estate was insolvent, an order was made appointing the solicitor of the deceased administratrix to represent the estate: *Re Tobin*, *Cook* v. *Tobin*, 6 P. R. 40; and see *Sherwood* v. *Freeland*, 6 Gr. 305; *Toronto Savings Bank* v. *Canada Life Assn. Co.*, 13 Gr. 171.

Cases where *Rule* applies.

The *Rule* has been held to apply though the deceased person was never a party to the action: *Webster* v. *The British Empire Ins. Co.*, *supra*, but see *Hughes* v. *Hughes*, 6 Ont. App. 373, and to an action for administration where the estate is small: *Re Colton*, *Fisher* v. *Colton*, 8 P. R. 542, and to actions for the construction of wills: *Gairdner* v. *Gairdner*, 1 Ont. 186; see also *Mendes* v. *Guedalla*, 10 W. R. 485, where an order was made at the trial; and *McCarthy* v. *Arbuckle*, 31 C. P. 48, where a defendant died after the trial. It also applies to proceedings on a special case: *Swallow* v. *Binns*, 17 Jur. 29; and to proceedings by petition: *Re Ranking*, L. R. 6 Eq. 601-5; *Ex parte Cramer*, 9 Hare App. xlvii.; and see *Maynay* v. *Davidson*, *Ib.* lxxxii., but is generally applicable only where from any cause there is difficulty in obtaining representation of the estate: *Long* v. *Storie*, Kay App. xii.; *Davies* v. *Boulcott*, 1 Dr. & Sm. 23; *Bliss* v. *Putnam*, 29 Beav. 20.

In an action to enforce a lien for an annuity charged upon real estate, it is not necessary to make the personal representative of a deceased person who was liable for its payment a party, unless an account of the personal estate of the deceased is asked: *Paine* v. *Chapman*, 7 Gr. 179, and see *Burns* v. *Canada Co.*, 7 Gr. 587.

In an action to make several defendants liable for a breach of trust, where one died before decree having made a will appointing executors who had not proved the will; (the liability of the surviving defendants being the same as that of the deceased defendant,) the Court made an order allowing the suit to proceed in the absence of a personal representative, reserving leave to the executors to intervene, if so advised when they had proved the will: *Hebermann Joint Stock Co.* v. *Fottrill*, 13 L. R. Ir. 335.

See *Wingrove* v. *Thompson*, 11 Ch. D. 419, cited in note to *Rule* 622.

Consent of person appointed necessary.

A person cannot be appointed to represent an estate under this *Rule* without his consent: *Prince of Wales Co.* v. *Palmer*, 25 Beav. 605; *Hill* v. *Bonner*, 26 Beav. 372. The proper person to be appointed is the person who would be appointed administrator *ad litem*: *Dean of Ely* v. *Gayford*, 16 Beav. 561; where the deceased had left a will which was disputed, the person named as executor therein was appointed: *Hele* v. *Lord Bexley*, 15 Beav. 340.

Judgment against personal representative, how far binding on real representative.

Although a judgment in a suit to which the personal representative was a party was conclusive as regards the personal estate and those beneficially interested therein, whether as legatees or next of kin; it was formerly only *prima facie* evidence of a liability of the estate as against those interested in the realty, whether as devisees, or heirs-at-law, and the latter were at liberty to rebut it: *Eccles* v. *Lowry*, 23 Gr. 167; *Lovell* v. *Gibson*, 19 Gr. 286; *Willis* v. *Willis*, 19 Gr. 573; *Harvey* v. *Wilde*, L. R. 14 Eq. 428; *Steel* v. *Lineberger*, 58 Penn.

St. Rep. 308; *Story* v. *Fry*, 1 Y. & C. C. C. 603, and see *Anderson* v. *Paine*, 14 Gr. 110; and it is therefore only to this extent that an order under the *Rule* will bind those interested in the real estate, except in cases coming under *The Devolution of Estates Act* (R. S. O. c. 108,) s. 4, in which the personal representative also represents the realty. But even before *The Devolution of Estates Act* the lands of a deceased person could be sold under execution against his personal representative, without making the persons interested in the realty parties: R. S. O. (1877), c. 66, ss. 35, 36, 40; and the persons interested in the realty were *prima facie* bound by the sale: *McEvoy* v. *Clune*, 21 Gr. 515. But where the claim for which the judgment was recovered was one that was not properly enforceable against the realty, the execution might be stayed in an action by heirs-at-law: *Anderson* v. *Paine*, 14 Gr. 110; and if a sale took place it might be successfully impeached by the heir-at-law: *Freed* v. *Orr*, 6 Ont. App. 690. Where the judgment against the personal representative was successfully impeached on the ground of fraud and collusion, the beneficiaries were entitled to set up the Statute of Limitations against the claim of the creditor which the personal representative had omitted or neglected to plead: *Jardine* v. *Wood*, 19 Gr. 617. **Rule 311.**

The Master in Chambers has power to entertain applications under this *Rule* for the appointment of a person to represent the estate of a deceased party: *Collver* v. *Swayzie*, 8 P. R. 42.

This *Rule* does not authorize the High Court to grant letters probate of wills, or letters of administration. It merely enables the Court to proceed with an action so as to bind the personal estate of a deceased person even though no letters probate, or letters of administration, have been granted by the Surrogate Court. The representative authorized to be appointed by this *Rule* is not an administrator, but merely represents the estate for the purpose of the action in which the order is made, and he is not entitled to act as an administrator of the estate, except so far only as it is necessary for him to do so for the purposes of the action in which he is so appointed. It has not been usual to require any security to be given by a person appointed under this *Rule* to represent an estate; and he has no authority to receive any moneys belonging to the estate he is appointed to represent, except according to the express order of the Court in that behalf. The Court has, under the original Chy. O., refused to appoint a person to receive a sum of money payable out of Court to a deceased person: *Rawlins* v. *McMahon*, 1 Drew. 225; *Williams* v. *Allen*, 32 Beav. 650, and has refused to order payment to the representative, where one has been appointed in the suit: *Byam* v. *Sutton*, 19 Beav. 646. *Rule* does not supersede jurisdiction of Surrogate Courts.

An administrator *ad litem*, however, may be appointed by the Surrogate Court: R. S. O. c. 50, s. 56, and see s. 59, and a decree against him binds the general administrator: *Davis* v. *Chanter*, 2 Ph. 545; *Croft* v. *Waterton*, 13 Sim. 653; *Ellice* v. *Goodson*, 2 Col. 4; *Williams* v. *Allen*, 32 Beav. 650; *Woodhouse* v. *Woodhouse*, L. R. 8 Eq. 514; *Collas* v. *Hesse*, 12 W. R. 565; and by the following *Rule* the High Court has also power in certain cases to appoint an administrator, or administrator *ad litem*, *Rule* 311:

311. Where no probate of the will of a deceased person, or letters of administration to his estate, have been granted by a Surrogate Court, and representation of such estate is required in any action or proceeding in the High Court, the Court may appoint some person administrator or administrator *ad litem* (according as the case may require) to the estate; and the person so appointed shall give the security required from, and have the rights, authority, and responsibility of, an administrator or administrator *pendente lite* (as the case may be), appointed by the Surrogate Court, but the Court may dispense with such security. Appointment of Administrator to represent estate in proceedings in High Court.

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(*a*) Where a general administrator is appointed under this Rule, the same fees shall be payable in stamps as would be payable to the Crown, or to the Judge of the Surrogate Court, under any Act then in force, upon the grant of administration of an estate of the same value made by the Surrogate Court.

(*b*) Where administration is granted by the High Court under this Rule, the Registrar shall forthwith transmit by mail to the Surrogate Clerk, a certified copy of the grant; and in case the grant is with will annexed, he shall, at the same time, also transmit to the said Clerk a certified copy of the will; and the Surrogate Clerk shall make similar entries in respect of the documents so transmitted as he makes in respect of particulars furnished to him under section 14 of *The Revised Statute respecting the Surrogate Courts*. 48 V. c. 13, s. 11.

This *Rule* seems to authorize the appointment of an administrator only in the case where no probate of the will of a deceased person, or letters of administration to his estate have been granted. It does not appear to authorize such an appointment where probate or administration has been granted, but the executor or administrator has died or has become incapable of acting.

It is not intended by this *Rule* that the business of the Surrogate Court should be transferred to the High Court: the intention is merely to provide for necessities arising in the progress of an action, where representation of an estate is required in an action and there has not been carelessness or negligence on the part of the party who may require the appointment made; the fact that a claim is likely to be barred by the Statute of Limitations is not a ground for applying under this *Rule*: *Meir* v. *Wilson*, 13 P. R. 33; *Ford* v. *Landed Banking Co.*, 13 P. R. 210.

An application by a mortgagee seeking to foreclose his mortgage to appoint an administrator to the estate of the mortgagor was granted: *MacLaren* v. *Rivett*, 7 C. L. T. 202: *Re Chambliss and Canada Life Ass. Co.*, 12 P. R. 649; *Cameron* v. *Phillips*, 13 P. R. 78. *In re Chambliss & Canada Life Ass. Co. supra*, the appointment was made before action commenced.

The *Rule* empowers the Court to appoint either an administrator *ad litem* or a general administrator. It was doubted by Boyd, C., whether an administrator *ad litem* would be a sufficient representative of the realty under *The Devolution of Estates Act* (R. S. O. c. 108): *Whitson* v. *Smith*, June 5, 1889.

The order appointing an administrator or administrator *ad litem* should as nearly as possible follow the form of a grant of administration made in a like case by the Surrogate Court, and should contain all the particulars necessary to be entered in the books of the Surrogate Clerk under the Surrogate Rule 48: for form of order see *Cameron* v. *Philips*, 13 P. R. 141; Howell's Surrogate Court Pr. pp. 841, 266.; *Davis* v. *Chanter*, 2 Ph. 549: as to effect of grant, see *Faulkener* v. *Daniel*, 3 Ha. 208: for form of order of foreclosure against an administration *ad litem*, see *Peal* v. *Gott*, W. N. 1885, 46.

Order for account against executor *de son tort*.

312. Where no order for general administration is asked or required, or where it is shewn that an executor *de son tort* has taken possession of the bulk of the personal assets belonging to the estate of a deceased person, such executor

de son tort may on the application of any one interested in the estate of the deceased, and, without the appointment of any other personal representative of the estate, be required to account for any assets of the estate which have come to his hands; and where a proper case is made for the appointment by the High Court of a receiver of the estate of a deceased person who has no legally appointed personal representative, the estate may be administered under the direction of the Court without the appointment of any person other than the receiver to represent the estate. 48 V. c. 13, s. 12. Rule 313.

Prior to the statute from which this *Rule* is taken it was impossible to obtain a decree for the general administration of the estate of a deceased person, without having a duly appointed personal representative before the Court, either as plaintiff or defendant; because the personal representative was the only person who had a legal title to the personal estate: see *Rule* 310, note.

Where the Court acts under this *Rule* and grants an order for the general administration of a deceased person's estate, without requiring a duly appointed personal representative to be made a party, it will itself assume the duties of a personal representative, and will not suffer the assets to be paid over to next of kin, legatees, or devisees, without making due inquiry as to the debts of the deceased, and providing for their payment out of the assets.

313. An infant may sue as plaintiff by his next friend; (*a*) and may defend any action by his guardian appointed for that purpose, [or by the Official Guardian as the case may be.] J. A. Rule 96. Infants.

The original *Rule* had at (*a*) the words "in the manner practised in the Court of Chancery," following Eng. R. 1875, O. 16, r. 8, (1883, R. 138). The words in brackets are not in the Eng. Rules, which, as respects infants, correspond otherwise with the above.

See also *Rules* 258, 259, 262.

By the practice of the Court of Chancery, every suit or application: *Cox* v. *Wright*, 9 Jur. N. S. 981, on behalf of an infant must be by next friend, who properly will be the father if he is not adverse in interest: *Woolf* v. *Pemberton*, 6 Ch. D. 19, but who need not be a relation: *Cross* v. *Cross*, 8 Beav. 455, nor a solvent person: *Re McConnell*, 3 Chy. Ch. 423, and therefore need not give security for costs: *Fellows* v. *Barrett*, 1 Keen 119, but may not be a married woman, notwithstanding the M. W. Act. 1884, s. 1 sub-s. 2: *Thynne* v. *St. Maur*, 34 Ch. D. 465; nor a defendant: *Anon*, 11 Jur. 258; *Payne* v. *Little*, 13 Beav. 114; *Re Burges*, W. N. 1883, 177, unless merely a formal defendant: *Taylor* v. *Taylor*, 16. L. J. N. C. 66. In *Valder* v. *Hawkins*, 2 M. & K. 248, it was said that the Court always expected next friends to be substantial persons, and that they should be relations, connections or friends of the family, not mere volunteers: see also *Foster* v. *Cautley*, 10 Ha. App. 24, and *Woolf* v. *Pemberton*, *sup.*; but see cases *supra* and *infra*. Circumstances connecting a next friend too closely with parties adverse in interest may render him an improper person, and liable to be removed, though nothing is alleged against his character, circumstances or conduct: *Re Burgess, Bottomley* v. *Burgess*, 25 Ch. D. 243. The consent of the next friend should be obtained before using his name, though the infant's consent is unnecessary: *Worthan* v. *Pemberton*, 9 Jur. 291. If a suit is instituted on an infant's behalf without a next friend, it may, on the defendant's motion, be dismissed with costs, to be paid by the solicitor: Dan. Prac. 5th ed., 67, 6th ed., 105.

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Notwithstanding that generally anyone may sue as next friend of an infant, the Court will, on the application of the defendant, or of any person acting as next friend of the infant for the purpose of the application: *Guy* v. *Guy*, 2 Beav. 460, institute an inquiry as to whether the suit is for the benefit of the infant, and if the result shows that the proceedings are not for the benefit of the infant, the suit may be stayed: *Anderton* v. *Yates*, 5 DeG. & S. 202, or dismissed with costs, to be paid by the next friend: *Fox* v. *Sawerkrop*, 1 Beav. 583; *Golda* v. *Kerr*, W. N. 1884, 46; and see *Re Elsom*, *Thomas* v. *Elsom*, W. N. 1877, 177; *Mill* v. *Mill*, 4 C. L. T. 252; 20 C. L. J. 252.

In an action on behalf of an infant by a next friend acting with the father's authority, the father died and the mother, the testamentary guardian, was held entitled to be substituted as next friend though no charge of improper conduct had been made against the actual next friend; *Hutchinson* v. *Norwood*, 31 Ch. D. 237.

The next friend of an infant was indemnified against the costs of an appeal to the Supreme Court out of the infant's estate, where the appeal was advised by more than one counsel and the Court of Appeal was not unanimous: *Cottingham* v *Cottingham*, 11 P. R. 13.

If no next friend is named a motion may be made to dismiss the action, with costs to be paid by the solicitor: *Flight* v. *Bollard*, 4 Russ. 298.

A compromise cannot be forced upon infants if it is of no benefit to them, even though agreed to by their counsel: *Rhodes* v. *Swithinbank*, 22 Q. B. D. 577; or if it is contrary to the opinion of their legal adviser: *Re Birchall*, *Wilson* v. *Birchall*, 44 L. T. N. S. 113; 16 Ch. D. 41.

When the next friend dies pending the action a new next friend may be appointed on an *ex parte* motion: *Daly* v. *Daly*, 9 L. R. Ir. 383; Dan. Forms 34.

The next friend should not take any step in the cause in the name of the infant after he attains twenty-one, for the infant may abandon the suit: *Brown* v. *Weatherhead*, 4 Ha. 122. If the infant adopts the proceedings after he becomes of age, he becomes liable for all the costs of the suit.

A next friend who refuses to appeal may be removed: *Depuy* v. *Welsford*, W. N. 1880, 121.

The next friend, if directed to pay costs, is personally liable for them, unless the Court gives direction otherwise: *Caley* v. *Caley*, 25 W. R. 528.

As to whether a next friend is entitled to solicitor and client costs: see *Damant* v. *Hennell*, 33 Ch. D. 224.

Married women.

314. A married woman may sue for alimony without a next friend.

(*a*) In cases not provided for by *The Married Women's Property Act*, a married woman may sue as plaintiff by her next friend. J. A. Rule 97; 47 V. c. 19, s. 11.

Not the same as the Eng. R. 1875, O. 16, r. 8, (1883, R. 138).

In suits for alimony a wife could always formerly sue alone; and may compromise the suit and deal with it just as any other suitor can: *Vardon* v. *Vardon*, 19 C. L. J. 229; 6 Ont. 719.

Practice before Act of 1872.

Prior to *The Married Woman's Act* of 1872, a married woman could not sue at law without her husband being joined as a co-plaintiff: Lush's Prac. (2nd ed.) 33. In Equity she might sometimes be sole plaintiff, but was required to sue by next friend. It had long been a settled rule of the Court of Chancery, that wherever the husband and wife without a next friend sue or defend together, or where the husband sues as next friend of his wife, the suit or defence is regarded as that of the husband alone, and would not prejudice any future claim by the wife: *Wake* v. *Parker*, 2 Keen 59, 70; *Hughes* v *Evans*, 1 S. & S. 185; *Moie* v. *Smith*, 1 J. & W. 605. Where the suit related to the separate property of a wife, she was required to sue by next friend, otherwise

the defendant might demur: *Houlding* v. *Poole*, 1 Gr. 206; *Blackburn* v. *McKinlay*, 3 Chy. Ch. 65; *Wake* v. *Parker*, *supra*. That rule applied not only where a bill was filed, but in all applications made exclusively on the wife's behalf: *Re Waugh*, 15 Beav. 508; *Cooney* v. *Girvin*, 1 Chy. Ch. 94; and this practice was not altered by the Judicature Acts in England: *Roberts* v. *Evans*, 7 Ch. D. 830. Where the wife sued by next friend, the husband was still often required to be a party, and he was usually made a defendant: *Wake* v. *Parker*, *supra*; *Roberts* v. *Evans*, 7 Ch. D. 830; see, however, *Aboulaff* v. *Oppenheimer*, 47 L. T. N. S. 702; 52 L. J. Q. B. 309; unless he had no adverse interest, in which case he might be co-plaintiff: *Meddowcraft* v. *Campbell*, 13 Beav. 184; *Beardmore* v. *Gregory*, 2 H. & M. 491; *Davis* v. *Prout*, 7 Beav. 288. **Rule 314.**

So where a suit was brought against a married woman as having separate estate it was necessary to join her husband and generally the trustees of such estate as defendants: see *Atwood* v. *Chichester*, 3 Q. B. D. 722; *Hancocks* v. *Lablache*, 3 C. P. D. 197; *McFarlane* v. *Murphy*, 21 Gr. 81; *Collett* v. *Dickenson*, 11 Ch. D. 687; *Flower* v. *Buller*, 15 Ch. D. 665.

A change was introduced in 1872, by *The Married Woman's Property Act*, 35 Vict. c. 16, (see Rev. Stat. 1877, c. 125, sec. 20), which was as follows:— M. W. Act of 1872.

"20. A married woman may maintain an action in her own name for the recovery of any wages, earnings, money and property by this or any other Act declared to be her separate property, and shall have in her own name the same remedies, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other her separate property for her own use, as if such wages, earnings, money, chattels and property belonged to her as an unmarried woman, and any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts, as if she were unmarried." 35 V. c. 16, s. 9. Suits by married women. Suits against.

It seems to have been established in *Lawson* v. *Laidlaw*, 3 Ont. App. 77, that the personal property enjoyed by a married woman under *The Married Women's Property Acts* of 1859 and 1872 and real estate enjoyed by her under the Act of 1872, were her "separate property" within the meaning of the above sec. 20 so as to enable her to sue alone in respect thereof.

Dower not set apart was held to be separate estate: *Douglas* v. *Hutchinson*, 6 Ont. 581.

After the Act of 1872 in those cases in which it allowed a married woman to be sued alone, or enabled her to sue without a next friend, it was not necessary to make her husband a party, unless he had an interest, and was made a party in respect of that interest: see *McFarlane* v. *Murphy*, 21 Gr. 80; *Boustead* v. *Whitmore*, 22 Gr. 222; *Murdoch* v. *O'Sullivan*, 25 Gr. 392; but if the husband was joined as a co-plaintiff, the wife was required to sue by next friend, otherwise the rule applied that the suit was that of the husband: *Re Spencer & McDonald*, 19 Gr. 467; *Young* v. *Robertson*, 2 Ont. 434.

The Act of 1872 enabled a wife to sue alone and without a next friend in relation to such estate only as by that, or any other Act, is declared to be her "separate property": *Redman* v. *Brownscombe*, 6 P. R. 84; *Hooper* v. *Maitland*, 7 P. R. 50. If the property did not answer the description of separate property, she was compelled to sue by next friend: *Pruyn* v. *Soby*, 7 P. R. 44. The Act of 1872 was then the only Act which gave the quality of separate estate to unsettled property of a married woman; and whether or not her unsettled real property acquired that quality depended upon whether the marriage took place before or after 2nd March, 1872: see R. S. O. 1877, c. 125, s. 20, and *Godfrey* v. *Harrison*, 8 P. R. 272.

Rule 97 of the original J. A. 1881, was the next step, and followed in a great measure, but was also an extension of, the Act of 1872. Original *Rule* 97.

The Act of 1872 rendered a wife capable of being sued at law, as before the Act she could be in Equity, separately from her husband in respect of her separate engagements, contracts or torts; but it was only in respect of her separate property, or her contracts in regard to any separate business carried on by her: see *Berry* v. *Zeiss*, 32 C. P. 231, that she could sue alone. The original *Rule* 97 enabled her to sue alone, not only in respect of her separate

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Rule 314. estate, but also in cases relating to her separate engagements, contracts or torts; and by leave in all other cases in which theretofore a next friend was necessary, upon giving security for costs, if the Court should think fit.

Under the corresponding English Rule a married woman in receipt of a separate income of £1,150 was not required to give security for costs on obtaining leave to defend separately: *Noel* v. *Noel*, 13 Ch. D. 510. So a married woman suing alone without a next friend, and having sufficient separate property to pay costs of the action, was not required to give security: *Brown* v. *North*, 9 Q. B. D. 52.

There was held to be nothing in the *Rule* to preclude the Court from exercising the power to give leave after action brought: *Kingsman* v. *Kingsman*, 6 Q. B. D. 122, where refusal to stay an action was considered equivalent to leave to sue without next friend.

Present practice, under R. S. O., 1887, c. 132.

On 1st July, 1884, *The Married Woman's Property Act*, 1884, (47 Vict. c. 19), came into operation (now R. S. O. 1887, c. 132), and the capacity of a married woman to sue and be sued, will now be governed by s. 3 of that Act, and thenceforward a married woman plaintiff will stand in the same position so far as security for costs is concerned as any other plaintiff: *Threlfall* v. *Wilson*, 8 P. D. 18, though she has no separate estate: *Re Isaac*, 30 Ch. D. 418; and even though the cause of action may have arisen prior to 1st July, 1884: *Severance* v. *Civil Service Supply*, 48 L. T. N. S. 485; *James* v. *Barraud*, 31 W. R. 786; 49 L. T. N. S. 300.

Section 3 of the R. S. O. c. 132, is as follows:—

Married woman to be capable of holding property as a *feme sole*.

"3. (1) A married woman shall be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, in all respects as if she was a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary is shewn.

(4) Every contract entered into by a married woman with respect to and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

This section is in the terms of the Eng. Act of 1882, 45 & 46 V. c. 75.

So far as it enlarges the liability of a married woman or her capacity to contract it is not retrospective. Sub-sections (3) and (4) have been held not to be retrospective so as to include contracts made before the Act: *Conolan* v. *Leyland*, 27 Ch. D. 632; *Turnbull* v. *Forman*, 15 Q. B. D. 234; *Scott* v. *Wye*, 11 P. R. 93.

Sub-sec. (4) does not enable a married woman, who has no separate property, to contract so as to bind separate property she may afterwards acquire: see *Re Shakespear*, 30 Ch. D. 169; *Palliser* v. *Gurney*, and other cases, *infra*.

The Act seems to apply in the case of all married women, whether married before or after 1st July, 1884, to enable them to sue or be sued alone after that date, whether in respect of a cause of action arising before or after that date: *James* v. *Barraud*, 49 L. T. N. S. 300; 31 W. R. 786, an action for trespass committed before the Act brought in her own name: *Gloucester, etc.* v. *Phillipps*, 12 Q. B. D. 533, an action of contract: *Weldon* v. *Winslow*, 13 Q. B. D. 784; *Weldon* v. *DeBathe*, 14 Q. B. D. 339; *Lowe* v. *Fox*, 15 Q. B. D. 667, actions for torts.

Under 47 V. c. 19, s. 22 (now repealed), the right to sue, and the liability to be sued under the Act of 1872 were preserved; see *Scott* v. *Wye*, *supra*. **Rule 314.**

Time under the Statutes of Limitations runs against a married woman from the commencement of the Act: *Weldon* v. *Neal*, 32 W. R. 828, 51 L. T. N. S. 289: see also *Re Lady Hastings*, 35 Ch. D. 94.

Section 14 of R. S. O. c. 142 is as follows:—

"14. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other." **Remedies of married woman for protection and security of separate property.**

A husband may bring an action against his wife for money lent and for money paid at her request after marriage: *Butler* v. *Butler*, 14 Q. B. D. 831; affirmed in appeal, 16 Q. B. D. 374: see *McGregor* v. *McGregor*, 20 Q. B. D. 529; and a wife may sue her husband to recover possession of her real estate: *Till* v. *Till*, 15 Ont. 133.

R. S. O. 1877, c. 125, s. 20, was held to affect procedure only, and not to render a married woman liable in respect of her *contracts* except in the same way as she was formerly liable in Equity, that is to say, her liability was made to depend upon the possession of separate estate; and that fact was therefore required to be alleged: *Darling* v. *Rice*, 1 Ont. App. 46; *Standard Bank* v. *Boulton*, 3 Ont. App. 93; see *Field* v. *McArthur*, 25 C. P. 167; 27 C. P. 15. See also *per* Bramwell, L.J., *Atwood* v. *Chichester*, 3 Q. B. D. 723; and *Durrant* v. *Ricketts*, 3 Q. B. D. 177. These authorities were followed in subsequent cases, though not without expressions of dissent on the part of some of the Judges: see *Clarke* v. *Creighton*, 45 U. C. Q. B. 514, ; *Griffin* v. *Patterson*, 45 U. C. Q. B. 536; *Hessin* v. *Baine*, 2 Ont. 302; *G*—— v. *R*——, 9 P. R. 174 and *Anon*, 1 C. L. T. 730. See also *Jones* v. *Elderton*, W. N. 1884, 39. **Liability dependent on possession of separate estate under Act of 1872.**

It was at first supposed that the intention of the English Act of 1882, and of the above Ont. Act of 1884, was to make the material change that the power of suing and being sued, in respect of a contract, should be, as in the case of a *feme sole*, not regulated by the possession of separate estate, and some of the earlier cases decided in England under the Act of 1882 tended to shew that the plaintiff need not aver the possession of separate estate as the foundation of her right to sue; that the married woman might be sued "as if she was a *feme sole*," and unless she, by pleading, raised the question of separate estate or of its being bound, judgment might be "recovered against her"; but that since "any damages or costs recovered against her," are to be "payable out of her separate property and not otherwise," execution could only issue against, and therefore only in the event of her possessing, such separate property: see *Gunston* v. *Maynard*, 75 L. T. Jour. 102; *Brown* v. *Morgan*, 12 L. R. Ir. 122; and *Perks* v. *Mylrea*, W. N. 1883, 64, in which the apparently conflicting decision in *Moore* v. *Mulligan*, W. N. 1884, 34, is explained: *The Quebec Bank* v. *Radford*, 10 P. R. 619. The cases were, however, not uniform, and later cases were not consistent with this view: *Jones* v. *Elderton*, W. N. 1884, 39; *Gloucestershire Banking Co.* v. *Phillips*, 12 Q. B. D. 533; *Re Shakespear*, *Deakin* v. *Lakin*, 30 Ch. D. 169; and it is to be observed that in *Gunston* v. *Maynard*, *supra*, it was shewn that the defendant had separate estate. **Effect in this respect of the present Act, R. S. O., c. 132.**

When the point came before the Court of Appeal, however, it was decided that the disability of a married woman to contract was only removed by the Act, so as to enable her to enter into a binding contract in respect of her separate property. If she has no separate property she cannot contract. A plaintiff, therefore, alleging in his statement of claim a contract by a married woman must allege and prove the existence of separate property, at the time of entering into the alleged contract: *Palliser* v. *Gurney*, 19 Q. B. D. 519; *Tetley* v. *Griffith*, 36 W. R. 96; 57 L. T. N. S. 673; *Meager* v. *Pellew*, 14 Q. B. D. 973; *Beckett* v. *Tasker*, 19 Q. B. D. 7.

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In England the Practice Masters' Rules provide specially (see (38), Snow & Winstanley Ann. Prac. 1888, p. 1100; Wilson Jud. Act, 7th Ed. 706) that when a married woman sues alone, or is sued, it must appear upon the face of the writ that she is suing, or being sued, in respect of her separate estate. There is no corresponding provision in the Ont. *Rules*, but the construction placed upon the Act is, as in England, that a married woman must have separate estate to found a liability on a contract, and a plaintiff must allege and prove the existence of separate estate in respect of which she is entitled to contract: *Molsons Bank* v. *Drew*, 9 C. L. T. 107; *Moore* v. *Jackson*, 9 C. L. T. 334; 25 C. L. J. 409; *Bank of Commerce* v. *Woodcock*, (before Ferguson J., 16 Oct. 1889).

The law remains as before the Act, that separate property which is subject to a restraint on anticipation, is not separate property upon which a judgment can operate: *Bursill* v. *Tanner*, 13 Q. B. D. 691; *Myles* v. *Burton*, 14 L. R. Ir. 238; *Scott* v. *Morley*, 20 Q. B. D. 120; *Beckett* v. *Tasker*, 19 Q. B. D. 7; see also *Pike* v. *Fitzgibbon*, 17 Ch. D. 454; *Smith* v. *Lucas*, 18 Ch. D. 531; *Re Holgate*, 34 Ch. D. 385; *Re Dixon*, 35 Ch. D. 4; *Smith* v. *Whitlock*, 34 W. R. 414; *Roberts* v. *Watkins*, 46 L. J. Q. B. 552; *Re Glanville*, 31 Ch. D. 532; *Re Andrews*, 30 Ch. D. 159; except (under sec. 20 of the Act) a judgment on a contract entered into before marriage, which is unaffected by such a restraint, contained in any settlement of her property, made by the married woman herself: see *Bursill* v. *Tanner*, *supra*. It would seem, therefore, that the possession of such separate estate only, will not be sufficient to enable her to enter into a contract: see *Beckett* v. *Tasker*, *supra*.

The execution by a married woman of a general power of appointment by will makes the property appointed liable to meet her debts: see sec. 6 of the Act. This was not the case before the Act and the section does not apply in the case of a contract entered into before the Act: *Re Roper*, 59 L. T. N. S. 203.

The Act, in enlarging the capacity of a married woman to take property as her separate property, does not affect the rule that on a gift to a husband, his wife, and a third party, the husband and wife take one moiety and the third party the other moiety: *Re Jupp*, 59 L. T. N. S. 129.

Where a wife is sued on a contract made before marriage there is no need to shew the possession of separate estate at the time of entering into the contract or at the time of judgment: *Downe* v. *Fletcher*, 21 Q. B. D. 11; more fully reported, 59 L. T. N. S. 180. *Quære*, whether judgment in such case will be restricted to property not subject to any restraint on anticipation as in *Scott* v. *Morley*, *infra*: see *Downe* v. *Fletcher*, 59 L. T. N. S. 181, *per* Lord Coleridge; and *Axford* v. *Reid*, 22 Q. B. D. 548, decided under the English M. W. Act of 1870.

In the case of a contract entered into after 1st July, 1884, both separate property at the date of the contract, and all separate property thereafter acquired, will be liable to satisfy any judgment recovered: see sec. 3, (4) of the Act.

Form of judgment under Act of 1872.

This was not so before the Act. In England the form of order against a married woman was for an inquiry as to the separate estate which she had at the time of the contract, and still has, with a declaration that the claim in question may be recovered out of it: see *Picard* v. *Hine*, L. R. 5 Chy. 274. *McQueen* v. *Turner*, 30 W. R. 80; 30 W. R. 428; *Davis* v. *Belleuden*, 46 L. T. N. S. 797; *Robinson* v. *Pickering*, 50 L. J. Chy. 527; *Gallagher* v. *Nugent*, 8 L. R. Ir. 353; *Darrant* v. *Ricketts*, 8 Q. B. D. 177; *King* v. *Lucas*, 23 Ch. D. 712, and a receiver of it might be appointed by the same order: *Re Peace* v. *Waller*, 24 Ch. D. 405. A charge by a married woman upon her separate estate was held sufficient evidence of separate estate to entitle plaintiff to an inquiry: *London Discount Alliance Co.* v. *Kerr*, 1 Cab. & El. 5. In Ontario under the Act of 1872 the judgment was similar: *Lawson* v. *Laidlaw*, 3 Ont. App. 91, 92; *Wallace* v. *Hutchinson*, 3 Ont. 398.

Under present Act.

The form of judgment, under the present Act, against a married woman as settled in *Scott* v. *Morley*, 20 Q. B. D. 132 is as follows:

"It is adjudged that the plaintiff recover £ and costs to be taxed against the defendant, such sum and costs to be payable out of the separate property as

hereinafter mentioned and not otherwise; and it is ordered that execution herein be limited to the separate property of the said defendant not subject to any restraint against anticipation, unless by reason of s. 19 (*s. 20 of Ont. Act*) of *The Married Woman's Property Act*, such property shall be liable to execution notwithstanding such restriction." **Rule 314.**

See also *Quebec Bank* v. *Radford*, 10 P. R. 619; *Turnbull* v. *Forman*, 15 Q. B. D. 234; *Kinnear* v. *Blue*, 10 P. R. 465; *Cameron* v. *Rutherford*, *ib.* 620.

This is not a personal but a "proprietary" judgment: *per* Bowen L.J. in *Scott* v. *Morley*, 20 Q. B. D. at p. 128. The married woman is not liable; it is only her separate property which is made liable.

A writ of sequestration against the "estate and effects" was held to be in proper form, but would only operate on separate property, not subject to any restraint on anticipation: *Hyde* v. *Hyde*, 59 L. T. N. S. 529; 36 W. R. 708.

The property liable may be reached in execution in the usual way: *Barker* v. *Westover*, 5 Ont. 121-2; *Lawson* v. *Laidlaw*, *supra*; and see *Perks* v. *Mylrea*, W. N. 1884, 64; *Peace* v. *Waller*, 24 Ch. D. 405. Execution.

In actions in this Province against a married woman for a tort committed by her, it was held under the Act of 1872 that the husband was not a proper party, but the wife was to be sued alone, and that her liability was not dependent upon her possession of separate estate: *Amer* v. *Rogers*, 31 C. P. 195; *Barker* v. *Westover*, *supra*. This seems to be in accordance with the opinions expressed by Hagarty, C.J., in *Stone* v. *Knapp*, 29 C. P. 609, Spragge, C., in *McFarlane* v. *Murphy*, and Wilson, J., in *Wagner* v. *Jefferson*, 37 Q. B. 577, 578. Under the present Act it is held in England that the husband and wife may be sued jointly, or the wife may be sued alone, for torts committed by her after marriage: *Seroka* v. *Kattenburg*, 17 Q. B. D. 177; see *Scott* v. *Morley*, 20 Q. B. D. at p. 125; *Bahin* v. *Hughes*, 31 Ch. D. 390; but as to the law in Ont. see *Amer* v. *Rogers*, *supra*. Actions of tort.

In actions by a married woman for a tort suffered by her, unconnected with her separate estate, her husband was, even after the Act of 1872, required to be a party plaintiff: see *Amer* v. *Rogers*, 31 C. P. 199; but under the present Act it would seem that the wife may sue alone: *Weldon* v. *Winslow*, 13 Q. B. D. 784; *Spahr* v. *Bear*, before Boyd, C., 2 Oct. 1889.

A married woman in sole occupation of a house bought by her out of her own earnings may sue alone, without her husband, in an action for trespass: *Weldon* v. *De Bathe*, 14 Q. B. D. 339.

See generally on the present law in Ontario, 3 C. L. T. 63; and in England 87 L. T. Journ. 419.

It is not easy to see what cases are not provided for by *The Married Women's Property Act*, and in which, therefore, under clause (*a*) of the present *Rule*, a married woman may sue by next friend. The Act renders a married women capable of suing and liable to be sued "in all respects as if she were a *feme sole*." The Act of 1884 had before these words, the words "either in contract or in tort or otherwise." In the Revision of the *Rules*, these words have been omitted, as giving no additional force to the language, and as being inappropriate under the present system, which does not recognize different forms of action: *Spahr* v. *Bear*, *supra*. Next friend.

It is also left in doubt whether in cases where a next friend may be necessary the practice formerly existing in Chancery applies, such as for instance the rule that the next friend must be a solvent person: see *Re Thompson*, *Stevens* v. *Thompson*, 38 Ch. D. 317.

The following summary of the principal decisions under the former practice may however be useful:

The defendant may raise the question of want of next friend by motion to stay proceedings till a next friend is appointed: *McPherson* v. *McCabe* 1 Chy. Ch. 250; *Pruyn* v. *Soby*, 7 P. R. 44; *Aboulof* v. *Oppenheimer*, 47 L. T. N. S. 702; 52 L. J., Q. B. 309; and formerly by demurrer: *Jessop* v. *McLean*, 15 Gr. 489; *Blackburn* v. *McKinlay*, 3 Chy. Ch. 65; but a demurrer would not now be a proper course: see *Young* v. *Robertson*, 2 Ont. 434 and notes to *Rule* 384. Objection for want of next friend, how taken.

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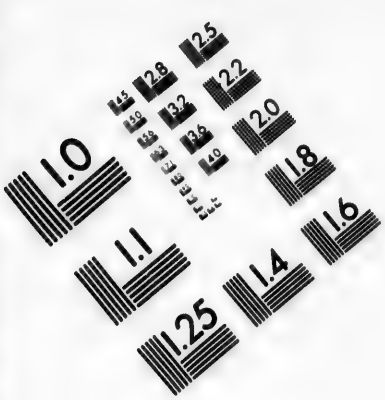
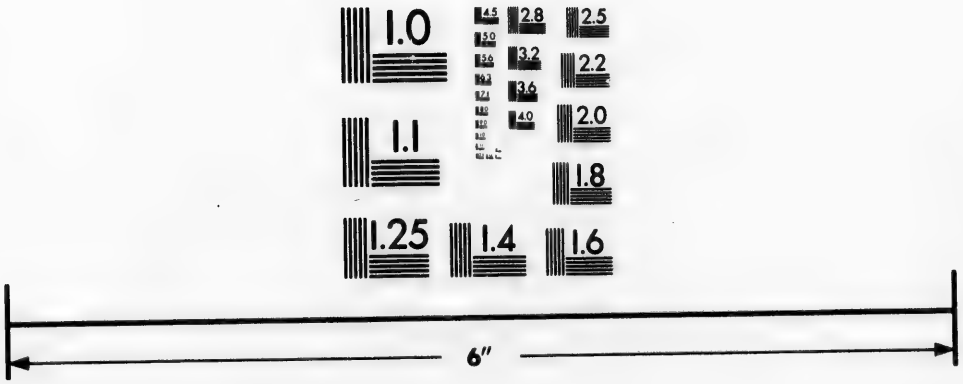
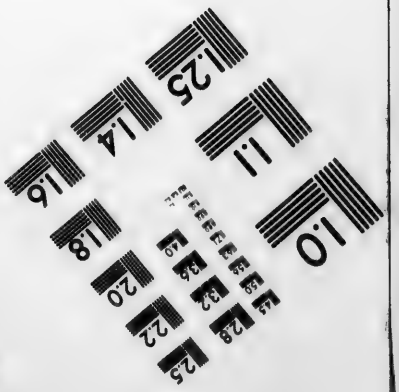




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Rule 315.

A question whether a next friend was necessary was not allowed to be taken upon a motion to limit the time for the appointment of a new next friend. The original order was required to be first rescinded: *Olmstead* v. *Rutherford*, 7 P. R. 140, and see *Shelley* v. *Goring*, 8 P. R. 36; *Webster* v. *Leys*, 10 P. R. 86; 5 Ont. 599; and *Re Thompson*, *Stevens* v. *Thompson*, 38 Ch. D. 317.

The objection was one that formerly might be waived by conduct, as it stands on the same footing as the right to security for costs: *Mallory* v. *Mallory*, P. R. 446; but see now *Martano* v. *Mann*, 14 Ch. D. 419, where it was held that since the Judicature Acts the Court has a judicial discretion to direct security for costs to be given at any time, and that the old rule as to waiver by step taken is abrogated: see also note to *Rule* 1245.

If the next friend is not appointed in a reasonable time, a motion may be made to limit the time therefor, or, in default, that the action be dismissed: *Thompson* v. *McCabe*, *supra*. The time limited is the same as upon an application to limit the time for furnishing security for costs, as to which: see *Grant* v. *Winchester*, 6 P. R. 56.

A defendant cannot act as next friend of a married woman plaintiff: *Payne* v. *Little*, 13 Beav. 114: *Bennett* v. *Sprague*, 4 C. L. J. 45; see *Lewis* v. *Nobbs*, 8 Ch. D. 591; except perhaps a merely formal defendant: *Taylor* v. *Taylor*, 16 L. J. N. C. 66. The next friend must be a person of substance, as he is liable for the costs: *Hind* v. *Whitmore*, 2 K. & J. 458; *Rann* v. *Lawless*, 1 Chy. Ch. 333; *Van Winkle* v. *Chaplin*, 2 Chy. Ch. 98; *Re Thompson*, *Stevens* v. *Thompson*, 38 Ch. D. 317. If not solvent an order may be made, on motion of defendants, to stay proceedings till a new next friend be appointed or security for costs given: *Slovel* v. *Coles*, 3 Chy. Ch. 421. Where such an order had been made and, not being complied with, the action was dismissed with costs, a second action by another next friend was stayed till the costs of the first were paid: *Re Payne*, *Randle* v. *Payne*, 23 Ch. D. 288.

A next friend of a married woman plaintiff must be authorized to act as such, otherwise the action may be dismissed on the application of the defendant. Where a next friend's authority was disputed by defendant, and not deposed to by the next friend, the action was dismissed with costs, payable by the next friend: *Schjott* v. *Schjott*, 19 Ch. D. 94: see also *Cook* v. *Fryer*, 4 Beav. 16. A writ issued by a next friend without employing a solicitor was set aside with all the proceedings: *Swann* v. *Swann*, 43 L. T. N. S. 530.

The next friend may be changed by the married woman on notice to the defendant: *Eastman* v. *Eastman*, 2 Chy. Ch. 183; *Harvey* v. *Boomer*, 3 Chy. Ch. 11.

Where parties are numerous.

315. Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorized by the Court to defend, in such action, on behalf of, or for the benefit of, all parties so interested. J. A. Rule 98.

This is the same as Eng. R. 1875, O. 16, r. 9, (1883, R. 131), and corresponds with what had long been the practice of the Court of Chancery: see Dan. Ch. Pr. 5th ed. 207, *et seq.*, 1088; *Thomson* v. *Victoria Mutual Company*, 29 Gr. 56.

A plaintiff suing under this *Rule* must indorse his writ accordingly: see *Rule* 224, and *Hynes* v. *Fisher*, 4 Ont. 78.

In *De Hart* v. *Stevenson*, 1 Q. B. D. 313, it was held that one part-owner of a ship might sue under this *Rule* on behalf of himself and his co-owners for freight. So also one underwriter on behalf of all: *Leathley* v. *McAndrew*, W. N. 1875, 259; 1 Charl. Ch. Ca. 58; one of a number of co-owners of a patent: *Sheehan* v. *G. E. Ry.*, 16 Ch. D. 59; or bondholders: *Fraser* v. *Cooper, Hall & Co.*, 21 Ch. D. 718; or policy holders in an Insurance Company: *Thomson* v. *Victoria Mutual Company*, 29 Gr. 56; or shareholders of a Company: *International Wrecking Company* v. *Murphy*, 12 P. R. 423. See also *Bergman* v. *McMillan*, W. N. 1881, 39.

In *Andrews* v. *Salmon*, W. N. 1888, 102, (see also *ib.* 176,) defendants were authorized to defend on behalf of all the members of the committee of a club. **Rule 316.**

This *Rule* was acted on in a case where certain charitable bequests in a will, if held invalid would go to the next of kin, and four of the next of kin besides the widow of the testator, and the Atty.-Gen. as representing the charities had been served, and it appeared that there were a large number of next of kin, many of whom were unknown, and service upon others would be difficult and expensive. An order was made declaring that the next of kin were sufficiently represented by those before the Court: *Gillies* v. *McConochie*, 18 C. L. J. 179.

Where a person suing on behalf of himself and others is disentitled to sue on his own behalf, he cannot do so on behalf of the others interested: *Dillon* v. *Raleigh*, 13 Ont. App. 53.

In suits by one on behalf of all others of a particular class the other members of the class, if fairly represented, are bound by the judgment: *Commissioners of Sewers* v. *Gellatly*, 3 Ch. D. 610; *Leathley* v. *McAndrew*, W. N. 1876, 38; 2 Charl. Ch. Ca. 24; *Burt* v. *British Nation Life Assurance Association*, 4 DeG. & J. 158, 174; *Barker* v. *Walters*, 8 Beav. 97. Where one of the class objects to the proceedings, he may, on applying, be made a party defendant: *Wilson* v. *Church*, 8 Ch. D. 552; *Fraser* v. *Cooper*, 21 Ch. D. 718. That is the proper course if he is really not represented by the plaintiff. He cannot otherwise appeal from an order obtained by the plaintiff: *Watson* v. *Cave*, 17 Ch. D. 19; unless perhaps in a case where a person has already been made a defendant in the same interest as the applicant, and appointed under this *Rule* to represent that interest: see *Fraser* v. *Cooper*, *etc.*, 21 Ch. D. 718.

A person fairly represented will not be allowed to attend the proceedings unless he may be joined as a party: *Conybeare* v. *Lewis*, 48 L. T. N. S. 526.

316. In any case in which the right of an heir-at-law or of the next of kin, or of a class depends upon the construction which the Court may put upon an instrument, and it is not known or is difficult to ascertain who is or are such heir-at-law or next of kin or class, and the Court considers that in order to save expense or for some other reason it will be convenient to have the question or questions of construction determined before such heir-at-law, next of kin or class, shall have been ascertained by means of inquiry or otherwise, the Court may appoint some one or more person or persons to represent such heir-at-law, next of kin or class, and the judgment of the Court in the presence of such person or persons shall be binding upon the party or parties or class so represented. J. A. Rule 99. **Persons appointed to represent a class.**

Same as the Eng. R. June, 1876, R. 7 (1883, R. 154).

Where upon the construction of a will, questions had arisen as to what classes of representatives of the testator were entitled, and great difficulty was foreseen in attempting to find the heir, who in the result might be held not entitled, an order was made under this *Rule* appointing persons to represent the various classes of persons, some or one of which might be held to be entitled before the questions of construction came on to be decided: *Re Peppitt's Estate*, *Chester* v. *Phillips*, 4 Ch. D. 230.

Persons interested in an estate, the subject of an administration action to which they have not been made parties and whose rights or interests may be

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Rule 317. affected by an order directing accounts and inquiries, are not bound by proceedings under that order, at any rate where they ought to be served, unless they are served with notice of the order or an order, has been made appointing a member of their class to represent them: *May* v. *Newton*, 34 Ch. D. 347.

In *Re Rees*, *Rees* v. *George*, 49 L. J., Chy. 568, persons who had not been parties, but had been served with notice of decree, were directed to be served with notice of hearing on further consideration, where an order was asked for against them personally.

In *Re Cooper*, *Cooper* v. *Vesey*, 20 Ch. D. 611, one of four trustees under a will was a beneficiary and son of the testator and bore the same name. He, personating the testator, mortgaged the trust estate, and employed the mortgage money for his own use. After his death the remaining trustees brought an action against the mortgagees and beneficiaries to have the mortgage declared void. It was held that the plaintiffs represented the beneficiaries and that the latter were improperly made parties, and an order directing the mortgagees to pay their costs was therefore reversed on appeal.

In *Re Pringle*, 17 Ch. D. 821, an action by legatees for construction of a will, the defendants the executors, two of the next of kin, were at the hearing authorized to represent the absent next of kin.

In *Cook* v. *Fearn*, 27 W. R. 212, representation of an unascertained class, viz., the next of kin of the plaintiff, was dispensed with.

See also *Loveap* v. *Smith*, 15 Ch. D. 655; *Hobbs* v. *Reid*, W. N. 1876, 95; and *Beale* v. *Ruston*, W. N. 1878, 179; *Moore* v. *Siskin*, 53 L. T. N. S. 815.

Partners may sue in firm name.

317. Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of the respective firms, if any, [of which such persons were co-partners at the time of the accruing of the cause of action]; and any party to an action may in such case apply [to the Court or a Judge] for a statement of the names of the persons who [were, at the time of the accruing of the cause of action,] co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the Judge may direct. [Provided that, in the case of a co-partnership which has been dissolved, to the knowledge of the plaintiff, before the commencement of the action, the writ of summons shall be served upon every person sought to be made liable.] J. A. Rules 100, 501 and Eng. R. 1883, 136.

The power to partners to sue and be sued in the name of their firm was first given by the Jud. Act 1881, *Rule* 100, now 317. In such cases, if partners are suing in the name of the firm, they must, on the demand of the defendant, disclose the names of the partners; and whether suing or being sued, they may be ordered by a Judge, on the application of any party to the action, to make such disclosure: *Rules* 251 and 317. If a firm is sued as such, service may be effected either upon any one or more of the partners, or at the principal place of business of the partnership upon any person having the control or management of the business. The partners are to appear individually in their own names, but all subsequent proceedings go on in the name of the firm: *Rule* 228.

After judgment against the firm, execution may issue against any property of the firm, or against any person admitted or adjudged to be a partner, or against any person served as a partner with the writ who has failed to appear. If the

judgment creditor claims to be entitled to issue execution against any one else as a partner in the firm, he may apply for an order to that effect, and an issue may be directed to try the question : *Rule* 876. **Rule 317.**

This Rule is the same as the Eng. Rule 1883, 136, except that for "to the Court or a Judge" the Eng. R. has "to a Judge." This alteration to suit our practice has apparently by reason of a slip not been carried into the subsequent part of the *Rule* where the furnishing of the statement is to be as the Judge may direct.

The original *Rule* 100 and Eng. R. 1875, O. 16 r. 10, did not contain the other words in brackets. The question therefore arose whether the *Rule* applied to persons only who were at the time of the commencement of the action, partners in an existing firm, or also to persons who were partners at the time the debt was contracted, but who had ceased to be so at the time of bringing the action, either by the firm being dissolved, or new partners having come in and former partners retired. In *ex p. Blain*, 12 Ch. D. 533, James. L.J., pointed out the difficulty, and he and Brett, L.J., expressed doubt whether in a case where A. B. & C. were partners at the time of bringing the action and E. F. & G. at the time of the contract, the same firm name being used by both, the firm could be sued. In *ex p. Young*, 19 Ch. D. 124, Lord Selborne, without absolutely expressing an opinion, seemed inclined to agree with the views of Brett, L.J., who thought that the *Rule* authorized the suing, in the name of their firm, the members of a partnership dissolved before the issue of the writ, in respect of a cause of action which arose during the existence of the firm, Cotton, L.J., thought the *Rule* applied only to a partnership existing at the time when the writ issued. The point was not in that case decided, as the majority of the Court held that the judgment was not at any rate binding on a member of the dissolved firm who had not been served with the writ as a partner, nor had admitted on the pleadings that he was, nor had been adjudged to be, a partner : see *Rule* 876. Subsequently, in *Davis* v. *Morris*, 10 Q. B. D. 436, the question again arose, and it was expressly held by Watkin Williams, J., that under the original *Rule* the right to sue partners in the name of their firm was not limited to the case of partners carrying on business at the date of the writ ; and also that it is a question of fact whether the plaintiff intended to sue under the firm name former partners as well as those who were members of the firm at the commencement of the action.

The view of Brett, L.J., was followed in Ontario in *Wilson* v. *McKay*, 20 C. L. J. 368 ; *S. C.*, *Wilson* v. *Rodger*, *McKay & Co.*, 4 C. L. T. 548 ; 10 P. R. 355 ; and is now expressed in the above Con. *Rule* that the point may be clear.

Where an individual has entered an appearance in an action against a firm there must be a novation to render him liable for a debt contracted before he was a member, the fact that the individual had undertaken to indemnify the firm is not enough : *Cripps* v. *Tappin*, 1 Cab. El. 13. See *Scarf* v. *Jardine*, 7 App. Cas. 345.

A judgment obtained against some partners is a bar to an action for the debt against others not sued : *Kendall* v. *Hamilton*, 4 App. Cas. 504. See *Re Hodgson*, *Beckett* v. *Ramsdale*, 31 Ch. D. 177 ; 34 W. R. 127 ; 55 L. J. Chy. 241 ; *Cambefort* v. *Chapman*, 19 Q. B. D. 229.

In *Escott* v. *Gray*, 39 L. T. N. S. 121, it was held that a cost book mining company, though unincorporated, might be sued by its partnership name.

As to the effect of partners severing in their defence and not raising the same defences, see *Cropper* v. *Smith*, 53 L. J. Chy. 891 ; and *Smith* v. *Cropper*, 10 App. Cas. 249.

A plaintiff in a class suit cannot under this *Rule* be compelled to disclose the names and addresses of the persons on whose behalf he sues : *Leathley* v. *McAndrew*, W. N. 1875, 259.

A form of notice of motion for a statement of the partners under this *Rule* is given in the App. No. 11, and a form of order in No. 131.

The order for the statement cannot be enforced by attachment under *Rule* 523 : *Pike* v. *Keene*, 24 W. R. 322.

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Rules 318, 319. Person trading under firm name.

318. Any person carrying on business in the name of a firm, apparently consisting of more than one person, may be sued in the name of such firm. J. A. Rule 101.

Same as Eng. R., June, 1876, R. 8; (1883, 137.)

Appearance must be entered by such a person in his individual name: see *Rule* 288, and *Taylor* v. *Collier*, 30 W. R. 701.

Court may proceed though some of the parties interested are not before it.

319. Where questions arise between parties, who are some only of those interested in the property respecting which the question arises; or where the property in question is comprised with other property in the same settlement, will, or other instrument, or is the property of an intestate, the Court may adjudicate on the questions arising between such parties without making the other parties interested in the property respecting which the question arises, or interested under the same settlement, will, or other instrument, parties to the action; and without requiring the whole trusts and purposes of the settlement, will, or instrument, or the whole estate of the intestate, to be executed or administered under the direction of the Court, and without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount of the property touching which the question or questions have arisen, or of the whole estate or assets; but where the Court is of opinion that the application is fraudulent, or collusive, or that for some other reason the application ought not to be entertained, it may refuse to make the order asked. Chy. O. 57.

The Court may under this *Rule* execute one or more of several specific trusts embraced in an instrument without making all the persons interested in the other trusts embraced therein parties: *Parnell* v. *Hingston*, 3 Sm. & G. 337. But some of the parties interested on both sides of the question involved must be before the Court: *Swallow* v. *Binns*, 9 Hare App. xlvii. The Court has refused to permit a plaintiff at the hearing to strike out the names of defendants whom he had improperly omitted to serve with a subpœna to hear judgment, and proceed in their absence although such parties had merely a nominal interest: *Lanham* v. *Pirie*, 2 Jur. N. S. 1201, and see *Quantz* v. *Smelzer*, 6 P. R. 228; but where at the hearing it was discovered that an order *pro confesso* against certain defendants had been vacated by a subsequent amendment, the Court pronounced a decree saving the rights of such defendants: *Waddle* v. *McGinty*, 15 Gr. 261. A decree for foreclosure could not be made under this *Rule* as against some only of the parties interested in the equity of redemption: *Caddick* v. *Cook*, 32 Beav. 70. But where the parties interested in the equity of redemption are numerous, the Court may, under *Rule* 306, award judgment, and direct that parties so interested be made parties in the Master's Office, but such order can only be made, when one or more parties interested in the equity of redemption, are already parties to the action.

The *Rule* applies to applications made under *The Trustee Relief Act*, 1850, and some out of several parties entitled to the equity of redemption were held entitled to apply under that Act for a reconveyance: *Re Sharpley's Trusts*, 1

W. R. 271. The *Rule* also applies to parties to special cases : *Swallow* v. *Binns*, 9 Hare App. xlvii ; *Re Brown*, 29 Beav. 401. **Rule 320.**

When the Court proceeds under this *Rule* in the absence of any parties interested, the absent parties are not bound by the proceedings : *Doody* v. *Higgins*, Hare App. xxxii.

Cases where one of a class may sue without joining others.

320. It shall not be competent to a defendant to take an objection for want of parties in any case to which the seven sub-clauses next hereinafter set forth apply.

Residuary legatee, etc.

1.—A residuary legatee, or next of kin, may have a judgment for the administration of the personal estate of a deceased person without serving the remaining residuary legatees or next of kin.

Legatee whose legacy is charged on realty.

2.—A legatee interested in a legacy charged upon real estate ; or a person interested in the proceeds of real estate directed to be sold, may have a judgment for the administration of the estate of a deceased person, without serving any other legatee or person interested in the proceeds of the estate.

Residuary devisee or heir.

3.—A residuary devisee, or heir, may have the like judgment, without serving any co-residuary devisee, or co-heir.

One of several *c. q. t.*

4.—One of several *cestuis que trustent*, under a deed or instrument, may have a judgment for the execution of the trusts of the deed or instrument, without serving any other of such *cestuis que trustent*.

In actions for protection of property.

5.—In all cases of actions for the protection of property pending litigation, and in all cases in the nature of waste, one person may move on behalf of himself, and of all persons having the same interest.

Administration against one *c. q. t.*

6.—An executor, administrator, or trustee, may obtain a judgment against any one legatee, next of kin or *cestui que trust*, for the administration of the estate or the execution of the trusts.

Assignee of *chose in action* may sue without joining assignor.

7.—An assignee of a chose in action may institute an action in respect thereof without making the assignor a party thereto. Chy. O. 58 ; J. A. Rule 102. (See *Imp. Act* 15 & 16 Vict. c. 86, s. 42.)

The English Rule, 1883, R. 155-160 are to the same effect as clauses 1-6.

The object of this *Rule* is to save unnecessary expense, and where unnecessary parties are made to the action, the Court will refuse to charge the estate with

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Rule 320. extra costs thereby occasioned: *Rodgers* v. *Rodgers*, 13 Gr. 457; *Bradley* v. *Wilson*, *Ib.* 645, and it would seem that the plaintiff may be ordered to pay such costs.

Persons interested in an estate the subject of administration proceedings to which they have not been made parties, and whose rights may be affected, are not bound by the proceedings unless they are served with notice of the order: see *Rule* 322; or an order has been made appointing a member of their class to represent them: see *Rule* 316: *May* v. *Newton*, 34 Ch. D. 347.

Persons not made parties, must be served with judgment.

Although in the several cases mentioned in this *Rule* the action may be commenced and judgment obtained without making all persons interested parties to the action, yet the persons who but for this *Rule*, would be necessary parties to the proceedings must under *Rule* 322, be served with a copy of the judgment, unless the Court, or Master, dispense with the service, and it is not until "after such service," that they are bound by the proceedings. Whether persons upon whom service of the judgment is dispensed with, are bound by the proceedings as if they had been actually served, is not stated in the *Rule*, and it is possible that they would not be so bound: see *Doody* v. *Higgins*, 9 Hare App. xxxii.

Persons from whom an account is sought, should be made parties.

Notwithstanding this *Rule*, all persons from whom an account is sought, must be made parties in the first instance: *Latch* v. *Latch*, L. R. 10 Chy. 464; *Walker* v. *Steigmann*, L. R. 12, Eq. 152; *Rolph* v. *U. C. Building Society*, 11 Gr. 275, 278-9; *Hopper* v. *Harrison*, 28 Gr. 22; and the judgment cannot be varied under *Rule* 322, at the instance of persons served with the judgment so as to direct the taking of accounts for which no foundation is laid in the pleadings: *Foster* v. *Foster*, L. R. 3 Chy 330, at all events not without giving the party from whom an account is sought an opportunity to adduce evidence to show that the account should not be ordered; and persons served with the judgment, have no greater right to call the original defendants to account, than they would have if such persons had been originally made co-defendants in the action; thus in an action by a remainderman for an account, it was held that a tenant for life served with the judgment could not claim an account of the income: *Whitney* v. *Smith*, L. R. 4 Chy. 513.

All persons in the same interest with the plaintiff, necessary to be made parties, except perhaps infants, should be made co-plaintiffs; where they are made defendants in consequence of their refusal to join as plaintiffs, they will be refused their costs: *Ling* v. *Smith*, 25 Gr. 246.

Action by residuary legatee.

SUB-CLAUSE 1.—Where the action is brought by one of several residuary legatees, the plaintiff sufficiently represents all the residuary legatees, and the others are not entitled as of course to appear in the Master's Office, by a separate solicitor, and if they do, they may be refused their costs; to entitle them to costs some sufficient reason should be stated in the Master's report, for their being represented by a separate solicitor: *Gorham* v. *Gorham*, 17 Gr. 386.

Personal representative a necessary party to action for administration.

The legal personal representative is ordinarily a necessary party to an action for general administration, and it is necessary to allege that the person named as the legal personal representative has proved the will or obtained letters of administration as the case may be: *Penny* v. *Watts*, 2 Ph. 149; *Re Marshall*, *Fowler* v. *Marshall*, 1 Chy. Ch. 29; *Kelly* v. *Ardell*, 11 Gr. 579; *Simons* v. *Millman*, 2 Sim. 241; *Lowry* v. *Fulton*, 9 Sim. 104; *Zimmerman* v. *O'Reilly*, 14 Gr. 646; *Groves* v. *Lane*, 16 Jur. 1061; *Cooke* v. *Gittings*, 21 Beav. 497; *Beardmore* v. *Gregory*, 2 H. & M. 491; *Caru* v. *Hills*, L. R. 15 Eq. 79; *Dowdeswell* v. *D.*, 9 Ch. D. 294; *Rowsell* v. *Morris*, L. R. 17 Eq. 20; but see *Rule* 312. But probate, or administration, obtained by the alleged personal representative *pendente lite* before the trial of the action, will be sufficient to bind the estate: *Bateman* v. *Margerison*, 6 Hare 496; *Trice* v. *Robinson*, 16 Ont. 433; and this was held even though the objection was taken by defendant in his answer; *Edinburgh Life Assurance Co.* v. *Allen*, 19 Gr. 593; and see *Stump* v. *Bradley*, 15 Gr. 30; *McDonald* v. *McDonald*, 14 Gr. 133, where probate not obtained until after judgment. Judgment for the general administration of a deceased person's estate may now be granted against an executor *de son tort* where the legal personal representa-

tive is not a party, *Rule* 312; formerly it was otherwise: *Rowsell* v. *Morris*, L. R. 17 Eq. 30; *Outram* v. *Wyckoff*, 6 P. R. 150; *Re Kirkpatrick*, *Stevenson* v. *Kirkpatrick*, 10 P. R. 4; but see *Re Lovett*, *Ambler* v. *Lindsay*, 3 Ch. D. 198. Judgment for administration, however, cannot be granted against one of several executors who have proved, even though the absent executor be out of the jurisdiction: *Re Freeborn*, *F.* v. *Carroll*, 6 P. R. 188; *Latch* v. *Latch*, L. R. 10 Chy. 464. All the executors who have proved, and all who have acted, even though they have not proved, are necessary parties: *Vickers* v. *Bell*, 4 D. J. & S. 274; *Hamp* v. *Robinson*, 3 D. J. & S. 97; *Latch* v. *Latch*, *supra*; but an executor who has renounced, or who has neither proved nor acted, need not be made a party: *Forsyth* v. *Drake*, 1 Gr. 223; *Willis* v. *Walker*, Vern. 90 *(n)* 2; *Stinson* v. *Stinson*, 2 Gr. 508; but where the plaintiff brought a suit for administration against one of three executors and trustees, alleging in the bill that the others had never acted, and the bill having been served by publication, on a hearing *pro confesso* the Court refused to make a decree in the absence of the other two executors and trustees as parties, or of proof of the facts alleged, accounting for their not being made parties: *Lane* v. *Young*, 17 Gr. 100. The renunciation of an executor under R. S. O. c. 50, s. 62, is peremptory and cannot be recalled on the death of the acting executor: *Allen* v. *Parke*, 17 C. P. 105; and after renunciation he cannot execute a power of sale given to him, *qua* executor: *Travers* v. *Gustin*, 20 Gr. 106; and see *Re Delaronde*, 19 Gr. 119. As to the acts which will render an executor liable, notwithstanding his renunciation of probate, see *Vannatto* v. *Mitchell*, 13 Gr. 665. **Rule 320.**

The representative of a deceased executor who fully accounted to the surviving executor, need not be made a party: *Webster* v. *Leys*, 28 Gr. 471.

An executor proving the will, after judgment has been obtained, against another executor who had previously proved, might formerly have been added as a party by a supplemental order: *Guthrie* v. *Watrond*, 22 W. R. 723; and it would seem he might under the present practice be brought before the Court under an order to continue proceedings, see *Rules* 621, 622. A general decree for administration was granted in a creditor's suit against an administrator *ad litem*, it being alleged in the bill that there was no personal estate, and the parties interested in the realty having allowed the bill to be taken *pro confesso* against them: *Dey* v. *Dey*, 2 Gr. 149, but see remarks of Spragge, C., in *Garrao* v. *McDonald*, 20 Gr. 130.

Action for protection of estate until probate.

An action for protecting the estate until probate cannot be joined with an action for administration; formerly a bill so framed was demurrable for want of parties: *Rawlings* v. *Lambert*, 1 J. & H. 458; *Overington* v. *Ward*, 34 Beav. 175; and see *Tempest* v. *Camoys*, 35 Beav. 201; and *Cole* v. *Glover*, 16 Gr. 392; but now any objection to an action on the ground of the absence of necessary parties, can not under *The Judicature Act* be taken by demurrer, but the question must be raised on motion to add the necessary parties: *Werdermann* v. *Société Generale D'Electricité*, 45 L. T. N. S. 514; 18 C. L. J. 18; 19 Ch. D. 246; *Young* v. *Robertson*, 2 Ont. 439.

Removal of assets may be restrained.

The removal of the assets out of the jurisdiction will be restrained by injunction even though the deceased's domicile was out of the Province: *Shaver* v. *Gray*, 18 Gr. 419.

Real representatives, when necessary parties.

Where the action relates to the realty as well as the personalty, unless the executor is also trustee, or devisee, of the realty, or of some part of it: *Stewart* v. *Hunter*, 14 Gr. 132, or entitled thereto under *The Devolution of Estates Act*, (R. S. O. c. 108) s. 4, it is necessary to join the heir, or if the lands be devised, then the devisee, or one or more of the devisees: Calvert, 151, 153; *Rule* 970 *post*. But execution against the lands of a deceased person might, prior to *The Devolution of Estates Act*, be issued upon a judgment against his personal representative, although those interested in the realty were not parties to the action; R. S. O. c. 64, s. 26, and see *McEvoy* v. *Clune*, 21 Gr. 515.

No action for admin-

No action can be brought by a legatee, or next of kin, against a personal representative before a year has elapsed from the death of the testator, or

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Administration lies by legatee, or next of kin, within a year of death.

intestate, 33 Geo. 3, c. 8; *Slater* v. *Slater*, 3 Chy. Ch. 1; *Virian* v. *Westbrooke*, 19 Gr. 461; but see *Wallis* v. *Wallis*, 9 Ir. Chy. 511; *Prosser* v. *Mossop*, 29 W. R. 439. But an action for the protection of the estate simply, may be brought by a legatee, or next of kin, against an executor *de son tort* before the lapse of the year; *Beardmore* v. *Gregory*, 2 H. & M. 491; but not for administration as well: *Rawlings* v. *Lambert*, 1 J. & H. 458; *Overington* v. *Ward*, 34 Beav. 175. Formerly the High Court had no power to appoint an executor, in place of executors who have become incompetent to act through bodily infirmity, that could only be done by the Surrogate Court; nor would the High Court appoint a trustee in place of such executors: *Corrigal* v. *Henry*, 2 Gr. 310; but in *Re Moore, McAlpine* v. *Moore*, 21 Ch. D. 778. Under *The Trustee Relief Act* a trustee was appointed to discharge the duties of an executrix who retired: and see *Re Morphy* before Boyd, C., 9th April, 1887, and it would seem that *Rule* 311 does not extend the power of the High Court in this respect: see *Rule* 311, note. But where an executor has become insolvent a receiver will be appointed: *Harrold* v. *Wallis*, 9 Gr. 443; and see *Meacham* v. *Draper*, 2 Gr. 316.

High Court can not appoint trustee in place of executor.

When personal representative has distributed estate after advertising under statute, administration refused.

Where the personal representative has duly advertised for creditors under R. S. O. c. 110, s. 36, and has distributed the estate, that is an answer to a subsequent action against him for administration, by a legatee: see *Newton* v. *Sherry*, 1 C. P. D. 246; or by a creditor; *Clegg* v. *Rowland*, L. R. 3 Eq. 368, even though he have retained money in his hands to answer legacies, because from the time he sets apart moneys to answer legacies, he ceases to hold them as executor, but becomes then a trustee thereof for the legatees: *Ib.*; *Cameron* v. *Campbell*, 27 Gr. 307; *Ballard* v. *Marsden*, 42 L. T. N. S. 763; *Galbraith* v. *Duncombe*, 28 Gr. 27; but see *Noble* v. *Brett*, 24 Beav. 499. But if he has notice of a creditor's claim, he is not discharged because it was not sent in: *Wood* v. *Wood, Markwell's Case*, 21 W. R. 135; *Re Land Credit Co. of Ireland*, W. N. 1872, 210; and if the advertisement is insufficient he is not protected: *Wood* v. *Weightman*, L. R. 13, Eq. 434.

Account in Surrogate Court.

Where also there had been an accounting in the Surrogate Court by the personal representative, and no objection made for eight years, the right to a further account in the High Court of Justice was held to be barred: *Bell* v. *Landon*, 18 C. L. J. 178.

Personal representative distributing estate without advertising under statute, remains liable to creditors.

Personal representatives distributing an estate without advertising under the Statute (R. S. O. c. 111, s. 36), or without the authority of the Court remain liable to a creditor, though they had no notice of his claim: *Knatchbull* v. *Fearnhead*, 3 My. & Cr. 126; *Noble* v. *Brett*, 24 Beav. 499; *Jefferys* v. *Jefferys*, 19 W. R. 464; and also to legatees; and where the executor has distributed under a mistaken construction of the will he is liable to the parties injured: *Hilliard* v. *Fulford*, 4 Ch. D. 389; *Boulton* v. *Peard*, 3 D. M. G. 608; *Doyle* v. *Blake*, 2 Sch. & L. 243; but he would have a right to recoup himself out of any further payments due to those who had been overpaid: *Dibbs* v. *Goren*, 11 Beav. 483; and would also seem entitled to call on them to refund the money overpaid them, but not any interest thereon: *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18.

Infant not liable to account.

An infant executor or administrator is not liable to account for assets received by him whilst a minor: *Nash* v. *McKay*, 15 Gr. 247; *Hindmarsh* v. *Southgate*, 3 Russ. 324; *Merchants' Bank* v. *Monteith*, 10 P. R. 334; 20 C. L. J. 377. But a judgment for an account against a trustee who has received moneys while an infant ought to be general in its terms and not confined merely to his receipts after he comes of age: *In Re Garnes, Garnes* v. *Applin*, 31 Ch. D. 147.

Payment of legacy, is admission of assets.

Payment of a legacy in full, is, *prima facie*, an admission of assets to pay all legacies in full, but it is open to explanation: *Coleman* v. *Whitehead*, 3 Gr. 227. Where an executor in a residuary account stated that he retained £500 to meet outstanding legacies he was held to be precluded from afterwards showing that the statement was a mistake: *Brewster* v. *Pryor*, 55 L. T. N. S. 771.

Administration re-

Administration has been refused where the estate was sworn by the executors not to have exceeded £50: *Foster* v. *Foster*, 19 Gr. 463; but see *Re Falconer*,

1 Chy. Ch. 273; and where the plaintiff's claim as legatee, only amounted to $28, notwithstanding it was alleged that there were other legacies for a considerable sum remaining unpaid, administration was refused, though the suit was unopposed: *Reynolds* v. *Coppin*, 19 Gr. 627. Administration has also been refused where the applicant was a partnership creditor of the deceased and it was proved that his separate estate was insufficient to pay his separate creditors: *Re Barnard, Edwards* v. *Barnard*, 32 Ch. D. 447; 55 L. T. N. S. 40. **Rule 320. fused when estate small.**

This *Rule* applies to applications for administration on summary applications in Chambers, under *Rules* 965, 969, 972; but it is to be noted that Cl. 1 of this *Rule* is confined to actions by a *residuary* legatee, or next of kin, and *Rule* 2 is confined to actions by a legatee interested in a legacy charged upon real estate, and therefore neither of these clauses extend to actions by specific legatees, or pecuniary legatees whose legacies are not charged on real estate. *Rule* applies to application in Chambers for administration.

Sub-Clause 4.—A new trustee may be appointed in an action by one of several *cestuis que trustent*: *Jones* v. *James*, 9 Hare, App. lxxx.

A suit by one of two *cestuis que trustent* to recover an annuity charged upon land devised to the defendant, was held maintainable without making another *cestui que trust* interested in another annuity charged on the same land, a party: *Rees* v. *Engleback*, L. R. 12 Eq. 225.

But parties who claim adversely to the trust could not formerly be made parties to a suit for the execution of the trust: *Attorney-General* v. *Avon Corporation*, 3 D. G. J. & S. 637, where it is said that *Talbot* v. *Earl of Radnor*, 3 My. & K. 252, to the contrary had been constantly disapproved and never followed; but see now *Rules* 301, 302.

All persons from whom an account is required must be made original parties to the action, see *Rule* 320, p. 346; thus a *cestui qui trust* who has been party to a breach of trust, is a proper party: *Jesse* v. *Bennett*, 6 D. M. & G. 609; and a stranger or a creditor, who has joined in the breach of trust may be joined: *Land* v. *Blanshard*, 4 Hare 9; *Bank of Toronto* v. *Beaver & Toronto Mutual Fire Insurance Co.*, 26 Gr. 102; *Consett* v. *Bell*, 1 Y. & C., C. C. 569; *Stainton* v. *The Carron Co.*, 18 Beav. 146. But if a trustee commits a breach of trust, the person participating is not a necessary party to an action for the general administration of the trust estate: *Tiffany* v. *Thompson*, 9 Gr. 244. Persons from whom account required, must notwithstanding be parties.

Where a suit was brought by a remainderman for an account against trustees, the tenants for life who were served with the decree, were held not entitled to call the trustee to account as to the income: *Whitney* v. *Smith*, L. R. 4 Chy. 513.

The Court will decree the execution of a trust of lands in a foreign country when the trustee is resident within the jurisdiction: *Smith* v. *Henderson*, 17 Gr. 6; and see *Re Robertson R.* v. *R.*, 22 Gr. 449. Execution of trust in foreign country.

Sub-clause 5.—Where property was offered for sale by a trustee under depreciatory conditions of sale as to title, the sale was restrained in a suit instituted by one of several *cestuis que trustent*: *Dance* v. *Goldingham*, L. R. 8 Chy. 902. Sale by trustee restrained in suit by one of several *c. q. t.*

Where the action is necessary and proper, and has resulted in benefit to the co-owners, they may be compelled to bear their proportion of the expense of the action, according to the advantage they are shown respectively to have derived from the proceedings: *Gage* v. *Mulholland*, 16 Gr. 145.

Sub-clause 6.—Where an action for administration is brought by the personal representative, some special circumstances requiring the intervention of the Court must be shown: *Cole* v. *Glover*, 16 Gr. 392; *Barry* v. *Barry*, 19 Gr. 458; *Grant* v. *Grant*, 10 P. R. 211; 18 C. L. J. 99. It seems that he has no right to institute an action merely to obtain an indemnity by passing his accounts: *White* v. *Cummins*, 3 Gr. 602; *Cole* v. *Glover*, 16 Gr. 392. As to whether a deficiency of assets to pay debts in full is alone a sufficient reason, seems doubtful: *Sweetnam* v. *Sweetnam*, 6 P. R. 149; *Re Ette*, 6 P. R. 159; *Re Shipman, Wallace* v. *Shipman*, 24 Gr. 177; *Marsh* v. *Marsh*, 7 P. R. 129; *Re Jack, Jack* v. *Jack*, 13 C. L. J. 358; *Re Bromley*, (Blake, V.C., 28th Jan., 1878); and see further, *Rule* 969. Where there were leaseholds it was held that the executor was entitled to bring an action in order to obtain indemnity against liability on the In action for administration by personal representative, special circumstances must be shown.

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covenants in the lease: *Re Bosworth, Howard* v. *Easton*, 45 L. T. N. S. 136; *Dodson* v. *Sammell*, 1 Dr. & Sm. 575; 4 L. T. N. S. 44; but see R. S. O. c. 110, s. 34. The absence of a legatee beyond the jurisdiction, whom the executors are unable to discover, was held to be a sufficient ground for the executors coming to the Court: *Re Wade, Dee* v. *Wade*, 18 Gr. 485.

He may be ordered to pay costs.

Where the action is unnecessarily brought by the personal representative, he may be ordered to pay costs, or may be refused his costs: see cases cited *Rule* 972.

Executor may begin suit before probate.

An executor may begin an action before obtaining probate, but he must obtain probate before the trial: *Newton* v. *Metropolitan Railway Co.*, 1 Dr. & Sm. 583; *Trice* v. *Robinson*, 16 Ont. 433; or before a defence is filed that he is not executor; *Simons* v. *Milman*, 2 Sm. 241; but see *Edinburgh Life Assurance Co.* v. *Allen*, 19 Gr. 593; and the same rule applies to administrators: *Humphreys* v. *Humphreys*, 3 P. Wms. 350. But where an executor, before probate, brought an action to recover an asset of the estate, which the defendant had refused to deliver up until probate should be obtained, the action was stayed as being frivolous and vexatious: *Turn* v. *Commercial Banking Company*, 12 Q. B. D. 294; 50 L. T. N. S. 365; and an executor intermeddling with the estate before probate may be restrained from so doing, and a receiver may be appointed at the suit of a co-executor: *In re Moore*, 13 P. D. 36; 58 L. T. N. S. 386.

Executor suing one of several co-executors.

An executor cannot under this order bring an action against one or two co-executors who have proved, without making the other a party: *Lutch* v. *Lutch*, L. R. 10 Chy. 464.

But *c. q. t.* need not be joined.

An action may be brought by a trustee against his co-trustee to recover and secure the trust fund, without joining any of the *cestuis que trustent* as parties: *Horsley* v. *Fawcett*, 11 Beav. 565; *Baynard* v. *Woolley*, 20 Beav. 583; *May* v. *Selby*, 1 Y. & C. C. C. 235; *Peak* v. *Ledger*, 4 D. G. & S. 137; *Franco* v. *Franco*, 3 Ves. 75; and an action may also be brought by the trustee against one *cestui que trust* to recover the trust fund without making the other *cestuis que trustent* parties: *Bridget* v. *Hames*, 1 Coll. 72.

Action by personal representatives to enforce claim against realty.

An executor who advanced money to pay the price of certain land held by his testator as lessee with a right of purchase, was held entitled to enforce his claim against the land, for the advances so made, the personal estate being exhausted: *Lannin* v. *Jermyn*, 9 Gr. 160.

A personal representative who is a creditor of the estate may, where the personality is exhausted, obtain judgment against a devisee for administration of the reality devised. To such an action the heir-at-law was a proper party; but where the devisee made no objection in his answer to his not being joined, and the plaintiff alleged by his bill that there were no lands descended, a decree was made in the absence of the heir, for the administration of the realty: *Tiffany* v. *Tiffany*, 8 Gr. 158; but see now *The Devolution of Estates Act* (R. S. O. c. 108) s. 4.

Assignee must take beneficially.

And absolutely.

Bond to secure alimony is not assignable.

Defences existing at date of assignment may be set up.

SUB-CLAUSE 7.—See R. S. O. c. 122, s. 6. The assignee must take the beneficial interest in the claim assigned. He cannot sue in his own name alone, either under the statute, or under this *Rule*, where the assignment is made merely to enable him to bring the action: *Wood* v. *McAlpine*, 1 Ont. App. 234; and see *National Provincial Bank of England* v. *Harle*, 44 L. T. N. S. 585; 6 Q. B. D. 626; but see *Burlinson* v. *Hall*, 12 Q. B. D. 347; 50 L. T. N. S. 723; 53 L. J. Q. B. 222; where the assignment is only by way of security, the assignor may sue in his own name notwithstanding the statute: *Hostraeser* v. *Robinson*, 23 C. P. 350; *Dawson* v. *Graham*, 41 U. C. Q. B. 532. A bond to secure alimony to a married woman was held not to be assignable so as to enable the assignee to sue in his own name: *Reiffenstein* v. *Hooper*, 36 U. C. Q. B. 295; *Re Robinson*, 27 Ch. D. 160. Any defence existing against the assignor at the date of the assignment may be set up in an action by the assignee: *Exchange Bank* v. *Stinson*, 32 C. P. 158. Where the plaintiff has only a partial assignment, the assignor should be made a party; but the objection when taken at the hearing was cured by the assignor appearing by counsel and submitting to be added as a party plaintiff, and bound by the proceedings: *Yates* v. *Great Western Railway Company*, 24 Gr. 495.

321. In all the above cases the Court, if it sees fit, may require any other person to be made a party to the action, and may, if it sees fit, give the conduct of the action to such persons as it deems proper; and may make such order in any particular case, as it deems just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matter in question. Chy. O. 59.

Rules 321, 322. In such cases Court may require persons to be joined as parties.

Where proceedings are necessary against persons who have had dealings with the testator whose estate is being administered, the executor has a right to the conduct of the cause unless misconduct has been proved: *Longbourne* v. *Fisher*, 40 L. T. N. S. 124.

Where trustees were accounting parties they were not given the conduct of proceedings: *Allen* v. *Norris*, W. N. 1884, 118.

Conduct of a sale was given to the party most interested in getting a good price: in *Woolley* v. *Colman*, 30 W. R. 769; and *Davies* v. *Wright*, 32 Ch. D. 221.

Where the conduct of an administration action is given to a creditor he is entitled to costs as between solicitor and client: *Re Richardson*, *Richardson* v. *Richardson*, 14 Ch. D. 611; 43 L. T. N. S. 279.

As a general rule where two actions for administration have been commenced the conduct will be given to the plaintiff in the first, even though a decree may have been first obtained in the second. This rule is not however inflexible. There may be special circumstances which the Court will take into account such as the object of the first plaintiff in commencing his action, the amount of his interest, and the nature of his claim: *Re Swire*, *Mellor* v. *Swire*, 21 Ch. D. 647; *Townsend* v. *Townsend*, 23 Ch. D. 100; *Re McRae*, *Forster* v. *Davis*, 25 Ch. D. 16. See also *Perrin* v. *Perrin*, 3 Chy. Ch. 452, and *Re Draggon*, 8 P. R. 330, and notes to *Rule* 968.

Where the conduct of the cause was refused to a party, and he appealed, it was held that all parties were interested and should be served with notice: *Sephton* v. *Quillam*, 71 L. T. Jour. 264.

322. In all the above cases the persons who, but for Rule 320, would have been necessary parties to the action, are to be served with an office-copy of the judgment (unless the Court or Master dispenses with such service) indorsed with the notice set forth in Form No. 33 in the Appendix, and after such service, they shall be bound by the proceedings in the same manner as if they had been originally made parties to the action; and upon service of notice upon the plaintiff they may attend the proceedings under the judgment. Any party so served may apply to the Court to add to, vary, or set aside the judgment within fourteen days from the date of such service. Chy. O. 60, 587.

Persons who would be necessary parties except for Rule 320 must be served with judgment.

The Eng. Rule 1883, R. 162, make the service of such persons necessary only if directed by the Court or a Judge. See *May* v. *Newton*, in note to *Rule* 320, pp. 341-2, 346.

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Rule 322. Office copy to be served.

Office Copy to be Served.—An office copy of the judgment must be served. The copy of the judgment for service may be made an office copy, either by the Registrar, or Local Officer in whose office the judgment is entered, or by the Deputy Registrar, or Local Registrar, or Deputy Clerk of the Crown, at the place where the reference is being prosecuted: see *Rules* 19, 547. The office copy may be made, either by comparing the copy intended to be made an office copy, with the entry in the judgment book, or with another office copy.

All persons who (but for *Rule* 320) would have been necessary parties to action, must be served.

Who to be Served.—All parties, who, but for *Rule* 320, would have been necessary parties to the action, who have not been made parties by writ, must be served with the judgment, unless service be dispensed with. Infants and persons of unsound mind not so found who are interested must be served: *Clarke* v. *Clarke*, 20 L. T. O. S. 88, in such manner as the Master before whom the reference is being prosecuted directs: *Rule* 338. Before proceedings can be validly carried on against an infant or a person of unsound mind not so found, a guardian *ad litem* must be appointed for such person. Service of the office copy of the judgment on the Official Guardian *ad litem* seems of itself sufficient to constitute him guardian *ad litem* for infant parties requiring to be served under *Rule* 322; *Rule* 337; see *Rule* 3; but see notes to *Rule* 337. The procedure to obtain the appointment of a guardian *ad litem* for persons of unsound mind by order is not prescribed by these *Rules*: see *Rule* 338 and notes. Where a guardian *ad litem* is appointed by order, he must be served with the order appointing him guardian, and the office copy of the judgment. The Official Guardian is usually appointed guardian *ad litem*.

Infants.

Lunatics.

Service out of the jurisdiction may be directed: see *Chalmers* v. *Laurie*, 10 Ha. App. xxvii.; *Strong* v. *Moore*, 22 L. J. Chy. 917; or substituted service: Dan. Pr. 6th ed. 999.

Parties who are served, are bound by proceedings.

Effect of Service.—The person served is not liable to account, nor can a motion for an injunction be made against him: *Walker* v. *Seligmann*, L. R. 2 Eq. 152; *Hopper* v. *Harrison*, 28 Gr. 22; *Rolph* v. *U. C. Building Society*, 11 Gr. 275, 278-9; see, however, *In re Rees*, *Rees* v. *George*, 15 Ch. D. 490. Neither can he require the defendant to account any farther than if he had been himself an original defendant in the action: *Whitney* v. *Smith*, L. R. 4 Chy. 513. A party served, however, may impeach in the Master's office an instrument set up in answer to his claim as a legatee, on the ground of fraud: *Darling* v. *Darling*, *Rosa's* claim, 15 C. L. J. 112.

Whether the party served attend the proceedings or not, he is bound by the proceedings. Unless he gives notice to the plaintiff of his intention to attend the proceedings under the judgment, he is not entitled to service of notice of the proceedings in the Master's office: *English* v. *English*, 12 Gr. 441.

Persons who have been improperly served may move to set aside the service: *Re Symons*, *Betts* v. *Betts*, 54 L. T. N. S. 501.

Parties served may on notice to plaintiff attend the proceedings.

Attending Proceedings.—A person served is entitled, on giving notice to the plaintiff, to attend the proceedings. A party so attending, although entitled to notice of the future proceedings in the action, does not thereby become a party to the action: *English* v. *English*, 12 Gr. 441; *Walker* v. *Seligmann*, L. R. 12 Eq. 152; but see *Re Rees*, *Rees* v. *George*, 15 Ch. D. 490.

Costs where attending unnecessary.

Under *Rule* 55 the Master has power, among other things, to give special directions as to the parties who are to attend on the several accounts and inquiries: and see also *Rule* 334. A person served under *Rule* 322, and attending the proceedings without special leave, may be ordered to pay all the extra costs occasioned by his so attending, if it appear that his attendance was unnecessary: *Sharp* v. *Lush*, 10 Ch. D. 463; and see *Daubney* v. *Leake*, L. R. 1 Eq. 495: *Re Marshall*, W. N. 1879, 12.

Persons not attending proceedings not entitled to notice.

Persons served with the judgment, and not attending the proceedings, are not entitled to service of the warrant to settle the report: *Green* v. *Measures*, W. N. 1866, 122; nor of the notice of hearing on further directions: *Lee* v. *Sturrock*, W. N. 1876, 226. If any relief is intended to be asked against them they are entitled to notice, even though they have not attended the proceedings before the Master: *Re Rees*, *Rees* v. *George*, 15 Ch. D. 490.

Motion to vary Judgment.—The motion to vary, or set aside, the judgment must be made on notice to the plaintiff. The motion is to be made before a Judge in Court. In the Chancery Division, the motion should be set down to be heard on a Wednesday; and in the other Divisions on a Tuesday, or Friday; but see *Rule* 211 at present suspended. Two clear days' notice of the motion must be given: see *Rule* 479; and it must be set down at least the day before the day named for hearing the motion: see *Rule* 541. **Rule 322.** Parties served may move against judgment.

On the motion to vary the judgment by any person served with a copy, the Court will not direct the taking of accounts for which no foundation was laid in the pleadings or proceedings in the action, except perhaps on the terms of allowing the party from whom such account is sought, an opportunity to adduce evidence, to show why it should not be granted: *Foster* v. *Foster*, L. R. 3 Chy. 330; and see *Murgatroyd* v. *Caldwell*, 10 L. T. N. S. 410. Additional accounts and inquiries have been directed after the report, at the instance of a party subsequently served with the decree: *Reeve* v. *Reeve*, W. N. 1871, 52. Under the former practice in Chancery, any person served with the decree might rehear the cause: *Ellison* v. *Thomas*, 1 D. J. & S. 18.

Where the question intended to be raised does not appear on the pleadings or previous proceedings in the action, it may be necessary to present a petition in the nature of a bill of review under the former Chancery practice. No petition for leave to file this petition is necessary: *Kidd* v. *Cheyne*, 18 Jur. 348; *Duggan* v. *McKay*, 1 Chy. Ch. 380; and see *Rules* 782, 786.

It would seem that a purchaser under a judgment pronounced in an action constituted under *Rule* 320, is bound to see that it has been served on all necessary parties, so as to bind them by the proceedings, in the same way that a purchaser is bound to see that all necessary parties, are made parties to any other action in which a sale is directed by the Court. *Prima facie*, only the persons who are actually named as parties to the record are bound; *Rule* 322 forms an exception to this rule: see *Reeve* v. *Reeve*, W. N. 1871, 52, and *Russell* v. *Romaine*, 3 Ont. App. 635. Purchaser bound to see that all necessary parties are bound by the proceedings.

A purchaser, however, is not bound to inquire into the regularity of the proceedings antecedent to the judgment: *Gunn* v. *Doble*, 15 Gr. 655; *Shaw* v. *Crawford*, 4 Ont. App. 371; *Collins* v. *Denison*, 2 Chy. Ch. 465, and see R. S. O. c. 44, s. 10.

Dispensing with Service.—The Master, to whom an action is referred, as well as the Court, has under this *Rule* power to dispense with the service of a copy of the judgment. Formerly, where the Master dispensed with service he must have stated the reasons therefor in his report: see Chy. Ord. 587; but this provision has not been embodied in these *Rules*. Dispensing with service of judgment.

An advertisement may be published for persons who cannot be found to be served, as a condition of dispensing with service on them: see *Rule* 60. Advertisement.

Service on some of the next of kin, who were resident out of the jurisdiction was dispensed with: *English* v. *English*, 12 Gr. 441. An application to the Court to dispense with service may be made *ex parte*: *Ib.*

Absence from the jurisdiction is not of itself sufficient reason for dispensing with service: *Chalmers* v. *Laurie*, 10 Hare, App. xxvii.; *Maybery* v. *Brooking*, 7 D. M. & G. 673; *Strong* v. *Moore*, 22 L. J. Chy. 917. Absence from jurisdiction.

Whether parties on whom service of the judgment is dispensed with, either by the Court, or Master, are nevertheless bound by the proceedings, is nowhere stated; it would seem that they are in the same position as parties in whose absence judgment is pronounced under *Rule* 319, and that they are not bound: see *Doody* v. *Higgins*, 9 Hare, App. xxxii.; *May* v. *Newton*, 34 Ch. D. 347; but see *Bunnett* v. *Foster*, 7 Beav. 540. How far persons not served are bound.

Parties not having an interest at the date of the judgment cannot be brought before the Court under this *Rule*: *Colyer* v. *Colyer*, 11 W. R. 355; but see *Rule* 46.

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Rules 323, 324. Objection to non-joinder at hearing, judgment saving rights of absentees.

323. Where a defendant, at the trial or on motion for judgment, objects that an action is defective for want of parties, the Court, if it thinks fit, may pronounce a judgment saving the rights of the absent parties. Chy. O. 65.

The Court may now in every action deal with the matters in controversy, so far as regards the rights and interests of the parties actually before it: *Rule* 324.

The Court will only act under *Rule* 323, where justice can be done to all parties nothwithstanding the defective constitution of the action: *Lambert* v. *Hutchinson*, 1 Beav. 277, 286.

Cases in which *Rule* acted on.

Where in a suit to set aside an alleged fraudulent conveyance by a debtor, it appeared at the hearing that a note *pro confesso* entered against one of the defendants, the original debtor, had been waived by a subsequent amendment of the bill, the Court dismissed the bill as against that defendant, on the application of the plaintiff, without the dismissal being equivalent to a dismissal on the merits, and made a decree, saving the rights of that defendant: *Waddle* v. *McGinty*, 15 Gr. 261.

A decree has been made under Chy. Ord. 65, from which this *Rule* is taken in the absence—of the assignee of a bankrupt: *Maybery* v. *Brooking*, 7 D. G. M. & G. 673;—of a mortgagee: *Feltham* v. *Clark*, 1 D. G. & Sm. 307;—of a person entitled in a remote contingency: *Daubuz* v. *Peel*, 1 Coop. *temp.* Cott. 365;—of the heir-at-law of the last surviving trustee, and of the personal representative of a testator: *Faulkner* v. *Daniel*, 3 Hare. 199.

Objections for want of parties must be taken promptly.

An objection for want of parties should be taken as soon as possible, and not postponed until the trial, or motion for judgment: *Lake* v. *South Kensington*, 11 Ch. D. 121; *Sheehan* v. *Great Eastern Ry. Co.*, 16 Ch. D. 59; 29 W. R. 69; the objection should be taken by motion, and not merely raised by statement of defence; *Ib.*, and see notes to *Rules* 319, 324; and see *Vallance* v. *Birmingham*, 24 W. R. 454; *Roberts* v. *Evans*, 7 Ch. D. 830; 26 W. R. 280, where no costs of pleadings were allowed to plaintiff from the time the objection was taken.

Misjoinder.

324. No action shall be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Adding and striking out parties.

(*a*) The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and upon such terms as may appear to the Court or Judge to be just, order that the name of any party, (*x*) whether as plaintiff or defendant improperly joined, be struck out, and that the name of any party, whether plaintiff or defendant, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added.

(*x*) *i.e.* person: *Long* v. *Crossley*, 13 Ch. D. 391.

(*b*) No person shall be added [or substituted] as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent [in writing] thereto to be filed. Rule 324.

The words "in writing" were not in the original *Rule*.

(*c*) All parties whose names are so added [or substituted] as defendants shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such writ of summons or notice (*y*). J. A. Rule 103.

Same as Eng. Rule 1875, O. 16, r. 13 (1883 R. 133), except the words in brackets

(*y*) As to the words "only on the service of such writ of summons or notice," see *The Bowesfield*, 51 L. T. N. S. 128.

As a general rule where an action is brought against one only of several joint contractors, he is entitled to have his co-contractors joined as defendants and is not limited to serving them with a third party notice under *Rule* 329; *Pilley* v. *Robinson*, 20 Q. B. D. 155; *Scarf* v. *Jardine*, 7 App. Cas. 364; but where the party sued is on the face of the contract the sole contractor, and other persons are behind jointly interested, the contracting party, when sued, has no right to force the other persons on the plaintiff as joint contractors: *Toronto & Hamilton Nav. Co.* v. *Silcox*, 12 P. R. 622; see also *Eyre* v. *Moring*, W. N. 1884, 58.

The proper course for a defendant desirous of raising the objection that some one jointly liable with him has not been joined as defendant is to apply in Chambers to have the action stayed, shewing that the person alleged to be jointly liable with him, is within the jurisdiction: *McArthur* v. *Hood*, 1 Cab. & E. 550.

The first clause is an extension of the Chy. O. 53, which provided that no suit should be dismissed by reason of the misjoinder of persons as plaintiffs.

The Court of Chancery formerly under Chy. O. 65, exercised a similar power of dealing with the questions raised in a suit, wherever justice could be done to all parties notwithstanding misjoinder or nonjoinder: see *Lambert* v. *Hutchinson*, 1 Beav. 277, 286. Where necessary, the decree expressly saved the rights of absent parties.

From the provisions for adding parties contained in the sub-clause of this *Rule*, it would appear that "misjoinder" includes "non-joinder."

Misjoinder, though it cannot defeat an action, may affect the costs: *Roberts* v. *Evans*, 7 Ch. D. 830.

Misjoinder and non-joinder of parties are not since the Jud. Act grounds of demurrer: see *Blake & Co.* v. *Moore*, 8 L. R. Ir. 95; *Werderman* v. *Société Générale, etc.*, 19 Ch. D. 246; *Hunter* v. *Young*, 4 Ex. D. 256 in notes to *Rule* 384; *Young* v. *Robertson*, 2 Ont. 434; *Scane* v. *Duckett*, 3 Ont. 370. The defendant's course is to apply under the present *Rule* to add, or strike out, parties, or require the plaintiff to do so; and the defendant should raise any objection of this kind that he may have, at the earliest possible moment: *Sheehan* v. *Great Eastern Ry. Co.*, 16 Ch. D. 59, where the objection was not allowed though taken by the defence; see also *Ruston* v. *Tobin*, W. N. 1880, 19; *Roberts* v. *Evans*, 7 Ch. D. 830; *Scane* v. *Duckett*, 3 Ont. 370. Where the defendant's contention is that additional parties are necessary to enable the action to proceed at all, it would seem, however, that it is sufficient for him to take the objection by his defence, leaving the plaintiff to apply to add parties if so advised: see *Nobel's Explosives Co.* v. *Jones*, 28 W. R. 653; 42 L. T. N. S. 754; 49 L. J. Chy. 726; *Lydall* v. *Martison*, 5 Ch. D. 780. Striking out and adding parties.

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Rule 324. A demurrer will still be proper where the plaintiffs are not persons entitled to bring the action, so that the objection is one of substance, and not merely that other parties should be also joined: *McClenaghan* v. *Grey*, 4 Ont. 329.

Clause (*a*) provides a cure for misjoinder and non-joinder, by striking out or adding parties. Applications under it may be made by either party, or the Court may act *mero motu*: *Kino* v. *Rudkin*, 5 Ch. D. 160. The power given is very extensive, and may be exercised at any stage of the proceedings, before trial on motion, and at the trial: *Kino* v. *Rudkin*, 6 Ch. D. 160, in a summary way: *Rule* 325. An order was made after delivery of a statement of claim: *Anon.* 2 Charl. Ch. Ca. 25; but was refused as being asked for at an unreasonably late stage where the case had come on for trial and had been adjourned: *Williams* v. *Andrews*, W. N. 1875, 237; 1 Charl. Ch. Ca. 60. It cannot be made after final judgment: *Attorney-General* v. *Corporation of Birmingham*, 15 Ch. D. 423. In that case new parties had succeeded to the rights and liabilities of the defendants, and it was held on appeal, that the pleadings could not be amended to introduce these parties after final judgment, and that when it becomes necessary to enforce such a judgment against persons who had acquired a title after it was made, an action must be brought for that purpose. Where the judgment is not drawn up, however, and can therefore be recalled, the plaintiff may be allowed to amend and add parties: *Keith* v. *Butcher*, 25 Ch. D. 750.

An application to add as a defendant a person who ought to be, but has not been joined, ought to be granted or refused upon the same principles on which a plea in abatement for the non-joinder of such person would have succeeded or failed: *per* Lord Cairns in *Kendall* v. *Hamilton*, 4 App. Cas. 516.

Striking out parties.

Striking out Parties.—Under the former practice, if a party was improperly joined, the defendant might demur if the impropriety appeared on the face of the proceedings; otherwise it was necessary to defend, and proceed to a hearing of the cause. The present *Rule* enables the Court to strike out a party improperly joined, before expense is incurred.

If a defendant is improperly joined, he should apply to have his name struck out, at the earliest possible moment; but a defendant was struck out on his own application, though he had delivered a statement of defence upon which issue had been joined, and delay only influenced the decision as to the costs: *Vallance* v. *Birmingham & Midland Land, etc., Corporation*, 2 Ch. D. 369.

Where defendants did not move under this *Rule* to be struck out, but took part in the defence, they were held jointly liable with other defendants to the costs of the action: *Twinbarrow* v. *Braid*, W. N. 1878, 169.

The Court will not virtually try the cause, however, on such an application. Where, therefore, a plaintiff, a builder, sued for work and labour done, and made two persons defendants who occupied the position of lessee and lessor, alleging that there was a doubt which was liable to him, Lush, J., on the application of the lessor, refused to strike him out on his statement that the lessee was liable to do all repairs: *Anon.* W. N. 1875, 203; 1 Charl. Ch. Ca. 59. Under an order striking out a defendant and giving the plaintiff leave to amend, he may not amend by striking out another defendant, even though that defendant's interest was determined: *Wymer* v. *Dodds*, 11 Ch. D. 436; *Elwon* v. *Vaughan*, W. N. 1879, 69. A defendant sought to be struck out is entitled to notice, that he may be heard as to the question of his costs: *Wymer* v. *Dodds*, *sup.*

A defendant in ejectment, a tenant, whose landlord had obtained leave to defend, and whose lease had expired pending the suit, was not allowed to have his name struck out, as the plaintiff's security would thus be diminished: *Johnston* v. *Oliver*, 9 P. R. 353.

On grounds apart from any question of personal responsibility defendants on their own application may not be allowed to be struck out: see *Heatley* v. *Newton*, 19 Ch. D. 336.

Adding parties.

Adding Parties.—This *Rule* is to be read in connection with *Rules* 300, 301, 445: *Edwards* v. *Lowther*, 24 W. R. 434; and any person who might have been joined originally under the latter *Rules* may be added under this *Rule*.

see *Smith* v. *Haseltine*, W. N. 1875, 250; 1 Charl. Ch. Ca. 56; *Lony* v. *Crossley*, 13 Ch. D. 388, subject to the restrictions hereafter referred to, and to the power of the Judge in his discretion to refuse to interfere if injustice is likely to be done in any way by the addition: see *Edwards* v. *Lowther*, 34 L. T. N. S. 255. **Rule 324.** Adding parties.

The words "who ought to have been joined," in this *Rule* mean "ought, in order to do complete justice, to have been joined," and, as a general rule, "all parties against whom remedy or relief is sought should, if possible, be joined in the same action": *per* Archibald, J., in *Edwards* v. *Lowther*, 45 L. J. C. P. 419. There, an action was brought against a publisher of a newspaper for libel, and after issue joined the proprietor of the newspaper was added as a defendant on the plaintiff's application.

Where a plaintiff assigned his interest to a third person, who obtained an order giving him liberty to prosecute the suit in the name of the original plaintiff, it was held on the application of the defendant, that the assignee was bound to set forth the assignment, by amendment or otherwise, in the statement of claim, and that all proceedings after the order should be entitled in both causes: *Secar* v. *Lawson*, 16 Ch. D. 121.

But the Courts do not interpret the *Rules* as empowering them to add parties at the instance of a defendant to the same extent as upon the plaintiff's application.

In an action to restrain defendants from using certain premises as a smallpox hospital, application was made under this *Rule* by the plaintiff, to join another person with his consent who was an inhabitant of the same neighbourhood, on the ground that since the action was commenced the plaintiff had given up his business and was going abroad. An order was refused, on the ground that the cause of action was injury to the plaintiff's own property only, and it was not necessary to enable the Court effectually to dispose of all questions in the action that anyone be added: *Dalton* v. *St. Mary Abbotts*, 47 L. T. N. S. 349.

Where the plaintiffs were lessees of eleven houses for a long term, one being sub-let, they, together with the sub-tenant, brought an action to restrain a nuisance, etc., subsequently the sub-tenant declined to go on. The other ten houses having been let in the meantime, two of the other sub-tenants were on application added as co-plaintiffs with their consent: *House Property & I. Co.* v. *H. P. Horsenail Co.*, 29 Ch. D. 190.

Persons were added as defendants who appeared to be the persons really liable to plaintiffs, and were conducting the defence for the defendants sued: *Adams* v. *Watson Manufg. Co.*, 15 Ont. 218; see 9 C. L. T. 81, where the decision was affirmed as to the terms of payment of costs imposed as a condition precedent to amending.

In *Hathaway* v. *Doig*, 6 Ont. App. 246, where the plaintiff in an action to restrain a nuisance appeared to have no interest, his wife being the owner of the property injured, an application to substitute the wife with her consent as plaintiff was refused, it being held that the suit was not merely not properly constituted but had no proper existence at all, and another person who had a right should not be substituted for a person who had no right to institute proceedings; see also *New Westminster Brewery Co.* v. *Hannah*, 24 W. R. 899; *Walcott* v. *Lyons*, 29 Ch. D. 584, where an action was brought by a life tenant against trustees for improper investment; the defence made was that the life tenant had acquiesced; a motion to add the tenant in remainder, who had not acquiesced, as co-plaintiff was refused; but see *Rule* 445.

An application to add parties must be made upon notice: *Re Colbeck*, *Hall* v. *Colbeck*, 36 W. R. 259: see notes to *Rule* 325.

Adding Plaintiffs.—The addition of a plaintiff is subject to the provision of clause (*b*) of this *Rule*, that the addition shall be by his consent; but if he consents, the addition may be made against the wish of the other plaintiffs if necessary as where the right of action has passed from the original plaintiff: *Emden* v. *Carte*, 17 Ch. D. 169: 29 W. R. 666. Adding plaintiff.

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Rule 324.

Adding plaintiffs.

Where a party brought an action in his own name instead of in the name of the person in whom the legal title of the property to be recovered was vested, an amendment was allowed adding such party: *McIlwin* v. *F. Retts*, 7 C. L. T. 159, *Walcott* v. *Lyons*, 29 Ch. D. 584: and see *Ayscough* v. *Bullar*, 41 Ch. D. 341.

In *De Hart* v. *Stevenson*, 1 Q. B. D. 313, one of the several co-owners of a ship, sued for freight dues; the defendant applied to add the other co-owners as plaintiffs, confessedly in order to obtain the benefit of their liability for costs. The application was refused, on the ground that it was not shown that the presence of the others was necessary in order to completely adjudicate upon and settle the question arising in the action; see also *Harry* v. *Davey*, 2 Ch. D. 721, and *Walcott* v. *Lyon*, *supra*.

In *Long* v. *Crossley*, 13 Ch. D. 388, an action was brought by a tenant for life for specific performance of an agreement, signed by her "for myself and those entitled after me," to accept a lease of a coal mine. After notice of trial the plaintiff died, and the persons entitled in remainder of whom the plaintiff's executor was one, wishing to adopt the suit, were, at their request, added as plaintiffs, at the trial. The question whether the action would nevertheless fail was not considered by the Court. Fry, J., said, "I think that at present I have nothing to do with that. The object of the provision was, not that a party's case should be framed so as to succeed, but that it can be adjudicated on by the Court, whether in his favour or against him."

In *Cormack* v. *Grofrian*, W. N. 1876, 22, the action was by a shipowner against consignees of the cargo for demurrage, and a counter-claim was put in for damage to the cargo. Leave was refused to the plaintiff to add as co-plaintiffs the other owners (perhaps because they did not consent), though it was admitted to be hard that the plaintiff should have to meet the counter-claim alone if others were liable as much as he.

In *Beck* v. *Dear*, W. N. 1876, 40; 2 Charl. Ch. Ca. 25, the addition of a plaintiff was refused where the object was to bring a counter-claim against him. See also *Bank of Commerce* v. *Bank of B. N. America*, 10 P. R. 158; *Norris* v. *Beazley*, 2 C. P. D. 80.

See also *Seear* v. *Lawson*, 16 Ch. D. 121, *supra*, where a plaintiff was in effect added on a defendant's application.

In *Emden* v. *Carte*, 17 Ch. D. 169, a trustee of a bankrupt plaintiff was added as a plaintiff, and the conduct of the action given to him on his own application, he alleging that the interest in the action passed from the plaintiff to him. A similar order was made in *Bird* v. *Matthews*, 46 L. T. N. S. [illegible] *Woodward* v. *Shields*, 32 C. P. 282, and notes to *Rule* 622.

In *Saylor* v. *Cooper*, 2 Ont. 398, where the equitable owner of land sued in respect of a right of way of necessity implied by a grant of land, [illegible] permitted to make the owner of the legal estate a co-plaintiff by amendment at the hearing.

Adding defendants.

Adding Defendants.—Whether a defendant will be added or not upon a defendant's application, depends upon whether the adjudication upon and settling of the questions arising in the action requires the presence of the person proposed to be added: *Harry* v. *Davey*, 2 Ch. D. 721. In general a defendant will not be added against the plaintiff's will, unless in the language of clause (*a*) his presence is necessary to enable the Court to effectually and completely settle all matters in question, and unless the parties will be prejudiced by his non-joinder: *Ledue* v. *Ward*, 54 L. T. N. S. 214. In *Norris* v. *Beazley*, 2 C. P. D. 80, a defendant sought to add a person as a defendant. The person sought to be added consented, and the object of the application was to enable such person to set up a counter-claim against the plaintiff. The plaintiff objected, and it was held that this *Rule* should not be made use of in a manner harassing to plaintiffs, by forcing them to include in their action persons *against whom they do not seek to proceed*, unless a strong case is made out, showing that in the particular case justice cannot be done without the person being brought in. Denman, J., there said, "we ought not to act upon it (the *Rule*) by adding a defendant without the consent of the plaintiff, except in cases where it is clearly made out that it is necessary to do so." See also

Drage v. *Hartopp*, 28 Ch. D. 414; where one executor brought an action for foreclosure without joining either as plaintiff or defendant his co-executor who had absconded to avoid prosecution for fraud: and *Toronto & Hamilton Navigation Co.* v. *Silcox*, 12 P. R. 622, *supra*, and *Sanders* v. *Peek*, 50 L. T. N. S. 630; 32 W. R. 462.

The addition of a defendant contemplated by this *Rule*, is not of a person against whom the original defendant may have a remedy over; *Hewitt* v. *Heise*, 11 P. R. 47 (as to which see *Rule* 328); nor of a person claimed by a defendant to be liable to the plaintiff instead of himself: *Leveuley* v. *Harrison*, W. N. 1876, 39; 2 Charl. Ch. Ca. 26; *Lovell* v. *Holland*, W. N. 1876, 53; 2 Charl. Ch. Ca. 26. In such case the defendant can defend himself without the presence of the other party; and if the plaintiff does not proceed against the other party, the defendant is not injured.

In *Byrne* v. *Brown*, 22 Q. B. D. 657, lessors sued the son of the lessee who was entitled to the term, subject to a sub-lease to D., for damages for breach of covenant caused by dilapidations made by D. Under the terms of the sub-lease to D. (who was brought in under a third party notice) it was doubtful whether he was liable to indemnify the defendant, or only the executors of the deceased lessee. On defendant's application, the plaintiffs not objecting, the executors were added as defendants to enable them to get indemnity from D., and D. was held not entitled to object though the case might be different if plaintiffs objected.

In *Day* v. *Radcliffe*, 24 W. R. 844, an administration suit, where the plaintiff's title as a beneficiary under a will was doubtful, and the trustee under the will was the only defendant, the beneficiary interested in disputing the plaintiff's claim was added.

In *Ashley* v. *Taylor*, 10 Ch. D. 768, a defendant died, and the cause of action alleged in the claim did not survive. Upon the plaintiff's motion, alleging further facts which shewed a cause of action which did survive, the administrator of the deceased defendant was added. See also *Rule* 622.

In *Head* v. *Bowman*, 9 P. R. 12, the plaintiff sued for damages caused by the flooding of his lands by defendant's mill dam. The G. W. Ry. Co. had turned the waters of the stream into another channel, which was not deep enough to carry off all the water if the defendant's dam were removed, so that plaintiff could not obtain complete relief by succeeding against the defendant. Liberty was therefore given to add the Ry. Co.

Defendants might under the former Chancery practice and probably may still be added after the judgment, for the purpose of a motion for injunction to preserve the subject of the suit: *Young* v. *Huber*, 29 Gr. 49.

In *Kitching* v. *Hicks*, 9 P. R. 518, an action against an assignee for the benefit of creditors, claiming a lien on goods taken by the assignee, certain creditors claiming that they had a substantial interest in the subject of the action were on their own application, added as defendants.

In *Dix* v. *G. W. Ry. Co.*, 34 W. R. 712; W. N. 1886, 130; 54 L. T. N. S. 830; 55 L. J. Chy. 797, the defendant Company covenanted separately with the plaintiff and two other covenantees by one indenture. The plaintiff sued for specific performance of the covenant without joining the separate covenantees. They were added on the application of the Company.

An officer of a corporation cannot be added merely for the purpose of discovery: *Wilson* v. *Church*, 9 Ch. D. 552. See notes to *Rule* 301.

In *Kino* v. *Rudkin*, 6 Ch. D. 160, a person to whom the defendant had assigned *pendente lite* was added at the trial at his own request. Where plaintiff had assigned his interest before suit it was doubted whether it was proper to allow the assignee to be added as plaintiff: *Foster* v. *Ward*, 9 L. R. Ir. 447.

In *Molloy* v. *Kilby*, 29 W. R. 127, it was held that persons, not parties, made defendants to a counter-claim and wishing to interrogate the plaintiff, should apply under this *Rule* to be made defendants to the original action.

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Rule 324.

In *Hewitt* v. *Heise*, 11 P. R. 47, it was held that the facts did not show a case for adding a defendant but rather for service of a notice under *Rule* 329 claiming indemnity.

Adding a defendant at his own instance.

Cases have arisen in which a third party has applied for leave to come in as a defendant. For such a case no express provision is made. In *Mills* v. *Griffith*, 45 L. J. Q. B. 771, an action of ejectment was brought by a lessor against a lessee who had incurred a forfeiture. On motion of a mortgagee of the lessee to be added as a defendant, the Court refused to make an order, holding that the questions involved in the action were wholly on the covenant between the lessee and lessor. In *Wilson* v. *Church*, 9 Ch. D. 552, a representative action, a bond-holder who had a substantial interest and disputed the plaintiff's contention, was, on his own application, added as a defendant. See also *Watson* v. *Cave*, and *Kino* v. *Rudkin*, *supra*, p. 359.

In *Vavasseur* v. *Krupp*, 27 W. R. 176, a foreign sovereign (the Mikado,) applied and was added as a defendant in order to enable him to apply to dissolve an injunction.

In *Ferris* v. *Ferris*, 9 P. R. 443, an action was brought by a father, to recover arrears under an annuity deed against his son who had absconded. The son's wife had barred her dower by the annuity deed and had brought a suit against her husband for alimony. She now applied to be let in to defend this action on the ground that it was collusively brought to defeat her suit for alimony, and defraud her of dower. She was let in to dispute the amount claimed.

Consent of person added as plaintiff.

The consent referred to in clause (*b*) must be proved: *Turquand* v *Fearon*, 27 W. R. 396; *Mason* v. *Harris*, *Ib.*, 700; but before the present *Rule* it need not have been in writing. It was sufficient if the solicitor for the existing plaintiff stated that he was authorized to consent on behalf of the new plaintiff, the solicitor taking the ordinary responsibility of using a plaintiff's name: *Cox* v. *James*, 19 Ch. D. 55. The present *Rule* makes a change in the practice and requires the consent to be in writing. The objection that there is no consent of a plaintiff sought to be added may be taken by defendant: *Turquand* v. *Fearon*, *supra*; see also *Jackson* v. *Krüger*, 54 L. J. Q. B. 446; 52 L. T. N. S. 962; *Tryon* v. *National Prov.* 16 Q. B. D. 678.

The case of trustee and *cestui que trust* is no exception to this provision, the trustee's consent will be required in order to make him a co-plaintiff on the application of his *cestui que trust*: *Besley* v. *Besley*, 37 Ch. D. 648; so also where an assignee for the benefit of creditors was sought to be added as a plaintiff in an action by a creditor to set aside a fraudulent conveyance: *Bank of London* v. *Wallace*, 13 P. R. 176.

In *Duckett* v. *Gover*, 6 Ch. D. 82, a Company was made, by mistake of law, a defendant instead of a plaintiff. Time was given to obtain the consent of the Company to be joined as co-plaintiffs: see also *Mason* v. *Harris*, 11 Ch. D. 97, and *Pender* v. *Lushington*, 6 Ch. D. 70. Where a resolution of a Company had been passed that the Company's name should not be used in an action brought by a shareholder for himself and also in the name of the Company against directors alleging misapplication of the funds, the Company's name was struck out as plaintiff, and leave was given to amend the writ by adding the Company as defendants: *Silber Light Co.* v. *Silber*, 12 Ch. D. 717. In *MacDougall* v. *Gardiner*, 1 Ch. D. 13, 22, it was said that every litigation on a Company's behalf should be in the name of the Company if the Company really desires it. See also *McHenry* v. *Lewis*, 25 So. Jour. 777. Where there is a fraud committed by persons who can command a majority of votes, the majority may sue and the Company need not be plaintiff: see *Atwool* v. *Merryweather*, L. R. 5 Eq. 464; *Menier* v. *Hooper*, L. R. 9 Chy. 350; *Mason* v. *Harris*, 11 Ch. D. 107.

The consent must be filed.

Mortgagees were made co-plaintiffs with the mortgagor in *Goodrich* v. *Everglyn Coal Co.*, W. N. 1889, 152, an action on covenants in a lease made by both mortgagor and mortgagees to defendants.

As to when mortgagees are necessary parties: see *Saylor* v. *Cooper*, 2 Ont. 398; *Re Nickle* v. *Walkerton*, 11 Ont 433, and *Platt* v. *G. T. Ry. Co.*, *Ib.* 246.

Jessel, M.R., in *Duckett* v. *Gover*, 25 W. R. 554, said: "An application to strike out the name of a person added as plaintiff without his consent can only be made by the person so added:" but where proceedings were instituted without the authority of a Co. they were set aside at the instance of defendants: see *Cape Breton Co.* v. *Fenn*, W. N. 1881, 23. **Rules 325, 326.**

The authority given by a married woman to a next friend to sue for her is not a document which can be filed: *Rogers* v. *Horn*, 26 W. R. 432.

For the manner of service of added parties: see *Rules* 326 and 327.

325. Any application to add, or strike out, or substitute a plaintiff or defendant may be made to the Court or a Judge at any time before trial by motion, or at the trial of the action in a summary manner. J. A. Rule 104. How application is to be made.

The same as Eng. R. 1875, O. 16, r. 14 (1883, R. 134).

An application to add or strike out parties should be made promptly: *Sheehan* v. *Great Eastern Ry. Co.*, 16 Ch. D. 59; *Williams* v. *Andrews*, W. N. 1875, 237; 1 Charl. Ch. Ca. 60; *Valance* v. *Birmingham, etc.*, 2 Ch. D. 369. It may be after delivery of statement of claim: *Anon.* 2 Charl. Ch. Ca. 25; or at the trial, even during examination of witnesses: *Ruston* v. *Tobin*, W. N. 1880, 19; *Kino* v. *Rudkin*, 6 Ch. D. 160; *House Property Co* v. *H. P. Horsenail Co.*, 29 Ch. D. 190; *Gandy* v. *Gandy*, 30 Ch. D. 57; though it may under the circumstances be then too late: *Nobel's Explosives Co.* v. *Jones*, 28 W. R. 653; or in some cases after judgment if the party to be added does not object: see *Re Mason, Turner* v. *Mason*, W. N. 1883, 134, 147; *sed quære*, see *Heard* v. *Borgwardt*, W. N. 1883, 173 and 194, and *Hurst* v. *Hurst*, 21 Ch. D. 278, 289. Where it becomes necessary to enforce a judgment against persons who acquired title after it was made, an action must be brought: *Attorney-General* v. *Council of Birmingham*, 15 Ch. D. 423. But see cases under *Rule* 423, and *Morgan* v. *Day*, Dan. Pr. 5th Ed. 463 note (*o*), and *Campbell* v. *Holyland*, 7 Ch. D. 166.

The application is made in Chambers: see *Wilson* v. *Church*, 9 Ch. D. 552; and on notice: *Tildesley* v. *Harper*, 3 Ch. D. 277; *Re Colbeck, Hall* v. *Colbeck*, 36 W. R. 259; but an order *nisi* has under peculiar circumstances been made *ex parte*, to become absolute unless moved against within a time named in the order: *Re Wortley*, 4 Ch. D. 180; *Wilson* v. *Church*, *supra*.

The order, whether for adding, striking out, or substituting parties, is in the discretion of the Judge: and after trial it was held too late to add new plaintiffs and make a new case: *New Westminster Brewing Co.* v. *Hannah*, 24 W. R. 899.

326. Where a defendant is added [or substituted], unless otherwise ordered by the Court or Judge, the plaintiff shall sue out an amended writ of summons, and serve the new defendant with such writ, or notice in lieu of service thereof, in the same manner as original defendants are served. J. A. Rule 105. Amended writ where new defendant added.

Original *Rule* 105 was identical with Eng. R. 1875, O. 16. r. 15. The words in brackets which were not in the original *Rule* are taken from Eng. Rule 1883 R. 135, which is to the same effect as the present *Rule*. Where the person added is out of the jurisdiction, the writ if originally issued for service within the jurisdiction, should before service be amended according to the form for service out of the jurisdiction: *Keate* v. *Phillips*, W. N. 1878, 186. The directions for service of the writ on new defendants do not meet the case of consolidated actions: *Re Wortley, Culley* v. *Wortley*, 4 Ch. D. 180, where the defendants were added to the consolidated action without service of any writ being required.

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Rules 327, 328.

Where a sole plaintiff died after delivery of statement of claim and his executors took out the common order to revive, copies of the writ, order to revive and order adding a defendant were directed to be served on the added defendant: *Austen* v. *Bird*, W. N. 1881, 129; 17 C. L. J. 365.

Amended statement of claim.

327. If a statement of claim has been delivered previously to such defendant being added, the same shall, unless otherwise ordered by the Court or Judge, be amended in such manner as the making of the new defendant a party may render desirable; and a copy of the amended statement of claim shall be delivered to the new defendant at the time when he is served with the writ of summons or notice, or afterwards within 4 days after his appearance. J. A. Rule 106.

Same as the Eng. R. 1875, O. 16, r. 16.

Contribution or indemnity between defendants and other persons.

328. Where a defendant is, or claims to be, entitled to contribution or indemnity, or any other remedy or relief over against any other person, or where from any other cause it appears to the Court or a Judge that a question in the action (*a*) should be determined, not only as between the plaintiff and defendant, but as between the plaintiff, defendant and any other person, or between any or either of them, the Court or a Judge may on notice (*b*) being given to such last-mentioned person make such order as may be proper for having the question so determined. J. A. Rule 107.

Identical with Eng. R. 1875, O. 16, r. 17.

This *Rule*, with the next six *Rules*, provide machinery for giving effect to sec. 52. sub-s. 1 of the Ac

(*a*) "Question in the action:" as to the meaning of these words, see *Horwell* v. *London General Omnibus Co.*, 2 Ex. D. 365; 46 L. J. Ex. 700; and *Rice* v. *Alliance, etc., Gas Co.*, 12 L. R. Ir. 172.

(*b*) This notice refers not to notice of a motion contemplated by *Rule* 330 for leave to bring in a third party, but to a notice (corresponding to that prescribed by *Rule* 329 in cases of contribution, etc.), for the service of which leave is obtained on the application under *Rule* 330.

Third parties.

By *Rules* 301 and 302 plaintiffs are given the fullest liberty to join as defendants all persons against whom, jointly, severally, or in the alternative, they may jointly, severally, or in the alternative claim relief. By sec. 52 of the Act, in furtherance of one of the main objects of the Legislature, namely, to have the claims of all persons interested in the subject of the litigation disposed of in the same action, a further and entirely new jurisdiction is conferred upon the Court. By that section a defendant to an action may obtain (1) *against a plaintiff*—any relief that might be granted in an independent suit by the same defendant against the same plaintiff; (2) *against* (*a*) *a co-defendant*, or (*b*) *any other person*—any relief relating to or in connection with the original subject of litigation which might be granted in an independent suit by such defendant against such co-defendant or other person.

The mode in which a defendant may obtain the relief above mentioned against a plaintiff is by counter-claim, and is treated of hereafter: *Rules* 373,

et. seq.; but the *Rules* at present framed do not provide means to enable the Courts to give a defendant the full benefit of the remaining provisions of the above section. **Rule 328.** Third parties.

By a counter-claim, to a certain extent complete relief may be obtained against a co-defendant, or a third person not originally a party: *Rules* 373 and 375; but no counter-claim can be set up which does not seek relief against a plaintiff: see notes to *Rule* 373; and no mode of obtaining, as of right, actual present relief was intended to be provided by the English Rules (though it may be different in Ontario), in those cases in which a defendant claims relief against a co-defendant or a third party, independently of the plaintiff. *Rules* were framed (and have been adopted substantially in Ontario) enabling a defendant to bring in third persons, not already parties to the action, but interested in the subject of litigation; but all that was intended to be secured was a binding decision, with a view to future relief against such third party in a subsequent independent action. This limited effect was given to the English Rules designedly. Their scope and intention were discussed in *Treleven* v. *Bray*, 45 L. J. Chy. 113; 1 Ch. D. 176. There Mellish, L.J., said: "The meaning of sec. 24, sub-s. 3" (R. S. O. 1887, c. 44 sec. 52, sub-s. 7), "was carefully considered by the Judges. We came to the conclusion that it was not advisable to make any Rules which would enable one defendant to obtain relief against his co-defendant without an independent action against him. We considered that we had power to do so, but thought that it would be inadvisable that a plaintiff who might have a good case against an original defendant should be compelled to wait for his remedy while the defendants were fighting *inter se*. The only object of the *Rules* was to bind the third party conclusively, by the judgment given as between the plaintiff and the original defendant, but if he wants to get an indemnity or other relief against the third party, he must bring an action of his own." Scope of the *Rules*.

To the same effect are *Warner* v. *Twining*, 24 W. R. 536, and *Measures* v. *Thomas*, W. N. 1875, 203; 1 Charl. Ch. Ca. 65; *Padwick* v. *Scott*, 2 Ch. D. 736; *Schneider* v. *Batt*, 44 L. T. N. S. 142; 17 C. L. J. 368; 30 W. R. 420; and this view seems to have been approved in Ontario in *Dundas* v. *Gilmour*, 2 Ont. 463, to the extent at least that after a judgment disposing of the plaintiff, the other parties may not further litigate in the action between themselves so as to prevent the plaintiff's judgment from being entered. See also *Lockie* v. *Tennant*, 5 Ont. 52., where in cases of "indemnity, etc.," it seems to be decided that a separate action is necessary to obtain the indemnity, following *Treleven* v. *Bray*, *supra*. In *Hornby* v. *Cardwell*, 8 Q. B. D. 329, more fully reported, 45 L. T. N. S. 781, after the questions between plaintiff and defendant had been tried pleadings were in the same action delivered between the defendant and third party, and the liability of the latter to indemnify the defendant was determined. There are also expressions of opinion in several other cases that the *Rules* have a wider scope: see *Horwell* v. *The London Gen. Omnibus Co.*, 2 Ex. D. 374; *The Cartsburn*, 5 P. D. 35, 59 and 62. See also *Butler* v. *Butler*, 14 Ch. D. 329; *Sawyer* v. *Sawyer*, W. N. 1883, 181 and 212; the issue directed to be tried in *Bagot* v. *Easton*, 11 Ch. D. 392; *Piller* v. *Roberts*, 21 Ch. D. 198; and *Schneider* v. *Batt*, 8 Q. B. D. 705; *Steel* v. *Dixon*, 28 W. R. 796. In *Nealds* v. *Corkindale*, 4 Ont. 317, it was laid down that these later cases show the practice to be, to settle the rights between the defendants and third party in the same action in which the third party has been notified; and relief was accordingly given to the defendant to the extent of protecting him against the plaintiff's demand.

The English Con. Rules of 1883 expressly enable judgment to be given against the third party (see Rule 184); but the scope of the third party procedure is confined to cases of contribution or indemnity only: see *Pontifex* v. *Foord*, 12 Q. B. D. 152; *Sanders* v. *Peck*, 32 W. R. 462; 50 L. T. N. S. 630; *Catton* v. *Bennett*, 26 Ch. D. 161, and shown to be such by contract express or implied, not merely a claim to relief over: *Speller* v. *Bristol Steam Navigation Co.*, 13 Q. B. D. 96; see also *Birmingham etc. Co.* v. *London & N. W. Ry. Co.*, 34 Ch. D. 261; *Tritton* v. *Bankart*, 35 W. R. 474; 56 L. T. N. S. 306; 56 L. J. Chy. 629; *Caistor* v. *Chapman*, W. N. 1884, 31; *Gloucestershire* v. *Phillipps*, 32 W. R. 522; 12 Q. B. D. 533; *Johnston* v. *Salvage Association*, 19 Q. B. D. 458; *Carshore* v. *N. E. Ry. Co.*, 29 Ch. D. 344.

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Rule 328. Two classes of cases in which a third party may be brought in, are provided for by the Ontario *Rules*.

Cases of contribution or indemnity.

(1) Where a defendant is, or claims to be, entitled to contribution and indemnity, or any other relief over, against any other person: *Rule* 328, first part.

These are the cases of the most frequent occurrence, and examples of them will be found in the forms of the notice required to be given to the third party: see Appendix Form No. 18.

The mode of procedure is provided by *Rules* 329, 331 and 332, taken together. Defendant serves a notice on a third party: *Rule* 329, the latter may appear, if he resists the plaintiff's claim as against the defendant who served the notice. If he does not appear he is bound by the decision: *Rule* 331. If he appears, before anything further can be done in respect of the claim to contribution, etc., directions must be obtained as to the extent to which, and the mode in which, the claim is to be determined: *Rule* 332.

The claim which the defendant has against the third party, need not be identical or co-extensive with the plaintiff's claim against the defendant himself. The object of the *Rules* is that "if there is a substantial question which may be determined in the action, not only between the plaintiff and the defendant, but also between the defendant and a third party, then that question is not to be tried twice over," *per* Jessel, M.R., in *Swansea Shipping Co.* v. *Duncan*, 45 L. J. Q. B. 640; in such a case the third person "is to be cited to take part in the original litigation, and so to be bound by the decision on that question once for all:" *S. C.* 1, Q. B. D. 649.

"The object of the Act was not only to prevent the same question being litigated twice, but to obviate the scandal which sometimes arose by the same question being differently decided by different juries": *Beuecke* v. *Frost*, 1 Q. B. D. 422, *per* Blackburn, L.J.; see also *Re Coltie*, 2 Ch. D. 51.

A right to indemnity arising after action brought, entitles a defendant to notify a third party: *Edison & Swan Co.* v. *Holland*, 33 Ch. D. 497.

The third parties can only be joined before trial: *Lockie* v. *Tennant*, 5 Ont. 52, and will not be allowed to be brought in, if the plaintiff will be prejudiced: *Bower* v. *Hartley*, 1 Q. B. D. 652; *Wye Valley R'y. Co.* v. *Hawes*, 16 Ch. D. 489; see also *Swansea, etc.*, v. *Duncan*, 1 Q. B. D. 648-9, and *Rule* 333; *Hutchison* v. *Colorado United Mining Co.*, W. N. 1884, 40.

See notes to *Rules* 329, 331 and 332.

Common "question in the action."

(2) Where from any other cause, it is made to appear that a *question in the action* should be determined between the plaintiff, defendant, and any other person, or between any or either of them: *Rule* 328, last part.

The mode of procedure in these cases is provided by *Rules* 328, 330 and 332 taken together. The defendant must obtain leave to bring in the third party by motion under *Rule* 330; when an order will be made for the service of the "notice" mentioned in *Rule* 328, last part. That order will contain all necessary directions as to appearance and the effect of non-appearance. If the third party appears further directions must be then obtained, under *Rule* 332.

This class will comprehend a great variety of cases in which the plaintiff may, or may not, be interested, and it is therefore left entirely to the Court or a Judge to direct what persons shall be allowed to be notified, what questions may be raised, and what proceedings shall be taken: *Rule* 330, and to what extent the person brought in shall be bound or made liable: *Rule* 332; and in considering how far the questions allowed to be raised should be determined in the action, the plaintiff's convenience, as in the former class of cases, is to be consulted: *Rule* 333, and *Swansea, etc.*, v. *Duncan*, 1 Q. B. D. 644; *Bower* v. *Hartley*, 1 Q. B. D. 652; *Associated Home Co.* v. *Whichcord*, 8 Ch. D. 457; and *Wye Valley R'y. Co.* v. *Hawes*, 16 Ch. D. 489.

A person cannot be brought in as a third party because he is alleged to be the beneficial plaintiff, and for the purpose of raising equities against him which do not attach against the plaintiff: *Bank of Commerce* v. *Bank of B. N. America*, 20 C. L. J. 136; 4 C. L. T. 200; and see *Jackson* v. *Krüger*, in note to *Rule* 324.

A third party cannot counter-claim against the plaintiff: *Edes* v. *Wardale* 28 Ch. D. 333; *quære*, whether he may counter-claim against the defendant who brings him in: *Ib.* 338; 54 L. J. Chy. 384. **Rule 329.**

A third party is not a person served with notice of proceedings within the definition of "defendant" in sec. 2 of the Act: *Ib.*

See notes to *Rules* 330 and 332.

In *Walker* v. *Balfour*, 25 W. R. 511, it was held that a third party brought in under *Rule* 328 was not entitled under that *Rule* to have any other person, against whom he has a claim, added; but in *Fowler* v. *Knoop*, 36 L. T. N. S. 219; W. N. 1877. 68, the third party against whom indemnity was claimed, was allowed under the concluding words of sec. 52, sub-s. 7, of the Act to bring in a fourth party, from whom he claimed indemnity upon the same grounds upon which it was claimed from him. Perhaps the point cannot yet be considered as settled: see *Yorkshire Waggon Co.* v. *Newport Coal Co.*, 5 Q. B. D. 268; and *Witham* v. *Vane*, W. N. 1880, 108. Fourth, etc., parties.

The *Rules* relating to third party procedure apply in an action of replevin; *Bradley* v. *Clarke*, 19 C. L. J. 80; 9 P. R. 410. Replevin.

Where a defendant makes a claim against a co-defendant for indemnity or other relief, his proper course is to proceed under *Rule* 328, and not by counter-claim: *Furness* v. *Booth*, 4 Ch. D. 586. The contrary ruling of V.-C. Hall in *Shephard* v. *Beane*, 2 Ch. D. 223, (an earlier case) has not been followed, and was subsequently disapproved of by the same Judge in *Harris* v. *Gamble*, 6 Ch. D. 748. The defendant may raise a question against a co-defendant by a pleading which also states a defence against a plaintiff; but such pleading is not a counter-claim, and should not be so entitled: *Furness* v. *Booth*, *supra*. Claims against co-defendants.

329. Where a defendant is entitled to contribution, indemnity, or other remedy or relief over against any person not a party to the action, he may (*x*) serve a notice to that effect: Notice to persons not already parties.

(*a*) A copy of such notice shall be filed with the proper officer, and served on such person, according to the rules relating to the service of writs of summons;

(*b*) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the Court or a Judge, be served within the time limited for delivering his statement of defence;

(*c*) Such notice may be in the form or to the effect of the Form No. 18 in the Appendix, with such variations as circumstances may require and therewith shall be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action. J. A. Rule 108.

This is the same as the Eng. R. 1875, O. 16, r. 18 (see 1883 R. 170), except that the latter requires the notice to be stamped with the seal with which writs of summons are sealed, and inserts at (*x*) the words "by the leave of the Court or Judge."

The right to indemnity may have arisen either before, or after, the commencement of the action: *Edison* v. *Holland*, 33 Ch. D. 497; see also *Edison* v. *Jablochoff*, 35 W. R. 178.

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Rule 330. The notice referred to may be given without any leave being first obtained, and is confined to the first class of cases mentioned in *Rule* 324 (see notes to that *Rule*); namely, where the defendant claims a remedy, or relief, over against a third party.

The Eng. Rules of 1883 make express provision (Rule 177) for serving a third party notice, where contribution, etc., is claimed from a person already a party to the action.

Delivery of pleading to co-defendant in lieu of notice.

Under the Ont. *Rules* the procedure is different, and the notice, of which the form is given in the Appendix No. 18, need only be given where the third party is not already a party to the cause. Where the relief over is claimed from a co-defendant, notice is sufficiently given by delivering to such defendant a statement of defence raising such claim: *Furness* v. *Booth*, 4 Ch. D. 586. An order directing that such delivery shall be sufficient notice, was made in *Marner* v. *Bright* and *Bagot* v. *Easton*, 11 Ch. D. 392, but even in England was held unnecessary in *Butler* v. *Butler*, 14 Ch. D. 329, and *Towse* v. *Loveridge*, 25 Ch. D. 76. Since the notice provided by this *Rule* may under the Ontario *Rules* be given, without order, to a person not already a party, so where contribution or other relief over is claimed from a party to the cause, the delivery to him of a pleading claiming such relief is sufficient notice of the claim without an order: see *Burke* v. *Pittman*, 12 P. R. 662, and *Rule* 376 in the case of a counter-claim.

It will then be open to the party served to move to discharge the service, if the case is not one of contribution or indemnity within the *Rules*: see *Towse* v. *Loveridge*, *supra*; or when an application is made under *Rule* 332, for directions as to the proceedings upon such claim, he may perhaps object to the claim being entertained: see *Schneider* v. *Batt*, 8 Q. B. D. 705; *Wye Valley Ry. Co.* v. *Hawes*, 16 Ch. D. 489.

A claim by a defendant against a co-defendant for indemnity will not be tried without an order under *Rule* 332 providing for the determination of the claim raised: *Burke* v. *Pittman*, *supra*; *Flower* v. *Todd*, W. N. 1884, 47.

The procuring by a defendant of the pleadings of a co-defendant who claims contribution, etc., from him does not operate as a notice to the former: *Steel* v. *Dixon*, 28 W. R. 796; 42 L. T. N. S. 765.

Service of notice out of jurisdiction.

The notice to the third party is to be served according to the *Rules* relating to the service of writs of summons. Such notice may therefore be served out of the jurisdiction under *Rule* 271: see notes to that *Rule* and *Swansea Shipping Co.* v. *Duncan*, 1 Q. B. D. 644; *Dubout* v. *Macpherson*, 23 Q. B. D. 340. In such case the time for appearance (eight days) mentioned in *Rule* 331 will not be sufficient, and in *Swansea, etc.* v. *Duncan*, *supra*, this was used as an argument that the enactments as to notice to third persons were not intended to apply to persons out of the jurisdiction. The answer given by the Master of the Rolls to this objection was, that the order giving leave to serve the notice out of the jurisdiction is to name such a time for appearance as the necessity of the case as to time and place requires: see English Order 11, R. 4 (1883 R. 68) and the *Rule* allowing eight days only must be taken to be modified accordingly. That *Rule* has not been adopted in the *Ontario Act*, but probably *Rule* 276 would be held in like manner to modify *Rule* 331. It would be prudent to obtain leave to serve the person out of the jurisdiction, instead of merely applying under *Rule* 274 to have the service, when effected, allowed.

Court may direct notice to be given.

330. Where, under Rule 328, it is made to appear to the Court or a Judge, at any time before or at the trial, that a question in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff and defendant and any other person, or between any or either of them, the Court or Judge, before or at the time of making the order for having

such question determined, shall direct such notice to be given by the plaintiff at such time and to such person and in such manner as may be thought proper; and if made at the trial, the Judge may postpone such trial as he may think fit. J. A. Rule 109. Rule 331.

This *Rule* is identical with the Eng. R. 1875, O. 16, r. 19, and prescribes the procedure for the second of the two classes of cases mentioned in *Rule* 328, namely, where a third party is sought to be brought in for the determination of a *question in the action*, not only as between the plaintiff and defendant, but as between the plaintiff and defendant and such third person, or between any or either of them. Notice in cases of "common question."

In that case, *Rule* 329 does not apply, and therefore it is necessary under *Rule* 328, last part, to apply for leave to serve notice on the third party. This motion for leave will be made in Chambers on notice, not necessarily to the third party: see *Pearson* v. *Lane*, W. N. 1875, 248; *Corrie* v. *Allen*, 48 L. T. N. S. 464; W. N. 1883, 35; but notice to the plaintiff will be proper: *Wye Valley Ry. Co.* v. *Hawes*, 16 Ch. D. 489; *Finlay* v. *Scott*, W. N. 1884, 8, though see *Corrie* v. *Allen*, 48 L. T. N. S. 464. If notice is not given to the plaintiff he may, if he considers himself prejudiced, apply to discharge the order: see *Corrie* v. *Allen*, 48 L. T. N. S. 467-8; *The Bianca*, 8 P. D. 91; but he could as conveniently take any objection he may have, on any motion for directions under *Rule* 332.

Leave to give a notice where necessary should be promptly applied for: *Birmingham & District Land Co.* v. *London & N. W. Ry. Co.* 56 L. T. N. S. 702.

On the motion for such leave, the propriety of having the question so tried must be "made to appear," but probably it will be enough as (in England) on an application for leave to serve a motion claiming contribution or indemnity, if a "plausible" case is made out for serving the third party: see *Beynon* v. *Godden*, 4 Ex. D. 247, or that a "common question" is *bona fide* raised without considering the validity of any claim which it may involve against the third party: see *Carshore* v. *N. E. Ry.*, 29 Ch. D. 344, leaving him to move to discharge the service. If leave is granted, the order will ordinarily direct the *plaintiff*: *Rule* 330; *Horwell* v. *London General Omnibus Co.*, 46 L. J. Ex. 700; 2 Ex. D. 365, to serve notice on the third party, and will provide for the form of notice, the mode of service, and the time for appearance, or pleading, by the third party, and any other directions that may be necessary: *Steel* v. *Dixon*, 42 L. T. N. S. 765; 28 W. R. 796.

Where defendants wished to raise, and to have decided, a question in the action, as between them and a co-defendant, they, instead of the plaintiff, were allowed to serve a pleading on their co-defendant raising the question: *Steel* v. *Dixon*, 42 L. T. N. S. 765; 28 W. R. 796.

This *Rule* was applied under complicated circumstances in *Brown* v. *Cousineaux*, 11 P. R. 363. See also *Burke* v. *Pittman*, 12 P. R. 662.

331. If a person not a party to the action, who is served as mentioned in Rule 329, desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, he must enter an appearance in the action within 8 days from the service of the notice; in default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise; provided always, that a person so served and failing to appear Appearance by third party.

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Rule 332. within the said period of 8 days, may apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or Judge shall think fit. J. A. Rule 110.

This *Rule* is identical with Eng. R. 1875, O., 16 r. 20. It applies only to the cases of contribution, etc., in which a notice under *Rule* 329 has been served.

Appearance by third party served under *Rule* 329.

As to the time for entering appearance in the case of a third party out of the jurisdiction, see note to *Rule* 329.

Appearance indicates a desire "to dispute the plaintiff's claim in the action, *as against the defendant*, on whose behalf the notice has been given": *Rule* 331.

By non-appearance the third party is taken to admit the validity of any judgment obtained against the defendant who brought him in, but it seems that no actual relief can be obtained against him: see the form of notice in Appendix, No. 18; *Treleven* v. *Bray*, 45 L. J. Chy. 113; 1 Ch. D. 176, and *The Cartsburn*, 5 P. D. 59.

The third party may move to set aside the notice served upon him: *Benecke* v. *Frost*, 1 Q. B. D. 429; *Bower* v. *Hartley*, *Ib.* 652; *Horwell* v. *London Gen. Omnibus Co.*, 2 Ex. D. 365. He should not in such cases, properly speaking, enter an appearance: see *Horwell* v. *London General Omnibus Co.*, 2 Ex. D. at p. 366; and *Corrie* v. *Allen*, 48 L. T. N. S. 466; but it would seem that the party would not be prejudiced by appearing: *Benecke* v. *Frost*, 1 Q. B. D. 421. In England a conditional appearance may be entered: see Eng. R. 1883, 100. *Pleasants* v. *E. Dereham*, 47 L. T. N. S. 439; *Nelson* v. *Pastorino*, 49 L. T. N. S. 564; for which, however, there is no provision in Ontario.

Notice of an application to set aside the notice must of course be given to the defendant who served the notice, and may also properly be given to the plaintiff, who is interested in seeing that no question is introduced into the litigation which may prejudice him: see *Bower* v. *Hartley*, 1 Q. B. D. 652; *Wye Valley Ry. Co.* v. *Hawes*, 16 Ch. D. 489; *Rule* 333.

If the defendant who gave the notice cannot, from the nature of the case, become entitled to remedy or relief over against the third party, the service will be set aside: *Horwell* v. *London General Omnibus Co.*, 2 Ex. D. 365. See also *Harry* v. *Davey*, 2 Ch. D. 721; *Rice* v. *Alliance, etc.*, 12 L. R. Ir. 172.

A married woman who has no separate estate cannot be brought in as a third party: *Jones* v. *Elderton*, W. N. 1884, 39; *Gloucestershire Banking Co.* v. *Phillipps*, 12 Q. B. D. 533.

Where the third party appears, nothing more can be done in regard to the claim for contribution, without an application under *Rule* 332 for directions as to subsequent proceedings: see *The Cartsburn*; *Swansea* v. *Duncan*; *Benecke* v. *Frost*; *Burke* v. *Pittman*, *supra*.

Where the third party appears, he may be limited in the extent to which he may take part at the trial: *Exton* v. *London & N. W. Ry. Co.*, 38 Ch. D. 144; *Byrne* v. *Brown*, 37 W. R. 592; 60 L. T. N. S. 651; or may be allowed to actively assist in resisting the action: *Pearson* v. *Lane*, W. N. 1875, 248. In the latter case he may obtain discovery from the plaintiff: *Eden* v. *Weardale* (No. 3) 35 Ch. D. 287; and the plaintiff may treat him as a defendant and obtain discovery from him: *McAllister* v. *Bishop of Rochester*, 5 C. P. D. 194; *Eden* v. *Weardale* (No. 2) 34 Ch. D. 223; see *Bradley* v. *Clark*, in note to *Rule* 488, 510; *Piller* v. *Roberts*, 21 Ch. D. 201; *Hornby* v. *Cardwell*, 8 Q. B. D. 329; and he may be ordered to pay the costs: *Edison* v. *Holland*, 37 W. R. 699. *Quære*, whether, after judgment, plaintiff can amend and claim an injunction against third party: *Ib.*

Direction as to mode of deter-

332. If a person not a party to the action served under these Rules appears pursuant to the notice, the party givin-

the notice may apply to the Court or a Judge for directions as to the mode of having the question in the action determined; Rule 332. determining questions in action.

(*a*) The Court or Judge, upon the hearing of such application, may, if it shall appear desirable so to do, give to the person so served liberty to defend the action upon such terms as shall seem just, and may direct such pleadings to be delivered, or such amendments in any pleadings to be made, and generally may direct such proceedings to be taken, and give such directions, as to the Court or Judge shall appear proper for having the question most conveniently determined, and with respect to the mode and extent in or to which the person so served shall be bound or made liable by the decision of the question, [and as to the costs of the proceedings]. J. A. Rule 111.

The words in brackets were inserted in consequence of the decision in *Yorkshire Waggon Company* v. *Newport*, 5 Q. B. D. 268, that the Court under the Eng. R. of 1875 had no jurisdiction to impose any terms as to costs. See *Tomlinson* v. *Northern Ry.*, 11 P. R. 538, and other cases *infra*, p. 372. Otherwise this is the same as Eng. R. 1875, O. 16, r. 21, (1883, R. 175).

Where a third party has appeared the Court has power to direct him to pay the costs of the action: *Edison* v. *Holland*, 37 W. R. 699; *Hornby* v. *Cardwell*, 8 Q. B. D. 329.

In either of the two classes of cases mentioned in *Rule* 328, before the trial of any issue raised against a third party, whether a co-defendant or a stranger, can be had, the direction of the Court or Judge must be obtained under this *Rule* as to the extent to which the question is to be entertained in the action and the mode in which it is to be determined: *Piller* v. *Roberts*, 21 Ch. D. 198; *Flower* v. *Todd*, W. N. 1884, 47; *Burke* v. *Pittman*, 12 P. R. 662; *Tritton* v. *Bankart*, 35 W. R. 474.

This application in cases within *Rule* 329 is the first opportunity the plaintiff has of examining how the introduction of the third party will affect him, and notice of the motion must of course be given to him: see *Bower* v. *Hartley*, 1 Q. B. D. 652; *Wye Valley, etc.* v. *Hawes*, 16 Ch. D. 489; *Swansea, etc.* v. *Duncan*, 1 Q. B. D. 648-9; *Finlay* v. *Scott*, W. N. 1884, 8.

In general the motion will be made, as the *Rule* provides, by *the party giving the notice*; but an application seems to have been made by the third party in *Piller* v. *Roberts*, 21 Ch. D. 198.

Where judgment has been obtained under *Rule* 739, a Judge cannot give directions as to the trial of the question of the liability of the third party who has been brought in: *Rich* v. *Darrett*, 28 Sol. Jour. 513; but in *Flower* v. *Todd*, W. N. 1884, 47, judgment having been obtained against one defendant under *Rule* 739, the question of the liability of his co-defendant to a claim for indemnity in respect of the judgment was directed to be determined at the trial.

The costs of the proceedings will in general be reserved till the trial: *Benecke* v. *Frost*, 1 Q. B. D. 422, but *quære* whether the order giving directions should not make some reference to the costs of the proceedings: *Tomlinson* v. *Northern Ry.* 11 P. R. 526.

The Court or Judge may give such directions as may be proper for having the question in which the third party is interested determined, subject always to the condition that the plaintiff must not be prejudiced or unreasonably delayed.

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Rule 332.

Directions which may be given.

Directions may be given that the third party is to be "bound" only by the decision upon some question: *Benecke* v. *Frost*, 1 Q. B. D. 422; or that he may be "made liable" by the decision apparently to either the plaintiff or the defendant who gave the notice: *Piller* v. *Roberts*, 21 Ch. D. 198; *Horwell* v. *London Omnibus, etc. Co.*, 2 Ex. D. 374; and all proper pleadings will be ordered to be delivered and directions given as to the trial: see *Witham* v. *Vane*, 49 L. J., Chy. 242; or looking at the circumstances, and notwithstanding that the third party may not have moved to discharge the service of the notice upon him, the Court or Judge may determine that it is not a proper case for citing a third party, or that the giving of any directions will prejudice or delay the plaintiff and may therefore refuse to give any: *Schneider* v. *Batt*, 44 L. T. N. S. 142; 8 Q. B. D. 101; see *Bower* v. *Hartley, sup.; Associated Home Co.* v. *Whichcord*, 8 Ch. D. 457, in which case the third party must be considered as dismissed from the action: *Schneider* v. *Batt*, 8 Q. B. D. 701; 45 L. T. N. S. 370; 50 L. J. Q. B. 525; 30 W. R. 420; 18 C. L. J. 56.

A defendant who is entitled to indemnity from a co-defendant is entitled to judgment before he has actually paid anything in discharge of his liability to the plaintiff: *English and Scottish Trust Co.* v. *Flatau*, 36 W. R. 938. See *Underhay* v. *Read*, *Ib.* 75; *Cunningham* v. *Lyster*, 13 Gr. 575; *Clendennan* v. *Grant*, 10 P. R. 593.

Practice prior to English Rules of 1883, and in Ontario.

It was established in England under the Rules prior to those of 1883, on which the Ontario *Rules* are founded, that the object of the *Rules* was that where the same question, of a substantial nature: *Corrie* v. *Allen*, 48 L. T. N. S. 464; W. N. 1883, 34, 65, though not necessarily the whole question in the action: *Bower* v. *Hartley*, 1 Q. B. D. 625, exists between several persons, that question shall be tried once for all; and that if there were no questions which could be determined between the plaintiff, the defendant and the third party at one trial, the case was not a proper one for citing a third party, and he should be dismissed: *Schneider* v. *Batt*, 50 L. J. Q. B. 525; 8 Q. B. D. 701; and this whether the third party was cited under *Rule* 329: *Swansea, etc.* v. *Duncan*, 45 L. J. Q. B. 640; 1 Q. B. D. 649; *Corrie* v. *Allen*, *supra*; or under *Rule* 330; *Schneider* v. *Batt*, *supra*; *Marner* v. *Bright*, *infra*, and *The Bianca*, 8 P. D. 91, where the third party was dismissed on the ground that the questions between the defendant and the third party were totally different from those between the plaintiff and defendant, which would be embarrassing to the plaintiff. See also *Blaina Iron Co.* v. *Garbutt*, 46 L. T. N. S. 162, where a question of seaworthiness, as between the plaintiff and defendant, and defendant and the third party, was not identical in point of time. The same view seems to have been taken in *Dundas* v. *Gilmour*, 2 Ont. 463, as the defendant and third party were not allowed to further litigate between themselves, after a trial had disposed of all questions as far as the plaintiff was concerned. That course was, however, allowed in *Hornby* v. *Cardwell*, 8 Q. B. D. 329; 45 L. T. N. S. 781; and there is a very distinct expression of opinion by the Court of Appeal in England under the Rules of 1875 that it is competent to the Court or Judge, after the matters in which the plaintiff is concerned are disposed of, to give directions by which any subsequent question between the defendant and the third party might be put in course of investigation: *The Cartsburn*, 5 P. D. 62. Probably the point can not yet be said to be settled in Ontario. See notes to *Rules* 328 and 333.

In *Neald* v. *Corkindale*, 4 Ont. 317, accounts between defendant and a third party were adjusted at the trial, and out of a balance found in favor of the defendant, the third party was directed to pay the defendant the amount of the plaintiff's claim against the defendant.

Judgment against third party, where a co-defendant.

Where a defendant claims contribution from a co-defendant in respect of the plaintiff's claim, it seems that there is no difficulty in giving the plaintiff judgment and adjusting the liabilities of the defendants between themselves by a subsequent inquiry: *Butler* v. *Butler*, 14 Ch. D. 329; *Sawyer* v. *Sawyer*, W. N. 1883, 181, 212; see also *Borough* v. *James*, W. N. 1884, 32; but directions for such inquiry must be obtained under this *Rule*: *Burke* v. *Pittman*, 12 P. R. 662; *Tritton* v. *Bankart*, 35 W. R. 474; 56 L. T. N. S. 306; 56 L. J. Chy. 629; *Flower* v. *Todd*, W. N. 1884, 47.

The English Rules of 1883 are limited to cases of contribution, indemnity, etc., and expressly provide for the trial of the question of the liability of the third party to defendant (Rule 174), at or after the trial of the action, which has been construed as meaning that this question should be tried at the trial between the plaintiff and defendant: *Caister* v. *Chapman*, W. N. 1884, 31. The English decisions therefore, under those *Rules*, cannot be fully applicable in Ontario. **Rule 332.** Practice under the Eng Rules of 1883.

If the third party admits his liability to indemnify defendant, he may be allowed to defend. If he does not admit his liability that question may be determined at the trial: *Coles* v. *Civil Service Supply Ass.*, 26 Ch. D. 529; *Flower* v. *Todd*, W. N. 1884, 47; 28 Sol. Jour. 301; see also *Callender* v. *Wallingford*, 53 L. J. Q. B. 569; *Blore* v. *Ashby*, W. N. 1889, 158. Where a third party appeared pursuant to a third party notice, but declined to state any defence, it was held that judgment might be ordered at once against him under the English Rule (No. 174 of 1883) if the Judge was not satisfied that there was any question as to the liability of the third party proper to be tried: *Gloucestershire Banking Co.* v. *Phillips*, 12 Q. B. D. 533.

In *Borough* v. *James*, W. N. 1884, 32, it was said that the fact that the third party has a counter-claim against the defendant is sufficient to prevent judgment being given against the third party.

These cases under the Eng. Rules of 1883 will not be precisely in point under the practice in Ontario but bearing in mind the difference in the scope of the *Rules*, they may be usefully consulted in cases of contribution, etc.

The following references will further illustrate this subject:

(1) **Cases of contribution, indemnity, etc., within Rule 328 first part, and 329.**

Examples illustrating the practice as existing in Ontario.

In *Benecke* v. *Frost*, 1 Q. B. D. 419, an action was brought for not accepting goods, and the defence was raised (amongst others) that the goods were not according to contract; the defendants were allowed to bring in persons to whom they had re-sold upon the same terms, in order to bind them by a decision as to the quality of the goods.

In an action by the holders of a bill, indemnity as to part was claimed by the acceptors from the drawer on the ground that the consideration had in part failed; the drawer denied failure of consideration; an order was made substituting the drawer for the plaintiff, and allowing him to sue on the bill, upon the acceptor's undertaking to pay the amount not in dispute, and the drawer's paying to the plaintiff the balance in dispute: *National Provincial Bank of England* v. *Bradley Bridge, etc., Co.*, W. N. 1876, 63; 2 Charl. Ch. Ca. 30.

Third parties admitting their liability to indemnify were substituted as defendants with the plaintiff's consent: *Commissioners of Waterford* v. *Veale*, W. N. 1876, 23, but not where plaintiff objected: *Measures* v. *Thomas*, W. N. 1875, 203; see also *Norris* v. *Beasley*, 2 C. P. D. 80: *Dawes* v. *Thornton*, W. N. 1876, 74; *Seligman* v. *Mansfield*, W. N. 1875, 240; *Barton* v. *London & N. W. Ry. Co.*, 38 Ch. D. 144; *Byrne* v. *Brown*, 37 W. R. 592; 60 L. T. N. S. 651.

A. contracted to sell goods to B. with a warranty, and himself bought the goods from C. stipulating for a similar warranty. B. sued A. for breach of warranty. It was held that C. was properly brought in, and directions were given for trial of the liability of C. to indemnify A.: *Hart* v. *Brown*, 28 Sol. Jour. 577.

Third parties were properly served, where defendant claimed contribution from them as partners, to the extent of one-half of what might be recovered against defendant: *McLaren* v. *Marks*, 10 P. R. 451.

(2) **Cases of common question within Rule 328, last part.**

An order will be made for the trial, with the issues in which the plaintiff is interested, of other issues between co-defendants, if they are germane to the matter in dispute, and convenient to be tried with the former issues, but not unless the plaintiff consents: *Marner* v. *Bright*, 11 Ch. D. 394, n; W. N. 1878, 211, or does not object: *Bagot* v. *Easton*, 11 Ch. D. 392, or though the plaintiff objects if he cannot be prejudiced: *Tebbs* v. *Lewis*, W. N. 1875, 204; 1 Charl. Ch. Ca. 66.

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Rule 332. Third parties.

In *Bayot* v. *Easton*, the plaintiff jointly with defendant B., entered into a contract with defendant E. to work in partnership an adventure on lands belonging to E. Plaintiff alleged that E. obtained the contract by misrepresentation, and asked for rescission, or, in the alternative, for dissolution. Defendant B. obtained leave to serve a notice of a claim he had against defendant E., arising out of the subject matter of the action. On an application by defendant B. under *Rule* 332, for directions as to the trial of the issue between B. and E., an order was made, allowing B. to prosecute his claim in the pending action.

In *Tebbs* v. *Lewis*, W. N. 1875, 204, the plaintiff, an intending vendee, sued an auctioneer for his deposit. The auctioneer claimed part of it for commission, and the vendor, who was brought in as a third party, claimed the deposit as forfeited. Lush, J., ordered the right of the third party against the auctioneer to be tried, and the vendor who appeared as third party was ordered to plead to the statement of claim as it stood, and deliver defence and counter-claim, if any, to the plaintiff and original defendant, plaintiff to have leave to reply, and defendant to amend his defence within six days.

In *Driver* v. *Canada Permanent L. & S. Co.*, 1 C. L. T. 730, an action was brought by D. against mortgagees to recover surplus moneys in their hands after a sale. The mortgagees claimed to retain part of the moneys as assignees of a judgment against D., and the whole was claimed by X. On motion by the mortgagees, X. was allowed to be brought in, that the question between all parties might be determined.

In an action for specific performance of an agreement to sell land, persons claiming an interest in the land were allowed to be cited as third parties to bind them on the *question of title*: *Harry* v. *Davey*, 24 W. R. 515; but an application afterwards to add them as defendants was dismissed: 2 Ch. D. 721.

In an action for damages for breach of contract to supply a pumping engine which had failed through the breaking of the crank shaft; third parties were allowed to be cited to be bound on the question of a latent defect in the forging: *Northampton, etc.* v. *Easton*, cited Archibald, Pr. 136.

Where the third party was alleged to have sold goods to defendant as of a certain quality, and defendants represented them to be of the same quality when they re-sold to the plaintiffs, this was held to be a ground for indemnity without any special agreement on the subject, and the third party was directed to be bound *by the decision as to the quality*: *Jacobs* v. *Brown*, W. N. 1884, 23; and see *Hart* v. *Brown*, *supra*. See also *Steel* v. *Dixon*, W. N. 1880, 113; 42 L. T. N. S. 765; 28 W. R. 796.

Where a defendant is sued in different Divisions by different persons for the same money, the proper course for his protection is matter for the discretion of the Court: *Associated Home Co.* v. *Whichcord*, 8 Ch. D. 457.

Costs.

It was at one time held in England under the corresponding English Rule of 1875, that no power was given to the Court to impose terms as to costs on the parties bringing in the third party: see *Yorkshire Waggon Co.* v. *Newport Coal Co.*, 5 Q. B. D. 268. This will not be so under the present *Rule*, as the concluding words "and as to the costs of the proceedings" have been introduced to meet the objection. Later English cases also affirm the jurisdiction, and where a third party appears and obtains leave to defend, his costs may be ordered to be paid by the plaintiff: *Witham* v. *Vane*, 28 W. R. 812; W. N. 1880, 108; 1881, 79; 44 L. T. N. S. 718; *Fulton* v. *Brown*, 9 C. L. T. 313; or by defendant: *Dawson* v. *Shepherd*, 49 L. J. Q. B. 529; W. N. 1880, 110; or to be borne by himself: *Williams* v. *S. E. Ry. Co.*, 26 W. R. 352; *Tomlinson* v. *Northern Ry.* 11 P. R. 419, 526; or he may be ordered to pay the plaintiff's costs directly: *Piller* v. *Roberts*, 21 Ch. D. 198; *Edison* v. *Holland*, 41 Ch. D. 28; or defendant's costs; and costs payable by him to the plaintiff may be given to defendant against the third party: *Hornby* v. *Cardwell*, 8 Q. B. D. 329; see also *Beynon* v. *Godden*, 4 Ex. D. 246.

The English Rules of 1883 make express provisions (Rule 176) for the determination of all questions of costs between the third parties and all other parties to the action.

333. A plaintiff is not to be unnecessarily delayed in recovering his claim by reason of questions between defendants in which the plaintiff is not concerned; and the Court or Judge is to give such direction as may be necessary to prevent such delay of the plaintiff, where this can be done, on terms or otherwise, without injustice to the defendants. J. A. Rule 112.

Rules 333, 334. Plaintiff not to be delayed by questions between defendants.

There is no express *Rule* like this in the English Act, but the decisions of the Courts are to the same effect: see *Bower* v. *Hartley*, 1 Q. B. D. 652; *Wye Valley R'y. Co.* v. *Hawes*, 16 Ch. D. 489; *Barton* v. *London & N. W. Ry. Co.*, 38 Ch. D. 144; *Byrne* v. *Brown*, 37 W. R. 592; 60 L. T. N. S. 651.

Procedure has not been unknown in Chancery, by which in some cases a matter in dispute solely between co-defendants, might be litigated by them. In *Cayley* v. *Hodgson*, 13 Gr. 433, that procedure operated so as to delay the plaintiff. It has, therefore, not been followed in some later cases: see *Biscoe* v. *Ward*, 1 C. L. T. 129; and *Campbell* v. *Robinson*, 27 Gr. 634. A question of title between two defendants was decided at the trial in *Woods* v. *Woods*, 16 Gr. 471; and see the decree in *Johnson* v. *Neezer*, D. B. 27, fo. 150. Where an inquiry was directed to determine the rights of the defendants *inter se*, as a separate reference, that the plaintiff should not be delayed thereby.

This *Rule* seems to recognize that there may be a determination of more than a question in which all parties are interested, and that issues may be tried in which the plaintiff is not concerned; and there does not seem to be any good reason why, after a judgment disposing of the plaintiff's claims has been pronounced, it should not be entered, and issues between other parties, either at the same trial or afterwards, disposed of without any new action, as was suggested in *The Cartsburn*, 5 P. D. 62; *Piller* v. *Roberts*, 21 Ch. D. 198, and in *Hamilton Prov. L. & S. Co.* v. *Smith*, 17 Ont. 1, and as was done in *Hornby* v. *Cardwell*, 8 Q. B. D. 329; 45 L. T. N. S. 781; *Blore* v. *Ashby*, W. N. 1889, 158: It seems, however, now settled otherwise in cases of indemnity at any rate: see *Schneider* v. *Batt*, 8 Q. B. D. 701; *Dundas* v. *Gilmour*, 2 Ont. 463, in note to *Rule* 332, *Lockie* v. *Tennant*, 5 Ont. 52; *Edison* v. *Holland*, 38 Ch. D. 28; *Caister* v. *Chapman*, W. N. 1884, 31.

334. In any cause [or matter] for the administration of the estate of a deceased person, no party (*a*) other than the executor or administrator shall, unless by leave, be entitled to appear either in Court or in Chambers, or in a Master's office, on the claim of any person not a party to the cause against the estate of the deceased in respect of any debt or liability. The Court, Judge or Master as the case may be, may direct any other party to the cause to appear, either in addition to or in the place of the executor or administrator, upon such terms as to costs or otherwise as he shall think fit. J. A. Rules 114, 518.

Parties to administration proceeding.

Same as Eng. Con. Rules, 1883, 169.

The Eng. Rule April, 1880, R. 8, has not the words in brackets and has at (*a*) the words "to the cause." Otherwise the *Rules* are the same.

Mere liberty to attend proceedings does not necessarily entitle the party to costs of attendance. The order should so provide if it is the intention that costs should be allowed: *Day* v. *Beatty*, 21 Ch. D. 830.

Only one party should in general attend to oppose a contested claim in an administration action: *Re Smith* v. *Watts*, 52 L. J. Chy. 209.

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Rule 335.

(ii) *Guardians.*

Insane persons.

335. In all cases in which lunatics and persons of unsound mind, not so found by inquisition [or judicial declaration] might respectively before the passing of *The Ontario Judicature Act, 1881*, have sued as plaintiffs, or would have been liable to be sued as defendants, in any action or suit, they may respectively sue as plaintiffs in any action by their committees or next friends in manner practised in the Court of Chancery before the passing of the said Act, and may in a like manner defend any action by their committees or guardians appointed for that purpose. J. A. Rule 124.

The words in brackets are not in the English Rules, in other respects this is to the same effect as Eng. R. 1875, O. 18, (1883 R. 139).

The practice adopted by this *Rule* is that of the Court of Chancery.

Lunatics as plaintiffs.

Lunatics—*As Plaintiffs.*—A lunatic so found by inquisition (or judical declaration under R. S. O. 1887, c. 54, s. 8,) and having a committee, must sue by him. If he has no committee, or if the committee has an interest in the subject matter of the action adverse to the lunatic, the suit in certain cases may be brought by the Attorney-General: *Atty. Gen.* v. *Panther*, 2 Dick. 748, but is usually by next friend: *Light* v. *Light*, 25 Beav. 248; *Porter* v. *Porter*, 37 Ch. D. 420; who may be any person who chooses to act, just as in the case of an infant: *Skinner* v. *White*, 19 C. L. J. 115; and need not be a solvent person: *Sharp* v. *Sharp*, 2 Chy. Ch. 244; *Crumley* v. *Kingston*, 3 C. L. T. 311; but a committee before instituting a suit on behalf of a lunatic or his estate must obtain the sanction of the Court: Dan. Prac. 5th ed. 82; 6th ed. 118.

If an action is brought in the name of a person, who was at the time in a state of mental incapacity, without either a committee or next friend, the defendant may move to dismiss the action, but not if the plaintiff becomes imbecile after commencing an action in the ordinary way: Dan. Pr. 5th ed. 81, 83; 6th ed. 118; *Wartnaby* v. *Wartnaby*, Jac. 377; *Blake* v. *Smith*, You. 594.

An action which can be shown to be not beneficial to a lunatic plaintiff will be stayed on application, as in the case of an infant: *Waterhouse* v. *Worsnop*, 59 L. T. N. S. 140.

Where an action is brought by a next friend on behalf of a person alleged to be of unsound mind, but who is really of sound mind, the action will on his application, shewing by affidavit his sanity and ability to manage his own affairs, be ordered to be dismissed with costs against the next friend: *Palmer* v. *Walesby*, L. R. 3 Chy. 732; and the defendant may make a similar application: *Skinner* v. *White*, 19 C. L. J. 115; *sed vide Quantz* v. *Smeltzer*, 6 P. R. 126.

The application must be to a Judge in Chambers, since if the affidavit is contradicted or doubtful, an inquisition in lunacy might be directed and the Master in Chambers has no jurisdiction to entertain such a question: *Skinner* v. *White*, *sup.*

Plaintiff becoming insane *pendente lite.*

If a plaintiff is found a lunatic, and a committee appointed after the commencement of an action, an order should be obtained for the committee to carry on the proceedings: *Green* v. *Pratt*, 41 L. T. N. S. 30, and see *Beall* v. *Smith*, L. R. 9 Chy. 85, where the effect of the appointment of a committee was said to paralyze a preceding action by a next friend. If during the action the committee dies or is removed, and a new committee is appointed, a similar order should be obtained. If the plaintiff's solicitor neglects to obtain an order in either of such cases, to carry on the proceedings, the defendant

may, before judgment, move to dismiss the action, unless the order is obtained within a limited time; after judgment the defendant may obtain the order himself. See Dan. Forms 3rd ed. 55. Rule 336. Lunatics.

The Court has no jurisdiction over the property of a person of unsound mind, except to protect it, so that where more is desired the proper course is to apply for the appointment of a committee to prosecute the suit: *Skinner* v. *White*, *sup.*; see *Jones* v. *Lloyd*, L. R. 18 Eq. 265; *Beall* v. *Smith*, L. R. 9 Chy. 85.

As to the effect of a person of unsound mind being declared a lunatic after an action commenced by next friend: see *Beall* v. *Smith*, *supra*.

Lunatics—*As Defendants.*—A lunatic defends by the committee of his estate, if he has one. If he has none, or the committee has an adverse interest, or the lunatic has not been so found by inquisition or judicial declaration, he defends by guardian *ad litem* under this *Rule*: see also *Howlett* v. *Wilbraham*, 5 Mad. 423; *Worth* v. *McKenzie*, 13 M. & G. 363. As defendants.

The committee of a lunatic's estate is a necessary party defendant with the lunatic in an action relating to that estate, and may defend without obtaining leave: Dan. Pr. 5th ed. 82.

In certain cases lunatics may be served with notice of application to the High Court by serving the Official Guardian. See the Act, s. 32 and notes, and *Wolff* v. *Ogilvy*, 12 P. R. 645.

As to the mode in which a lunatic defendant in an action is to be served, see *Rule* 263; *Wolff* v. *Ogilvy*, *supra*.

After service under *Rule* 263, no further proceedings are to be taken against a lunatic who has no committee, until a guardian *ad litem* is appointed: *Rule* 264. If the friends of a lunatic desire to defend for him, they should cause an appearance to be entered for him: see *Rule* 336, (*a*) and then apply in Chambers: *Crawford* v. *Crawford*, 9 P. R. 178, to have a guardian *ad litem* appointed. Any fit person who has no adverse interest may be such guardian: Dan. Pr. 5th ed. 160, but in general the Official Guardian will be appointed.

If no application is made on the lunatic's part the plaintiff may, after the time for appearance has expired, apply for the appointment of a guardian by motion on notice; in which case the Official Guardian will be appointed, unless he be already acting as solicitor for the plaintiff, or for some other parties having an interest in the subject matter of the action adverse to the lunatics, or unless the friends of the lunatic ask for the appointment of some other person, in which case some other proper person may be appointed: see *Rule* 336, though some good reason is now required for appointing some one other than the Official Guardian: see *Rule* 336 and notes.

The defence of a lunatic or person of unsound mind should be expressed to be by his committee or guardian: Arch. Pr. 13th ed. 1048.

Where a person of unsound mind not so found has to be made a party in the Master's office after judgment, or to be served with notice of motion for an administration order, a guardian *ad litem* must be appointed in the same manner as before judgment, or rather by analogy to the practice (see *Rule* 3) in an action before judgment: see *Rules* 335, 336, 337, and *Wolff* v. *Ogilvy*, 12 P. R. 645. The procedure will therefore be by special motion in Chambers: in the latter case before the application for the administration order is made: *Wolff* v. *Ogilvy*, *supra*; *Barry* v. *Brazil*, 1 Chy. Ch. 237.

Service of persons of unsound mind with an office copy of a judgment, pursuant to *Rule* 322 or otherwise, is effected as the Master before whom the reference is pending may direct: *Rule* 338.

A guardian *ad litem* to a defendant, who became of unsound mind after judgment, was appointed at the instance of a co-defendant who wished to obtain indemnity from the insane defendant: *Re Dawson*, *Johnston* v. *Hill*, 41 Ch. D. 415.

336. Where no appearance has been entered to a writ of summons for a defendant who is a person of unsound No appearance by person of

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Rule 336. unsound mind.

mind not so found by inquisition, or judicial declaration in lieu of an inquisition, the plaintiff may (*a*) apply to the Court or a Judge for an order that a guardian of such defendant be appointed, by whom he may appear and defend the action.

(*a*) But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of the application was, after the expiration of the time allowed for appearance, and at least six days before the day in the notice named for hearing the application, served upon, or left at the dwelling-house of, the person with whom or under whose care such defendant was staying at time of serving such writ of summons. J. A. Rule 69.

(*b*) Upon such application the Official Guardian shall be so appointed unless a Judge otherwise orders. J. A. Rule 588.

Eng. R. 1875, O. 13, r. 1, (1883 R. 101), does not speak of an Official Guardian, and includes the case of an infant which is here provided for by *Rule* 258 *et seq.*

It would seem that Sunday is reckoned in computing the six clear days: see *Brewester* v. *Thorp*, 11 Jur.; see also *Rules* 473, 475 and 479.

The corresponding English Rule of 1875 has been held not to render it obligatory on the plaintiff to apply for the appointment of a guardian to a person of unsound mind; but only to enable him to do so, and if he does not desire the person of unsound mind to appear and defend, he may on filing an affidavit of due service, proceed as if the person of unsound mind had appeared: *Taylor* v. *Peele*, W. N. 1881, 74; 45 L. T. N. S. 514. The English Rule of 1883 makes the application obligatory; instead of the word "may" at (*a*) the words "shall before proceeding further with the action against the defendant" are substituted.

It will be seen, however, from the terms of *Rule* 264, that the practice in Ontario is different from the Eng. Rule of 1875, and the same as the Eng. Rule of 1883, and that even though an appearance should be entered for a lunatic, if he has no committee or guardian *ad litem*, the plaintiff cannot proceed until a guardian *ad litem* is appointed. It is apprehended that the intention of the *Rules* is, that application may be made on behalf of a lunatic for the appointment of a committee or guardian *ad litem* by whom he may appear and defend; but that if no such appointment is made, the plaintiff may under this *Rule* apply to have a guardian appointed.

Applications under this *Rule* should be made to the Master in Chambers not to a Judge: *Crawford* v. *Crawford*, 9 P. R. 178. If the person has not been found to be of unsound mind by inquisition, or judicial declaration, facts must be shewn upon which the Court may judge for itself that the person is of unsound mind: *McIntyre* v. *Kingsley*, 1 Chy. Ch. 281. The official guardian is to be appointed, unless a case is made for appointing another proper person: see *Rule* 336, (*b*). It will doubtless have to be shewn that such other person has no conflicting interest: see *ib.*, and *James* v. *Robertson*, 1 Chy. Ch. 197. Service of notice of the application is necessary though the person to be served is out of the jurisdiction: *O'Brien* v. *Maitland*, 10 W. R. 275.

This *Rule* is based upon the English Chancery Order 7, Rule 3. There are, however, two alterations, viz., the substitution of "the official guardian or some other proper person" for, "one of the Solicitors of the Court," and the

omission of persons of weak mind from the persons regarded as *non compotes mentis*. In the Court of Chancery persons of great age and incapable of attending to business have been ordered to be defended by guardian *ad litem*: *Steel* v. *Cobb*, 11 W. R. 298; *Newman* v. *Selfe*, 11 W. R. 764; and in *Lord Cardwell* v. *Tomlinson*, 33 W. R. 814; 52 L. T. N. S. 746; 54 L. J. Chy. 957, the plaintiff having become by age and illness incapable of complying with an order for production or continuing proceedings, the proceedings were on application on his behalf amended by adding his brother as next friend. See *Re Kelly*, 6 P. R. 220. **Rules 337, 338.**

For further information on this subject, see Morgan's Chy. Orders, p. 400, 4th ed.; Seton 706.

An appointment of a guardian without notice served as directed by this *Rule* was held to be not a mere irregularity, and to be not capable of being waived by the fact that the Official Guardian who was appointed, acted as such, and made all the inquiries usual in such cases in the interests of the lunatic: *Warnock* v. *Pricur*, 12 P. R. 264.

337. Where infants, or persons of unsound mind not so found by inquisition, are served with any office copy of a judgment or order in any proceedings, or are made parties to actions after judgment, guardians *ad litem* are to be appointed for them in like manner as before judgment. Chy. O. 522, 525. Appointment of guardian *ad litem* to infants, or lunatics added after judgment.

Infants.—The appointment of guardians *ad litem* to infants before judgment, is now governed by *Rules* 258, 261, 262. Under those *Rules* service of the writ on the Official Guardian *ad litem*, *ipso facto* constitutes him the guardian of the infant on whose behalf he is served in all cases except actions for personal torts, or for the mere recovery of money: see *Rule* 260. Where an infant is required to be served with an office copy of judgment it is ordinarily in that class of cases in which service of a writ on the Official Guardian is sufficient service on the infant if an original defendant, and by analogy to *Rule* 258, (see *Rule* 3), in such cases, service of the office copy of the judgment on the Official Guardian would be sufficient service on the infant, and the Official Guardian would thereby become *ipso facto* his guardian *ad litem*. Where there are several infant defendants to be served, by analogy to *Rule* 258, only one copy of the judgment need be served on the Official Guardian.

Lunatics.—This *Rule* refers to persons of unsound mind not so found by any inquisition or order of the Court. The appointment of guardians *ad litem* to such persons before judgment is regulated by *Rule* 336.

The appointment is made on an application in Chambers, notice of which motion may be served along with the office copy of the judgment—or afterwards, but no further proceedings affecting the person of unsound mind can properly be taken until a guardian *ad litem* shall have been appointed for him: *Wolff* v. *Ogilvy*, 12 P. R. 645. Where the Master before whom the reference is pending, has also jurisdiction in Chambers, it would seem that he would have power to entertain such applications.

When a person has been judicially declared a lunatic, service is effected on his committee, who should be made a co-defendant: Sm. Pr. 7th ed. p. 311, and it would seem not to be necessary in such a case to appoint a guardian *ad litem*: *Ib.*, but when the lunatic has no committee within the jurisdiction, it has been held proper to serve the Official Guardian *ad litem* on behalf of such lunatic; see *Re Hagar*, 12 P. R. 645, *sed quære*.

338. Where a person required to be served with an office-copy of a judgment or order is an infant, or a person of unsound mind not so found by inquisition, the service is Service of infant or lunatic with judgment,

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Rule 339. how effected.

to be effected upon such person or persons, and in such manner, as the Master, before whom the reference under the judgment or order is being prosecuted, directs. Chy. O. 523.

Service of office copy of judgment. INFANTS.—For the reasons given in the note to the preceding *Rule*, service on the Official Guardian of an office copy of a judgment required to be served on an infant, may be sufficient service on the infant, and the Official Guardian may thereby *ipso facto* become his guardian *ad litem*, but at present this is a matter of inference; and until it has been judicially decided that such is the effect of the *Rules*, it may be safer to obtain an order expressly appointing a guardian *ad litem* for infants so required to be served and directing the guardian so appointed to be served on behalf of the infant under this *Rule*.

A guardian *ad litem* must be appointed for an infant whether he is made a party in his own right, or in a representative capacity, *e.g.*, as executor or trustee, or the proceedings will be void as against such infant: *Re Jackson, Massey* v. *Crookshanks*, 12 P. R. 475.

LUNATICS.—When a person who has been judicially declared a lunatic is required to be served with a judgment, the office copy should be directed to be served on his committee, who should be a co-defendant: see note to *Rule* 337, *sed vide Re Hagar*, 12 P. R. 645. Where the person required to be served is of unsound mind, but has not been judicially declared to be a lunatic, the direction of the Master before whom the reference is pending should be obtained under this *Rule* as to the mode in which he is to be served. By analogy to *Rule* 263 (see *Rule* 3) it would appear that the person with whom, or under whose care he is, should be directed to be served; and, unless it is shown that service on the person of unsound mind would be attended with danger, it would seem that he should be directed to be personally served as well: see *Re Miller*, 1 Chy. Ch. 215; *Re Newman*, 2 Chy. Ch. 390; *Re Mein*, 2 Chy. Ch. 429. No proceedings can be validly taken against a person of unsound mind until a guardian *ad litem* has been appointed. It is therefore necessary not only to obtain the Master's direction for service of the office copy of judgment on the person of unsound mind under this *Rule*, but it is also necessary to obtain an order appointing a guardian *ad litem* to such person. This is to be done by order to be obtained in Chambers on motion, supported by affidavits. Two clear days' notice of the motion is sufficient: *Rule* 479.

When a defendant in an action becomes of unsound mind after judgment, a guardian *ad litem* must be appointed for him before proceedings can be validly continued against him: *Wolff* v. *Ogilvy*, 12 P. R. 645. This must be done by order, upon motion, and cannot be effected by merely serving the Official Guardian on his behalf: *Ib; sed vide Re Hagar*, 12 P. R. 645, where it was held that this might be done where the defendant had been judicially declared insane, *sed quære*.

Person desiring to have a guardian *ad litem* appointed to himself, may attend Judge with proposed guardian. Evidence required on application.

339. A person desirous of appointing a guardian for himself other than the Official Guardian to defend an action or matter, may go before a Judge or Master with the proposed guardian if he thinks fit to do so. But he must satisfy the Judge or Master by affidavit that the proposed guardian is a fit person, and has no interest adverse to that of the person of whom he is to be the guardian in the matter in question; and if the affidavit is not sufficient for this purpose, the Judge or Master may examine the proposed guardian, or the person making the affidavit, *viva*

voce, or require further evidence to be adduced until he is satisfied of the propriety of the appointment. Chy. O. 526. Rule 340.

This *Rule* would appear to apply to all cases of disability where the appointment of a guardian is necessary.

When on the application of the plaintiff for the appointment of a guardian *ad litem* to an infant, or lunatic defendant, the guardian appointed was the nominee of the Court, the plaintiff was bound in any event to pay the guardian's costs, but where the nominee of the defendant was appointed, there was no such liability: *Clements* v. *Arnold*, 3 Chy. Ch. 75. The Official Guardian *ad litem* is now, by the direction of the Court, appointed in all cases, unless some special reason exists for the appointment of some other person. Costs of guardian *ad litem*. Official guardian to be appointed.

Where a guardian was irregularly appointed upon insufficient notice to the infant, the appointment was set aside on the application of the infant after decree: *Hamilton* v. *Hamilton*, 2 Chy. Ch. 160; and see *Re Jackson, Massey* v. *Crookshanks*, 12 P. R. 475. Proceedings set aside where guardian *ad lit.* irregularly appointed.

6. Joinder of Causes of Action.

340. Subject to the following Rules, the plaintiff may unite, in the same action and in the same statement of claim, several causes of action. J. A. Rule 115 *first part*. What causes of action may be joined.

Substantially identical with the first clause of Eng. R. 1875, O. 17, r. 1 (1883 R. 188).

Under the former practice (prior to *The Administration of Justice Act*, at least, see 20 Gr. 574 *n*), the Court of Chancery forbade multifariousness, or the uniting of separate and distinct subjects in one suit; but sought to deal with the rights of all parties interested in the subject matter brought before the Court. The Courts of Common Law limited the subjects of litigation by reference to parties; and sec. 84 of the C. L. P. Act (R. S. O. 1877, chap. 50), allowed causes of action of whatever kind to be joined in the same action, provided they were by and against the same parties and in the same right; but this enactment did not extend to replevin or ejectment. The Commissioners who recommended this change, first introduced in the English C. L. P. Act of 1852, s. 41, thought a plaintiff might be trusted not to jeopardise his case by an inconvenient combination of claims. They said in their first report, "A plaintiff is not likely to damage his claim for criminal conversation by adding a claim which may direct attention to a question of whether he is entitled to the price of goods sold, or other incongruous matter." Former practice.

The principles which formerly governed in Chancery and the Common Law Courts on this subject have been superseded by the *Rules* under this and the preceding heading respecting parties. Multifariousness is no longer an objection of itself: see *Cox* v. *Barker*, 3 Ch. D. 359; and the right to join several causes of action is not limited to cases where they are between the same parties, nor (save as provided in these *Rules*) in the same right.

The present *Rule* is an extension of s. 84, of the C. L. P. Act, and it is apprehended that the words "cause of action" must receive the same construction as they received under the above section of the C. L. P. Act: see *Bustros* v. *White*, 1 Q. B. D. 423. The *Rule* must, therefore, as put by an able commentator on the English Judicature Act, be taken to include, not only different legal relations arising out of the same transaction, but also separate and independent transactions: Wilson's Jud. Act, 7th ed. 189.

Under *Rules* 300 *et seq.* relating to parties any number of plaintiffs may be joined, claiming relief against any number of defendants, jointly, severally, or in the alternative; and this and the following *Rules* relating to the joinder of causes of action give a very wide discretion to a plaintiff, as to the

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Rule 340. subject-matters which may be investigated in the action; but it was not intended that any number of plaintiffs should be at liberty, by a number of separate trials in one action, to settle all the different complaints they might have against all persons whatsoever.

After the passing of *The Administration of Justice Act*, the view of some of the Judges in the Court of Chancery was, that a bill respecting several distinct subject-matters was not open to the objection of multifariousness, provided all the defendants were interested in the several causes of action: see *Brown* v. *Capron*, 20 Gr. 574. *n.*

Under the Judicature Act.

Under *The Judicature Act* and *Rules* it is submitted that there may be in an action:

(1) Several subject matters; in which case some one or more of the parties to the action should be interested in each of the different subject matters, though the relief claimed against different defendants may be on distinct grounds, and arising out of distinct legal relations of the parties; or,

(2) One subject matter; in which case the plaintiffs may claim relief separately in respect of the same or distinct grounds, against one or more of the defendants, or two or more of them may claim relief jointly against one or more of the defendants: see *Smith* v. *Richardson*, 4 C. P. D. 116, where Denman, J., said in giving judgment: "There is much force in the argument used to support the note to Order 17, Rule 1, in the valuable edition of the Judicature Act, 2nd ed., p. 187 (7th ed. p. 199), by Mr. Arthur Wilson, who sums up his reasoning thus. 'Order 16, dealing with parties, assumes an ascertained subject matter. Order 17 (now 18), dealing with subject matters, assumes ascertained parties. There must, therefore, be either identity of subject matter, in which case Order 16 gives ample liberty in the choice of parties, or identity of parties, in which case Order 17 gives a like liberty in the choice of subject matters.'"

Examples.

In *Honduras Ry. Co.* v. *Tucker*, 2 Ex. D. 301, there was one subject matter, a contract made and broken. The plaintiffs claimed relief against L. who made it, if T. was authorized to make it as agent of L., but if not so authorized then against T. as principal. Both were held to be rightly made defendants.

In *Child* v. *Stenning*, 5 Ch. D. 695, the plaintiff claimed damages from S. for a trespass, or in default from W. who had covenanted for quiet enjoyment. Both were held to be rightly made defendants.

In *Howell* v. *West*, W. N. 1879, 90, an action was held to be rightly brought against two defendants for totally distinct causes of action; against defendant West for breach of a contract to personally look after the plaintiff's son who was in delicate health at the defendant West's school; and against defendant Jones, a medical man, for negligent treatment of the plaintiff's son in an illness which resulted in his death at the school.

In *Booth* v. *Briscoe*, 2 Q. B. D. 496, eight plaintiffs were held to have rightly joined in an action for libel, each having an independent cause of action, but in respect of the same libel.

In *Verney* v. *Thomas*, 36 W. R. 398; 58 L. T. N. S. 20, several plaintiffs brought an action to restrain an infringement of certain rights of pasture, which they severally claimed as appurtenant to their respective lands.

In *Bagot* v. *Easton*, 7 Ch. D. 1, separate alternate causes of action were held to have been properly joined against the same defendant.

In *Dessi'ta* v. *Schunck, etc.*, W. N. 1880, 96, it was held, that separate causes of action against separate defendants might be joined with joint and several causes of action, where all related to the same subject matter.

The liberty given by the present *Rule* is, however, subject to the limitations contained in the following *Rules*, and to the discretion of the Court (see *Rule* 346) to interfere in order to prevent issues being raised which embarrass a fair trial of the action.

Lord Selborne, in *Burstall* v. *Beyfus*, 26 Ch. D. 39, said: "To bring into one claim distinct causes of action against different persons neither having anything to do with the other (and only historically connected) is not contemplated by Order 18, s. 1 (*Rule* 340), which authorizes the joinder not of several actions against distinct persons, but several causes of action." **Rule 341.**

341. No cause of action shall, unless by leave of the Court or a Judge, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are or is held [or for any wrong or injury to the premises claimed]. J. A. Rule 116. Action for recovery of land.

Same as Eng. R. 1883, R. 189.

The words in brackets were not in the original *Rule* 116, which was the same as Eng. R. 1875, O. 17, r. 2.

In actions of ejectment and replevin, s. 84 of the C. L. P. Act (R. S. O. 1877, c. 50) did not allow the joinder of other causes of action. That exception in cases of ejectment is continued in a modified form by the present *Rule*; but an action of replevin seems now to stand in no different position from other actions, no special provision having been made for cases of replevin.

Formerly, no claim could be joined with a claim for possession in ejectment, except a claim for *mesne* profits, in the case of a landlord against a tenant: Rev. Stat. 1877, c. 51, s. 70; and nothing was required to be stated in the writ or the issue, to enable the plaintiff to claim *mesne* profits: *Smith* v. *Tett*, 9 Ex. 307, 23 L. J. Ex. 93. Under *The Judicature Act* a claim for *mesne* profits, or any other claim, joined by leave or otherwise under this *Rule*, must be indorsed on the writ: see App. Form No. 6, and *Rules* 715 and 725, and set up in the statement of claim: see Forms Nos. 82 and 83.

Where the leave of the Court or Judge is necessary under this *Rule*, it must be obtained before the writ is issued: *Re Pilcher, Pilcher* v. *Hinds*, 11 Ch. D. 905; *Mellhargey* v. *McGinnis*, 9 P. R. 157.

Under special circumstances leave may be granted after the issue of the writ: *Rusbrooke* v. *Farley*, 33 W. R. 557; 52 L. T. N. S. 572; 34 L. J. Chy. 1079; but the plaintiff must show some reason why the bringing of a separate action will not do as well: *Musgrave* v. *Stevens*, W. N. 1881, 163.

Leave was refused after issue joined and the action set down for trial: *Clark* v. *Wray*, 31 Ch. D. 68. See also *Re Derbon infra*.

Semble, (1) that an objection that a writ of summons, joining a claim to recover land with other claims has been issued may be taken by defence, (2) that the plaintiff cannot cure the irregularities in his writ by omitting the claim to recover land in his statement of claim, (3) that to cure the irregularity the writ of summons must be amended, (4) that such amendment cannot be made without the consent of the defendant: *Wilmott* v. *Freehold, etc.*, 51 L. T. N. S. 552; but see *Mulkern* v. *Doerks*, 51 L. T. N. S. 429; 53 L. J. Q. B. 526; 28 Sol. Jour. 688, where a defendant, by appearing to a writ of summons, was held to have waived any objection there might be under this *Rule*. The irregularity appears to have been waived by reason of the Eng. R. corresponding to *Rule* 443: *In re Derbon*, 36 W. R. 667; 58 L. T. N. S. 519, it was held to be too late at the trial to object that claims had been improperly joined.

In an action uniting a claim to recover land and a claim for specific performance of a contract to purchase, asking for possession if specific performance should not be decreed, it was held that the two claims were improperly joined without leave, but leave was given, after statement of claim, to amend proceedings so as to join the claims, inasmuch as the two causes of action could not conveniently be prosecuted separately: *Campbell* v. *James*, 11 P. R. 347.

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Rule 341. Joinder of causes of action.

A claim to obtain quiet possession of land, and an injunction to restrain defendant from interfering with the plaintiff's quiet enjoyment, is not joining a separate cause of action with an action to recover land: *Kendrick* v. *Roberts*, W. N. 1882, 23; 30 W. R. 365; 46 L. T. N. S. 59. An action to establish title to land, to declare that a lease was entered into by mistake, for a receiver, and an injunction to restrain defendant from receiving the rents, was held not to be within this *Rule*: *Gledhill* v. *Hunter*, 14 Ch. D. 492, not following *Whetstone* v. *Dewis*, 1 Ch. D. 99; see also *Mayor of Norwich* v. *Brown*, 48 L. T. N. S. 898.

An action for the assignment of dower is an action for recovery of land: *McCulloch* v. *McCulloch*, 4 C. L. T. 252.

On motion to set aside a writ in which claims are improperly joined, the writ may upon proper terms be amended so as to strike out the claims wrongly joined: *White* v. *Ramsay*, 12 P. R. 626. In a foreclosure action against the assignee of the equity of redemption acquired from the trustee in bankruptcy of the mortgagor, it was found upon demanding possession that the mortgagor was on the land and refused to go out. Leave to amend the writ by adding the mortgagor was refused: *Sutcliffe* v. *Wood*, 50 L. T. N. S. 705; 53 L. J. Chy. 970; but see clause (*a*) of this *Rule infra*.

Where a plaintiff claimed possession as the assignee of a lease made by him to the defendants who assigned to a third party, who assigned and surrendered to the plaintiff, and the defence was, that the lease was in effect a mortgage, and fraud and want of consideration were alleged, the plaintiff was not allowed to amend his statement of claim and ask foreclosure of the land as mortgagee: *McIlhargey* v. *McGinnis*, 9 P. R. 157.

Leave was given in *Trust & Loan Co.* v. *Osborne* (23 Aug., 1881, Mr. Dalton), to join causes of action for specific performance of an agreement to purchase, and in default for rescission and recovery of possession, or sale, and a personal order for recovery of any deficiency.

In an action for recovery of land, leave has been granted to join a claim for recovery of a deed relating to the land, and for an injunction and receiver: *Cook* v. *Enchmarch*, 2 Ch. D. 111; a claim for a receiver of the rents and profits: *Atten* v. *Kennett*, 24 W. R. 845: and a claim for the administration of the personal estate of an intestate whose land was sought to be recovered: *Kitching* v. *Kitching*, 24 W. R. 901; W. N. 1876, 225.

In *Manisty* v. *Kenealy*, 24 W. R, 918, an action for recovery of chambers in Gray's Inn, of which Dr. Kenealy was trustee, a claim was allowed to be added for execution of a conveyance of the property to new trustees.

This *Rule* applies to a counter-claim as well as to an original claim, and a counter-claim by a mortgagee for a declaration that he was entitled to possession against a person in possession who was alleged to have no title, was held to be a claim for the recovery of land within this *Rule*: *Compton* v. *Preston*, 21 Ch. D. 138; *Pritchard* v. *Pritchard*, 17 Ont. 50; *Goring* v. *Cameron*, 10 P. R. 496; see also *Clark* v. *Wray*, 31 Ch. D. 68.

Leave was granted to join in an action for recovery of possession of a house, a claim for an injunction restraining interference with plaintiff's occupation of the house and a claim for trespass and for an assault committed at the time of the trespass: *Dennis* v. *Crompton*, W. N. 1882, 121.

Where leave has not been granted, the action may be stayed on motion: *Brandreth* v. *Sears*, W. N. 1883, 89; but see *White* v. *Ramsay*, 12 P. R. 626.

(*a*) Nothing in these Rules contained shall prevent any plaintiff in an action of foreclosure or redemption, [or for the immediate payment of the mortgage moneys,] from asking for or obtaining a judgment or order against the defendant for delivery of the possession of the mortgaged

property to the plaintiff, [either forthwith or] on or after a final order for foreclosure or redemption, as the case may be, and such an action shall not be deemed an action for the recovery of land within the meaning of the Rules. *See* Chy. O. 464. Rule 341.

The words in brackets are not in Eng. R. 1883, 189, which is otherwise to the same effect.

This clause is taken from Chy. O. 464, and is more explicit than the proviso regarding actions on mortgages contained in the original *Rule* (see Maclennan Jud. Act, 2nd ed. 271), under which same doubts might have been entertained as to whether claims for possession and payment (without foreclosure) might be joined.

The terms of the present clause preclude questions such as arose under the Eng. R. 1875, which was not so clear, and under which it was held that a foreclosure action was not an action for the recovery of land : see *Tawell* v. *State Co.*, 3 Ch. D. 629 ; (as to which : see *Hoar* v. *Loe*, W. N. 1884, 251) ; unless perhaps it included a claim for possession : *Wood* v. *Wheater*, 22 Ch. D. 281, so that no leave was necessary to join with a claim for foreclosure of a mortgage, a claim for the administration of the trusts of the mortgage. Since those decisions and since *Barwick* v. *Barwick*, 21 Gr. 39, was decided, it has been held that a foreclosure action is an action for the recovery of land within the Statute of Limitations : *Harlock* v. *Ashberry*, 18 Ch. D. 229 ; 19 Ch. D. 539 ; *Fletcher* v. *Rodden*, 1 Ont. 155 ; see also *Heath* v. *Pugh*, 6 Q. B. D. 345 ; 7 App. Cas. 235 ; but these cases will not affect the construction of the present *Rule*.

Order for possession may now be included in judgment.

The order for delivery of possession may now, if claimed by the writ, be included in a judgment of foreclosure, or sale, in the first instance : see *Imperial Loan & Investment Co.* v. *Boulton*, 22 Gr. 121 ; Forms, Nos. 182, 183 ; but where the relief has not been given by the judgment, it may still be obtained after the final order has been granted, upon application in Chambers, under this *Rule* : *Salt* v. *Edgar*, 54 L. T. N. S. 374 ; *Best* v. *Applegate*, 37 Ch. D. 42.

Order may be granted where writ claims a sale.

The Chy. Ord. 464, on which the latter part of this *Rule* is founded, was construed to apply to mortgage cases, where a final order for sale had been granted, as well as to foreclosure suits.

Order for possession not granted under the *Order* in specific performance cases.

But the Chy. Ord. 464, was held only to apply to mortgage cases, and not to actions for specific performance against a purchaser in possession, against whom a final order for rescission of the contract had been obtained : *Mavety* v. *Montgomery*, 1 Chy. Ch. 21 ; *Chisholm* v. *Allen*, 2 Chy. Ch. 411. Formerly the order could only be made against a party to the action, or persons who had acquired possession *pendente lite*, from a party to the action, and having no pretence to a paramount title : *Bank of Upper Canada* v. *Wallace*, 13 Gr. 184 ; *McKenzie* v. *Wiggins*, 2 Chy. Ch. 391 ; *Scott* v. *Black*, 3 Chy. Ch. 323 ; *Trust & Loan Co.* v. *Start*, 6 P. R. 90. Such an order was not granted against a tenant of the mortgagor not a party to the suit, though the tenancy were created after the mortgage : *Bank of Montreal* v. *Ketchum*, 1 Chy. Ch. 117 ; nor even against the mortgagor if he were in as a trespasser : *Irving* v. *Munn*, 1 Chy. Ch. 240 ; but under *The Judicature Act*, it is possible that a more liberal construction may be placed upon the *Rule* : see *Mason* v. *Seney*, 2 Chy. Ch. 30 ; but see *Salt* v. *Edgar*, 54 L. T. N. S. 374.

Not against tenant of mortgagor.

Order for possession, when it may be obtained.

The motion may be made on applying for a final order, or at any time afterwards : *Lozier* v. *Ranney*, 6 Gr. 323 ; *Keith* v. *Day*, 39 Chy. D. 452. Notice must be given of the application, but a demand of possession need not be shown : *Hodkinson* v. *French*, 1 Chy. Ch. 201 ; *Buckley* v. *Ouillette*, 2 Chy. Ch. 439 ; and see *Walker* v. *Mathews*, 1 Chy. Ch. 232 ; but it must be shown that the mortgagor is in actual possession : *Hodkinson* v. *French*, 1 Chy. Ch. 223 ; *McKenzie* v. *Wiggins*, *supra* ; *Buckley* v. *Ouillette*, *supra* ; and where a considerable time has elapsed since the final order was granted, it should be shown that the mortgagor has not since relinquished possession : *Irving* v. *Munn*, *Ib.* 240.

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Rules 342-344. Ejectment action.

The bringing of an action of ejectment is no bar to the application, but the applicant may be required to discontinue the ejectment, and pay the costs: *Moffatt* v. *White*, 1 Chy. Ch. 227.

On the motion, the Court will not, as a general rule, look behind the final order: *Mills* v. *Choate*, 2 Chy. Ch. 374.

Costs of application.

The plaintiff is entitled to the costs of the application: *Lazier* v. *Ranney*, 6 Gr. 323; but where they were not asked for by the notice of motion, nor on the argument, and no demand of possession was proved, the order was made without costs: *Mills* v. *Choate*, 2 Chy. Ch. 374.

Order, how enforced.

On disobedience of the order for possession, a writ of possession may now issue: see *Rules* 868, 870.

Delivery of title deeds may be ordered.

The mortgagee may also obtain an order for the delivery of the title deeds, as against the mortgagor, or any one claiming under him subsequent to the foreclosure: *Stennett* v. *Aruyn*, 2 Chy. Ch. 218.

Claims by assignee in insolvency.

342. Claims by an assignee in insolvency as such shall not unless by leave of the Court or a Judge, be joined with any claim by him in any other capacity. J. A. Rule 117.

Same as Eng. R. 1875, O. 17, r. 3 (1883, R. 190), except that for "an assignee in insolvency," the English Rule has "a Trustee in Bankruptcy."

The general rule as to joinder of causes of action being now made without the proviso contained in C. L. P. Act, s. 84, that they be in the same rights, it became necessary to specify cases in which causes of action accruing in different capacities shall not be joined. This is one of the cases: see also *Rule* 344.

Claims by or against husband and wife.

343. Claims by or against husband and wife may be joined with claims by or against either of them separately. J. A. Rule 118.

Same as Eng. R. 1875, O. 17, r. 4 (1883, R. 191).

By the Common Law Procedure Act (R. S. O. 1877, c. 50, s. 86) a husband might add claims in his own right in an action brought by him and his wife, for a cause of action accruing personally to the wife in respect of which they were necessarily co-plaintiffs: see *Harrison*, C. L. P. Act 87.

Claims by or against executor.

344. Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator. J. A. Rule 119.

Same as Eng. R. 1875 O. 17, r. 5 (1883 R. 192).

The joinder of claims provided for by this *Rule*, was not possible under the former practice: see Williams on Executors, 6th ed. 1729; and difficulty was experienced in deciding whether an executor or administrator should be sued as such, or personally. For instances, see *Ashby* v. *Ashby*, 7 B. & C. 444: *Corner* v. *Shew*, 3 M. & W. 350; *Bolingbroke* v. *Kerr*, L. R. 1 Ex. 222; *Moseley* v. *Rendell*, L. R. 6 Q. B. 338; *Abbott* v. *Parfitt*, L. R. 6 Q. B. 346.

Semble that as regards claims by an executor, this *Rule* refers to a case where the plaintiff's personal claim is in respect of the assets of the testator *qua* assets; the claim as executor and the claim personally are to be with reference to the same estate: *Johnson* v. *Burgess*, 47 L. J. Chy. 552.

The *Rule* it seems does not apply to a counter-claim, so as to enable the defendant to set up by way of counter-claim, claims against the plaintiff personally and as executor, where he is only suing in a distinct personal character: *Macdonald* v. *Carington*, 4 C. P. D. 28). **Rules 345-347.**

345. Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant. J. A. Rule 120. Joint and several claims.

Same as the Eng. R. 1875, O. 17 r. 6 (1883 R. 193).

346. If it be made to appear to the Court or a Judge that several causes of action joined in the same action are such as cannot all be conveniently disposed of in one action, the Court or a Judge may order any of such causes of action to be excluded, or may direct the issues respecting the separate causes of action to be tried separately, and may direct the statement of claim, or, if no statement of claim has been delivered, the copy of the writ of summons and the indorsement of claim on the writ of summons, to be amended accordingly, and may make such order as to costs as may be just. J. A. Rules 115, 121, 122, 123. Order for separate issues.

See Eng. R. 1875, O. 17, r. 1, 7, 8, 9, (1883, R. 188, 194, 195, 196).

In *Re Worssam, Hemery* v. *Worssam*, 51 L. J. Ch. 669, the Court declined to entertain an action to set aside a transaction and in the same proceedings inquire whether to do so was for the benefit of infants or unborn persons.

The provisions of the *Rules* for preventing any of the parties from being prejudiced are two:

(1) A claim which embarrasses a fair trial of the action may be struck out: *Rules* 346, 423. This was done in a case where a claim was made for inconsistent alternative relief by different plaintiffs: *Smith* v. *Richardson, supra*, where the vendor of goods and indorsees of a bill given by the purchaser to the vendor for the price, jointly sued the purchaser to recover the price, and also upon the dishonoured bill. Striking out embarrassing claims for diverse causes of action.

(2) The Court may direct the different causes of action to be tried separately under this *Rule*: see *Bayot* v. *Easton*, 7 Ch. D. 1; *Child* v. *Stenning*, 5 Ch. D. 695, and *Day* v. *Radcliffe*, 24 W. R. 844; *Barker* v. *Cox*, 3 Ch. D. 359. This course might formerly have been directed under R. S. O. 1877, c. 510, s. 85: see *Fitzsimmons* v. *McIntyre*, 5 P. R. 119. Separate trials.

Compare similar power given in *Rules* 373, 374, in regard to counter-claims and see *Hall* v. *Old Tatarcoch Lead Mining Co.*, 45 L. J., Chy. 775; 34 L. T. N. S. 901; *re Woodfine*, 38 L. T. N. S. 753; *Bayot* v. *Easton*, 7 Ch. D. 1; *Dessilla* v. *Schunk, etc.*, W. N. 1880, 96; *Cox* v. *Barker*, 3 Ch. D. 372.

7. *Mortgage Actions.*

347. Instead of a foreclosure, a mortgagee may pray for a sale of the mortgaged premises, and that any balance of the mortgage debt remaining due after such sale may be paid by the mortgagor, [or any surety for payment of the Mortgagee may have sale instead of foreclosure.

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Rule 347. mortgage debt who is a party to the action,] and the same may be adjudged accordingly. Chy. O. 426.

The words in brackets were not in Chy. Ord. 426.

Order for payment of deficiency when granted.

The relief mentioned in *Rule* 347, may be claimed by indorsement on the writ. A mortgagee, however, is only entitled to an order for the payment of the deficiency, where there is an express or implied contract by the defendant with the plaintiff, by covenant, or otherwise, to pay the mortgage debt. If there be no such contract the mortgagee is entitled to no personal remedy against the defendant: see *Christie* v. *Dowker*, 10 U. C. L. J. 161; *Turnbull* v. *Symmonds*, 6 Gr. 615; *Forbes* v. *Adamson*, 1 Chy. Ch. 117; *Clarkson* v. *Scott*, 25 Gr. 373; *Norris* v. *Meadows*, 28 Gr. 334; *Pierce* v. *Corcoran*, *Ib.* 356; *Mathers* v. *Helliwell*, 10 Gr. 175; where, however, the mortgage deed contains no express covenant to pay, the law will imply a contract by the mortgagor to pay: see *Sutton* v. *Sutton*, 22 Ch. D. 511; 48 L. T. N. S. 95; provided there be evidence that the mortgage was made to secure a debt or loan: *Hall* v. *Morley*, 8 U. C. Q. B. 584; *Pearman* v. *Hyland*, 22 U. C. Q. B. 202; *Jackson* v. *Veomans*, 19 C. P. 394; 28 U. C. Q. B. 307; 39 U. C. Q. B. 280. The mere acknowledgment of the receipt of the mortgage money, is not sufficient to raise any presumption of a loan, or an implied promise of repayment: *London Loan Co.* v. *Smyth*, 32 C. P. 530. Where there is a contract for the payment of the mortgage debt, judgment may now be obtained, if claimed by the writ, for the full amount due with costs, for which execution may issue at once, without waiting for a sale of the mortgaged property.

Not if there be no personal liability to pay.

Liability, when implied.

Order for immediate payment, when made.

Where, however, a reference to the Master to inquire as to incumbrances, is necessary, then where relief is also sought on the contract, the judgment should refer it to the Master to take the account, and direct payment of the amount which he may find due forthwith, after the making of the Master's report: see App. Form No. 182; *North of Scotland* v. *Beard*, 19 C. L. J. 252.

Surety, rights of.

A surety against whom a judgment has been recovered, which by agreement is to stand as security for the payment of the deficiency, is entitled to have the security realised before he can be called on to pay anything: *Teeter* v. *St. John*, 10 Gr. 85. An assignee of the equity of redemption who covenants with the mortgagee to pay off the mortgage debt, becomes a principal debtor, and if time be given him by the mortgagee, the mortgagor may be discharged: *Mathers* v. *Helliwell*, 10 Gr. 172.

Mortgagee entitled to sale, or foreclosure.

A mortgagee is now usually entitled to a sale or foreclosure, at his option: *Meyers* v. *Harrison*, 1 Gr. 449. But a subsequent mortgagee cannot, as plaintiff, have a sale against a prior mortgagee without the latter's consent: *McDougall* v. *Campbell*, 6 S. C. R. 502; although he may as a defendant, under *Rule* 350. Where infants are concerned, and the mortgagee claims foreclosure, the judgment usually directs a sale, or foreclosure, as the Master may find most beneficial for the infants.

Mortgagee of chattels right of, to foreclosure.

A mortgagee of chattels: *Cook* v. *Flood*, 5 Gr. 463; a municipal corporation: *Oxford* v. *Bailey*, 12 Gr. 276; and a chartered bank: *Bank of Upper Canada* v. *Scott*, 6 Gr. 451; are each entitled to foreclosure. But a mere pledgee of chattels is said to be only entitled to a sale: *Carter* v. *Wake*, 4 Ch. D. 605.

Mortgagee by deposit, when not entitled to a sale.

A mortgagee of lands by deposit is said not to be entitled to a sale, but only to a foreclosure: *Pryce* v. *Bury*, L. R. 16 Eq. 153 n; *James* v. *James*, *Ib.* 153; *Backhouse* v. *Charlton*, 8 Ch. D. 444; but where the deposit is accompanied by an agreement to execute a legal mortgage, the mortgagee is entitled to either sale, or foreclosure: *York Union Banking Co.* v. *Artley*, 11 Ch. D. 205; although an equitable mortgagee by deposit cannot insist on a sale, yet if a subsequent incumbrancer, or the mortgagor himself, desires a sale, it may be granted as in any other case: *Kerr* v. *Beebe*, 12 Gr. 204.

Crown cannot be foreclosed.

The Crown cannot be foreclosed, the only judgment that can be awarded where the equity of redemption is in the Crown, is one authorizing the

mortgagee in default of payment to take possession until the Crown shall think proper to redeem: *Reeve* v. *Attorney-General*, 2 Atk. 223; *Dunn* v. *Attorney-General*, 10 Gr. 482; or until the debt should be satisfied: *Hodge* v. *Attorney-General*, 3 Y. & C. 342; or, if the Crown consent, or do not object, a sale may be ordered: Seton, 1044; *Prescott* v. *Tyler* 1 Jur. 470; 2 Jur. 870; *Rogers* v. *Maude*, 1 Y. & C. C. C. 4; *Hancock* v. *Attorney-General*, 12 W. R. 569; *Bartlett* v. *Rees*, L. R. 12 Eq. 395. **Rule 348.** Form of judgment against the Crown.

A mortgagee of a railway is not entitled to enforce payment of his mortgage, by either sale, or foreclosure of the railway, he is only entitled to have a receiver, or manager, of the undertaking appointed: *Galt* v. *Erie and Niagara R. W. Co.* 14 Gr. 499; *Peto* v. *Welland R. W. Co.*, 9 Gr. 455; *Furness* v. *Caterham R. W. Co.*, 25 Beav. 614. But it seems a vendor of a right of way to a Railway Company is entitled to enforce a lien for unpaid purchase money, by sale, or rescission of the contract: *Walker* v. *Ware, H. & B. R. W. Co.*, L. R. 1 Eq. 195; *Martin* v. *London, Chatham & Dover R. W. Co.*, 12 Jur. N. S. 775; but see the *Bishop of Winchester* v. *Mid-Hants R. W. Co.*, L. R. 5 Eq. 17; *Pell* v. *Northampton & B. J. R. W. Co.*, L. R. 2 Chy. 100, where the lien was enforced by the appointment of a receiver. Mortgagee of railway not entitled to sale, or foreclosure. Vendor of Ry. Co., rights of.

The right of a mortgagee to either a sale or foreclosure, may be lost by his having sold, or parted with, part of the mortgaged property, without the concurrence of a person to whom the equity of redemption in the remainder has been conveyed. But this rule does not apply where the sale has been made under a power contained in the mortgage, or where the mortgage is of chattels which the mortgagee has a right to sell without any express power. But it applies to a sale under a decree in a suit to which the owner of the unsold portion was no party: *Gowland* v. *Garbutt*, 13 Gr. 578, and see *Crawford* v. *Armour*, *Ib.* 576; *Monsen* v. *Hauss*, 22 Gr. 279. Right to sale, or foreclosure, when lost by sale of part of property

Where the mortgaged lands are out of the jurisdiction, although the Court may grant judgment for foreclosure: *Paget* v. *Ede*, L. R. 18 Eq. 118; it will not grant a judgment for sale: *Strange* v. *Radford*, 15 Ont. 145.

Where the writ, or statement of claim, does not claim any personal remedy against the defendant, the judgment is erroneous, if it contain any personal order for payment of the mortgage debt, and such a defect was amended after the lapse of four years: *Cockenour* v. *Bullock*, 12 Gr. 138. Personal relief should not be directed if not claimed.

Where the judgment directs foreclosure, on default in payment, a final order may be made in Chambers, directing a sale in lieu of foreclosure, without appealing from the judgment: *Laslett* v. *Cliffe*, 2 Sm. & G. 278; *Fish* v. *Carnegie*, D. B. 3 & 4; *Thompson* v. *Badgley*, O. B. 25; but usually the sale will not be ordered until after the mortgagor has had the usual time to redeem: *Trust and Loan Co.* v. *Reynolds*, 2 Chy. Ch. 41; where the application is made by a defendant he will be required to deposit $80 to meet the expense of the sale, and this deposit will not be dispensed with, although the security be ample: *Thompson* v. *Macaulay*, 3 Chy. Ch. 111. But if the plaintiff prefer it, the defendant may be required to conduct the sale in lieu of making the deposit. Formerly the Court would not, after a decree for sale, direct a foreclosure without rehearing the cause: *McClelan* v. *Jacob*, 9 Gr. 50; except where the sale had been attempted, and proved abortive: *Goodall* v. *Burrows*, 7 Gr. 449; *Odell* v. *Doty*, 1 Chy. Ch. 207; *Girdlestone* v. *Gunn*, *Ib.* 212. In such a case, an order for foreclosure is granted in Chambers on motion; but the mortgagor must be allowed three months further time to redeem: *Ib.*; but in *Goodall* v. *Burrows* only one month was allowed. Where judgment for foreclosure, f. o. for sale may be granted. But if judgment is for sale, f. o. f. not granted,

After a judgment of foreclosure, an order for sale may be obtained, by a subsequent incumbrancer, under *Rule* 350.

348. The Court may direct a sale of the property, instead of a foreclosure of the equity of redemption, on such terms as the Court thinks fit; and, if the Court thinks fit, without previously determining the priorities of incum- Sale may be ordered, instead of foreclosure.

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Rule 349.

brancers, or giving the usual or any time to redeem. Chy. O. 428.

Ordinary time for redemption, when shortened.

Some special ground must be shown in order to deprive the mortgagor of the ordinary six months time to redeem: *Rigney* v. *Fuller*, 4 Gr. 198; *Swift* v. *Minter*, 27 Gr. 217; *Newman* v. *Selfe*, 33 Beav. 522; and even where an application for sale was made, in a foreclosure suit, by subsequent incumbrancers, after the time allowed them for redemption had expired, it was held that the mortgagor was entitled to an opportunity to redeem, before a final order for sale could be made: *Trust and Loan Co.* v. *Reynolds*, 2 Chy. Ch. 41.

Defendants when entitled to a sale in foreclosure action.

Where the writ claims foreclosure, the defendant is entitled to have the judgment drawn up for sale, on paying into Court $80; and where a judgment has been entered for foreclosure, a subsequent incumbrancer may also, on being made a party, at any time before the report is settled, on making a like payment, obtain on *præcipe* an order for sale in lieu of foreclosure; see *Rule* 350. The $80 is intended as security for the costs of the sale: see *Rule* 349 and notes.

On the Court being satisfied by evidence that the value of the mortgaged property was not sufficient to pay the amount due to the plaintiff, and that it was for the benefit of infant defendants, an account was dispensed with, and a judgment for immediate foreclosure was granted on the consent of the infant's solicitor: *Wolverhampton & Staffordshire Banking Co.* v. *George*, 24 Ch. D. 707.

Judgment for immediate sale, how awarded.

A judgment for an immediate sale, without appointing any day for redemption, can only be granted on motion for judgment, it cannot be awarded on *præcipe*. The motion may be made in Chambers, where infants are concerned: see *Rule* 717; *Cayley* v. *Colbet*, 2 Chy. Ch. 431; but in other cases the motion must be to the Court. An immediate sale has been granted on the consent of the mortgagor, and without the consent of the subsequent incumbrancers: *Township of Hamilton* v. *Stephenson*, 25 Gr. 198; but Blake, V.C., repeatedly refused to make such a decree without the consent of the subsequent incumbrancers, on the ground that the equity of redemption might be worthless, and the mortgagor might have really no interest in the mortgaged property.

Where a decree for sale was pronounced in Court, the Referee in Chambers refused to entertain a motion for a final order for sale, before the time for redemption had expired: *Buell* v. *Fisher*, 6 P. R. 51.

Where sale is asked by the mortgagor or incumbrancer, deposit to be made.

349. If the request for a sale is made by a subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the party making the request is to deposit in Court the sum of $80 for the purpose of covering expenses unless otherwise ordered by the Court or a Judge. *See* Chy. O. 429.

Chy. Ord. 429, from which this *Rule* is adapted, required the deposit of "a reasonable sum." The usual amount required was $80, but on special application before the sale, it was sometimes increased: *London & C. L. & A. Co.* v. *Morrison*, 7 P. R. 450; 15 C. L. J. 57. But an application after the sale had taken place to increase the deposit would not be entertained, even though the sale had failed to realise the amount of the plaintiff's claim: *London & C. L. & A. Co.* v. *Pulford*, 7 P. R. 432; 15 C. L. J. 55.

Deposit to secure sale in mortgage cases.

By the form of indorsement on the writ in mortgage actions, the amount of the deposit to be made by a defendant served with the writ, in order to secure a sale, is $80: see Form 9 c. When the sale is applied for by an original defendant to the action, an application to increase the amount of the deposit cannot be entertained, even though the costs of the sale will exceed $80: *Cruso* v. *Close*, 8 P. R. 33; and it would seem that the same rule will apply to subsequent incumbrancers obtaining a sale under this *Rule*: but the plaintiff may notify the defendant desiring the sale, to take the conduct of it: see *Rule* 351.

The deposit will not be dispensed with, even though the security be ample : *Thompson* v. *Macaulay*, 3 Chy. Ch. 111 ; or the applicant be a trustee : *Machell* v. *Campbell*, 5 U. C. L. J. 117 ; and a defendant cannot claim a sale against the consent of the mortgagee without making the deposit : *Taylor* v. *Walker*, 8 Gr. 506 ; except in the case of infant defendants, who are entitled to a sale, without the usual deposit : *Bank of Upper Canada* v. *Scott*, 6 Gr. 451 ; *Lawrason* v. *Fitzgerald*, 9 Gr. 371 ; but see *Western Canada Loan & S. Co.* v. *Dunn*, 9 P. R. 587. Where the sale is abortive, the deposit is applicable to the payment of the plaintiff's costs thereof : *Corsellis* v. *Patman*, L. R. 4 Eq. 156 ; and where the deposit was paid in by the mortgagor, and the sale realised enough to pay the claim of the plaintiff, but not all the subsequent incumbrances, the mortgagor was held not to be entitled to get back the deposit, but it was directed to be applied in payment of the claim of a subsequent incumbrancer : *Gzowski* v. *Beaty*, 8 P. R. 146.

Rule 350.
Cannot be dispensed with.
Except in case of infant defendants.
Application of deposit.

350. An incumbrancer made a party in the Master's office, and entitled to, and desiring a sale of the mortgaged premises, is to make the necessary deposit therefor before the Master's report is settled, whereupon an order may be issued on *præcipe* directing a sale of the mortgaged premises instead of a foreclosure, and thereupon the Master is to compute subsequent interest, and appoint a time and place, or times and places, for payment ; and all subsequent proceedings are to be taken and had as if the judgment had been in the first instance a judgment for sale. Chy. O. 456.

Incumbrancer made a party to a foreclosure suit, in the M. O., may apply for a sale.

The powers conferred by Chy. Order 456, from which this *Rule* is taken, were not extended under the former practice to the Deputy Registrars ; and there appears to be nothing in these *Rules* to extend the powers hereby conferred to Local Registrars, Deputy Registrars, or Deputy Clerks of the Crown. The order for sale does not come within the class of orders referred to in *Rule* 25. All applications under this *Rule* therefore should be made to the Registrar of the Division in which the action is pending.

Powers conferred by *Rule* 350, not extended to local officers.

The *præcipe* should show on whose behalf the application is made, and should also state that the applicant is an incumbrancer, made a party in the Master's office, who has proved a claim ; and that the Master's report has not been settled ; and should be accompanied by the certificate of the Accountant of the payment into Court of the requisite deposit of $80.

Præcipe for sale, form of.

An application, after the sale has taken place, to increase the amount of the deposit is too late : *London & Canadian Loan & Agency Co.* v. *Pulford*, 7 P. R. 432. Such an application should be made before the order for sale has been acted on : *London & Canadian Loan & Agency Co.* v. *Morrison*, 7 P. R. 450.

Application to increase deposit.

If the plaintiff deem the deposit inadequate he may require the incumbrancer obtaining the order for sale to conduct the sale : see *Rule* 351.

Where the sale realises sufficient to pay the plaintiff's claim, but not the claims of subsequent incumbrancers, the deposit will be ordered to be applied on account of the claims of the latter, according to their priorities : *Gzowski* v. *Beaty*, 8 P. R. 146. And where the sale proved abortive, except as to one parcel, which did not realize sufficient to pay the plaintiff's claim, the deposit was applied on account of plaintiff's costs of sale : *Corsellis* v. *Patman*, L. R. 4 Eq. 156.

Deposit, how applied.

Although a mortgagee by deposit is not entitled to a sale : see *Rule* 347, note ; yet a subsequent legal mortgagee made a party to the suit by the equitable mortgagee, is entitled to apply for a sale under this *Rule* : *Kerr* v. *Beebe*, 12 Gr. 294.

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Rules 351-353.

Plaintiff may require defendant asking sale to conduct it.

351. If before or upon the deposit to obtain a sale being made, the plaintiff prefers that the sale be conducted by the defendant desiring the sale, he may so elect; and he is thereupon to notify the defendant of such election. The notice may be to the effect set forth in Form No. 32 in the Appendix. Chy. O. 430.

Plaintiff may have reserved bid fixed.

Where the defendant claims a sale contrary to the wish of the plaintiff, the latter may protect himself against the mortgaged property being sold for less than his claim by getting a reserved bid fixed, and in the event of the sale proving abortive, he may obtain a final order for foreclosure: see note to *Rule* 347.

As to when the plaintiff may apply to increase the deposit, see note to *Rule* 349.

On filing notice, deposit to be returned to defendant.

352. Upon the plaintiff's filing in the office in which appearance is required to be entered a note of such election, and proof of service of such notice, the defendant making the deposit is to be entitled to a return thereof. Chy. O. 431.

Before the money can be obtained proof will have to be given to the Accountant of the due filing of the notice of election. The production of an office copy, with a certificate of its being filed would seem to be the proper proof.

In default of redemption final order may be granted in Chambers.

353. In default of payment being made according to the report in a foreclosure or redemption action, a final order of foreclosure may be granted against the party making default on an *ex parte* application. Chy. O. 451.

Judgments in mortgage actions in the usual form, are to be read as if this *Rule* was incorporated therein: see *Rule* 776. By the terms of this *Rule* it is confined to foreclosure and redemption actions, but it was always the practice under the Chy. Ord. 451, which was in similar terms, where the judgment was for sale in default of redemption, in like manner to obtain a final order for sale; and see *Rule* 133.

A final order is, generally speaking, necessary in all cases where a judgment directs anything to be done, upon the default of a party in doing a given act by a future day; the final order being the judicial determination that the default has in fact taken place.

Application for, how made.

Application for Final Order.—The application may be made to the Master in Chambers, or to any local officer having like jurisdiction.

Affidavit of non-payment to be produced.

In order to obtain a final order for default of redemption in a mortgage action, it is necessary to produce an office copy of the judgment, an office copy of the report, if any, the affidavit of the party to be redeemed of non-payment, and non-receipt of rents, and negativing his being in possession: *Scott* v. *McDonnell*, 1 Chy. Ch. 193; *Burford* v. *Lymburner*, *Ib.* 275; *Prees* v. *Coke*, L. R. 6 Chy. 645; or in case any sum has been paid since the account was taken, and before the day appointed for redemption, showing that notice has been given pursuant to *Rule* 365; or in case the party is in possession showing no receipts, beyond those for which credit has been given in the account. For forms of affidavits, see Leggo's Forms, 2nd ed., Nos. 684-686.

Certificate of bank officer.

There must also be produced a certificate of the cashier, or other like officer: *Campbell* v. *Garrett*, 1 Chy. Ch. 255, of the Bank, where the money is appointed

to be paid, of non-payment of the money, before, on, or since, the day appointed for payment: *Farrell* v. *Stokes*, 1 Chy. Ch. 201; duly verified by affidavit. **Rule 353.**

Affidavit of Non-payment.—Where there are several parties entitled to the money directed to be paid, the affidavit of non-payment should be made by all: *Annis* v. *Wilson*, 1 Chy. Ch. 217; *Kinnaird* v. *Yorke*, 60 L. T. N. S. 380; but where one of the parties is out of the jurisdiction, his affidavit may be dispensed with: *Lyman* v. *Kirkpatrick*, 2 Gr. 625; *Counter* v. *Wylde*, 1 Gr. 538; and see *Frith* v. *Cooke*, 52 L. T. N. S. 798, where the affidavit of the plaintiff's solicitor was accepted; *Kinnaird* v. *Yorke supra*; where a sole plaintiff resides out of the jurisdiction, the affidavit of his agent will be accepted, and in such case the affidavit should show where the custody of the mortgage has been: *Roe* v. *Shaw*, 1 Chy. Ch. 209; and where, in such a case, the affidavit is made by the solicitor of the plaintiff, it should show that the plaintiff has no other agent within the jurisdiction authorized to receive the money: *Taylor* v. *Cuthbert*, 1 Chy. Ch. 240; but see *Moody* v. *Tyrrell*, 6 P. R. 313; *Gillen* v. *Roman Catholic Episcopal Corporation*, 7 Ont. 146; *McMullen* v. *Polly*, 12 Ont. 702; 13 Ont. 209. An agent should state that he is authorized to receive the money: *Powers* v. *Merriman*, 1 Chy. Ch. 225; but it is not, however, necessary to produce the agent's authority: *Radclyffe* v. *Duffy*, 1 Chy. Ch. 302; and where the party to receive the money is a corporation aggregate, the affidavit of an officer of the company, must show that he is the proper officer to receive the mortgage money: *Western Assurance Co.* v. *Capreol*, 1 Chy. Ch. 227. Affidavit of non-payment, by whom to be made.

The affidavit of non-payment must be made after the day appointed for redemption: *Blong* v. *Kennedy*, 2 Ch. Ch. 453. When to be made.

When Notice Necessary.—The motion for a final order is usually *ex parte*: *Henderson* v. *Cowan*, 1 Chy. Ch. 297; *Rule* 353. But where two years had elapsed since the default, before the motion was made, notice was required to be served: *Kirkchoffer* v. *Stafford*, 2 Chy. Ch. 52; *Ardagh* v. *Orchard*, 2 C. L. J. 303; and where it appeared by the report, that the defendant had not received notice of the proceedings in the Master's office, in a case in which he was entitled to notice, notice of the motion was required to be served: *McCormick* v. *McCormick*, 6 P. R. 208; and where the account has been changed even *after* the day appointed for redemption, notice should be served: *Portman* v. *Smith*, 2 C. L. J. 167. Notice of motion when necessary.

On what Grounds Final Order Refused.—The order may be refused where the account is changed by the receipt of money before the day fixed for redemption: *Prees* v. *Coke*, L. R. 6 Chy. 645; *Garlick* v. *Jackson*, 4 Beav. 154. Final order when refused, where account changed.

Where the mortgagee is in occupation, or receipt of rents, he should be charged with rents up to the day fixed for redemption, or a new account must be taken, and a new day appointed for payment: *Pipe* v. *Shafer*, 1 Chy. Ch. 251; and it was held that this must be done even where the plaintiff swore he was in occupation merely as a caretaker: *Cummer* v. *Tomlinson*, 1 Chy. Ch. 235; or where a receiver had been appointed: *Jenner-Fust* v. *Needham*, 31 Ch. D. 500; 54 L. T. N. S. 420, affirmed by C. A.; 32 Ch. D. 582; *Piat* v. *Nicholson*, 80 L. T. Jour. 374; but see *ante Rule* 130, note: *Hoare* v. *Stephens*, 32 Ch. D. 194; 54 L. T. N. S. 230; *Holt* v. *Beagle*, 55 L. T. N. S. 592.

But the plaintiff's going into possession and receiving rents, *after* the day appointed for payment, does not affect his right to a final order: *Portman* v. *Smith*, 2 C. L. J. 167; *Greenshields* v. *Blackwood*, 1 Chy. Ch. 60; *Constable* v. *Howick*, 5 Jur. N. S. 331.

Where before the day appointed for payment, the office of the bank, at which the money is made payable, is closed, a new day must be appointed: *King* v. *Connor*, 1 Chy. Ch. 274. So where a Sunday was appointed for payment, the final order was refused: *Holcumb* v. *Leach*, 3 Gr. 449. Refused, where bank closed.

Where it appeared that the decree was erroneous, a final order was refused: *Commercial Bank* v. *Graham*, 4 Gr. 419; and see *Mitchell* v. *Strathy*, 28 Gr. 80. Or judgment erroneous.

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Rule 353.

Death of mortgagee, effect of.

Where a sole mortgagee, or one of several joint mortgagees, dies before the day appointed for payment, unless the judgment provides in the latter case for payment to the survivors, a new account must be taken, and a new day appointed: *Blackburn* v. *Caine*, 22 Beav. 614; *Kingsford* v. *Poile*, 8 W. R. 110.

Crown cannot be foreclosed.

Where the Crown is entitled to the equity of redemption, a final order of foreclosure cannot be obtained, but merely an order authorizing the mortgagee to take possession until the Crown may see fit to redeem: *Dunn* v. *Attorney-General*, 10 Gr. 482, or the security be satisfied; *Hodge* v. *Attorney-General*, 3 Y. & C. 342; Seton, 1044. A sale may be ordered where the Crown is interested: *Bartlett* v *Rees*, L. R. 12 Eq. 396.

Effect of final order. A bar to right of redemption.

Effect of Final Order. The final order of foreclosure, so long as it remains in force, is an absolute bar to the parties foreclosed from claiming the right to redeem. But it is no bar to the mortgagee, as long as he is in a position to restore the mortgaged property, from seeking to enforce payment of the mortgage debt: *Lockhart* v. *Hardy*, 9 Beav. 349; *Munsen* v. *Hauss*, 22 Gr. 279. But if, after a final order of foreclosure, he takes proceedings to enforce payment of the debt, that *ipso facto* operates as an opening of the foreclosure, and entitles the mortgagor to a reconveyance on payment of the money: *Palmer* v. *Hendrie*, 27 Beav. 349; 28 Beav. 341. If, however, the mortgagee, by his own act, unauthorized by the mortgagor, has made it impossible to restore the mortgaged property, proceedings to enforce payment of the debt will be stayed on the application of the mortgagor: *Ib.*; *The British & Canadian Loan & Investment Co.* v. *Williams*, 15 Ont. 366.

Unless mortgagee enforce payment of mortgage debt.

A final order of foreclosure obtained against an assignee of the equity of redemption for the benefit of creditors, is no estoppel to a subsequent action by him on behalf of the creditors of the mortgagor, under R. S. O. c. 124, s. 7, s.s. 2, to set aside the mortgage for fraud, where no such issue was raised in the action for foreclosure: *Glass* v. *Grant*, 16 Ont. 233.

Opening foreclosure at the instance of the mortgagor.

Opening of Foreclosure at the Instance of the Mortgagor.—Even after a final order has been obtained, the mortgagor may apply to set aside the order, and to be let in to redeem; and this relief was granted even as against a purchaser from the mortgagee after the final order of foreclosure: *Campbell* v. *Holyland*, 7 Ch. D. 166; 26 W. R. 160; *Johnston* v. *Johnston*, 9 P. R. 259; but it has been said that this relief can only be granted where the final order has been obtained by actual, positive fraud, or under circumstances of oppression: *Patch* v. *Ward*, L. R. 3 Chy. 203, 212; and in *Trinity College* v. *Hill*, 2 Ont. 348; 18 C. L. J. 387, the relief was refused as against a purchaser from the mortgagee after the final order, there being no such circumstances; but this case was subsequently reversed in appeal on the ground of irregularity in the proceedings; the sale having taken place under a decree *nisi*, which had not been made absolute before the final order was obtained: *S. C.* 10 Ont. App. 99.

Not opened as against purchaser from mortgagee except where fraud shown.

When rights of third parties do not intervene, it may be opened.

When the rights of third parties do not intervene, and the plaintiff can be replaced in the same position he occupied before the default, and recompensed for any damages he may have suffered, and there is a reasonable prospect for payment shewn, the foreclosure may be opened and the time for payment extended: *Waddell* v. *McColl*, 2 Chy. Ch. 62; but some reasonable excuse must be shewn for not redeeming at the time appointed, and the fact that the property is of much greater value than the amount due should be established: *Johnson* v. *Ashbridge*, 2 Chy. Ch. 251. The fact that the property has increased in value, is not alone a sufficient ground for opening the foreclosure: *Miles* v. *Cameron*, 9 P. R. 502; 19 C. L. J. 235; 3 C. L. T. 361. In *Platt* v. *Ashbridge*, 12 Gr. 105, the foreclosure was opened after a lapse of eighteen months, the mortgagor being illiterate, and having no solicitor, and not understanding the proceedings, and the property appearing to be worth three times the amount of the incumbrance. Where, after a final order of foreclosure against subsequent incumbrancers, the mortgagor redeems; that has the effect of opening the foreclosure as against the subsequent incumbrancers: *Read* v. *Smith*, 14 Gr. 250, *S. C.* 16 Gr. 52; *Box* v. *Bridgman*, 6 P. R. 234; *Otter* v. *Lord Vaux*, 2 K. J. 650; 6 D. M. & G. 638; and see *Ledbrook* v. *Passman*, 59 L. T. N. S. 306. In *Hilliard* v. *Campbell*, 7 Gr. 96, a final order of foreclosure

Evidence required.

Mortgagor redeeming after *mesne* incumbrancers have been foreclosed.

Purchaser of equity of

was set aside at the instance of a purchaser of the equity of redemption *pendente lite* but without notice of it, but in *Robson* v. *Argue*, 25 Gr. 407, such relief was refused. Rule 354. redemption.

Terms on which Foreclosure Opened at the Instance of the Mortgagor. The terms on which a foreclosure is opened are in the discretion of the Court. Where the security is not ample, the mortgagor may be required to pay the interest and costs by an early day, and six months may be allowed for the payment of the principal: Fisher on Mortges. 3rd ed. 1063. But where the security is ample, the costs of the action, and of the application, may be ordered to be paid forthwith, and the time extended for payment of the principal and interest, the defendant being charged with interest on the gross amount of the principal and interest, for the period of the extension: see *Trinity College* v. *Hill*, 8 Ont. 286; 20 C. L. J. 359, 385; *Holford* v. *Yate*, 1 K. & J. 677; *Whitfield* v. *Roberts*, 7 Jur. N. S. 1268; and see *Howard* v. *McClura*, 1 Chy. Ch. 27, and other cases cited in note to *Rule* 130. Terms on which foreclosure opened.

Opening of the Foreclosure by the Mortgagee. So long as the mortgagee is in a position to restore the mortgaged property, he may at any time, open the foreclosure by enforcing payment of the debt. But if, after he have obtained a final order, he has parted with the mortgaged estate, or any part of it, so that he is not in a position to re-convey, he will be restrained from recovering the debt: *Lockhart* v. *Hardy*, 9 Beav. 349; *Gowland* v. *Garbutt*, 13 Gr. 583; *Burnham* v. *Galt*, 16 Gr. 417; but see *Bald* v. *Thompson*, 16 Gr. 177; but the making of a mortgage by the mortgagee on the mortgaged estate, will not prevent him from opening the foreclosure by suing for the mortgage debt, if at the time of his bringing the action, he has paid off the mortgage, and is in a position to re-convey: *Munsen* v. *Hauss*, 22 Gr. 279. Opening foreclosure by mortgagee. Cannot be opened by mortgagee if not in a position to re-convey.

A mortgagee who has exercised his power of sale, where there is a personal liability to pay the mortgage debt, is entitled to sue for the deficiency; the fact that the mortgagee has acquired the land since the sale, is no objection to his right to recover; *Pegg* v. *Hobson*, 14 Ont. 272. In the absence of any objection to the sale under the power, the acquisition of the estate by the mortgagee would not give the mortgagor any new right of redemption.

354. In the event of the purchase money being insufficient to pay what has been found due to the plaintiff for principal, interest, and costs, subsequent interest, and subsequent costs in an action for sale, the plaintiff is to be entitled (where the mortgagor is a defendant, and such relief is prayed for), to an order *ex parte* for the payment of the deficiency. Chy. O. 455. Order for payment of deficiency may be obtained, when.

Where a personal order for payment is claimed by indorsement on the writ, that relief may now be awarded by the judgment in the first instance, without waiting for the ascertainment of the deficiency: see Forms 182, 183. Judgment on covenant, on *præcipe*.

Where the judgment is for foreclosure, accompanied by a personal remedy for payment of the mortgage debt, if the mortgagee, after obtaining a final order for foreclosure, enforce the judgment for payment, by issuing execution, or otherwise, he thereby opens the foreclosure. If he have, in such a case, parted with the mortgaged property after obtaining the final order, any further proceedings to enforce the payment of the debt will be restrained on motion: see *Rule* 353, note. Enforcing judgment on covenant after foreclosure.

The order for payment of deficiency can only be granted where there is a personal liability to pay. Where there is no contract to pay the debt between the plaintiff and defendant, or no privity between them, the order will not be granted, even though the defendant have agreed with some third party who is liable to the plaintiff, to assume and pay the mortgage debt: *Christie* v. *Dowker*, 10 Gr. 199; 10 U. C. L. J. 161; *Clarkson* v. *Scott*, 25 Gr. 373; *Norris* v. *Meadows*, 28 Gr. 334; and other cases cited in note to *Rule* 347. In the absence Order for payment of deficiency, only granted when there is a personal liability.

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Rules 355-357.

of an express covenant in the mortgage, the law will imply a contract to repay: *Sutton* v. *Sutton*, 22 Ch. D. 511; 48 L. T. N. S. 95; but there must be evidence of a debt, or loan: *Hall* v. *Morley*, U. C. Q. B. 584; *Pearman* v. *Hyland*, 22 U. C. Q. B. 202; *Jackson* v. *Yeomans*, 19 C. P. 394; *Jackson* v. *Yeomans*, 28 U. C. Q. B. 307; *S. C.* 39 U. C. Q. B. 280.

A mortgagee who has exercised his power of sale is entitled to sue for any deficiency which may remain due after deducting the proceeds of the sale, and the fact that the mortgagee has again acquired the land is no objection to his right to recover: *Pegg* v. *Hobson*, 14 Ont. 272.

Where a mortgagor who has parted with his equity of redemption is sued on his covenant to pay the mortgage debt, he is entitled, as against the assignee of the equity of redemption, to a lien on the mortgaged land, if still in the hands of the mortgagee, for any sum so paid, if the assignee of the equity of redemption has agreed to assume the mortgage: *Hamilton Provident L. & I. Co.* v. *Smith*, 17 Ont. 1.

Where account changed after order, or report, notice of credit may be given.

355. Where the state of the account ascertained by an order, or by the report of the Master, is changed by payment of money, by receipt of rents and profits, by occupation rent, or otherwise, before the final order for foreclosure or sale is obtained, the plaintiff, or other party to whom the mortgage money is payable, may give notice to the party by whom the same is payable, that he gives him credit for a sum certain, to be named in the notice, and that he claims that there remains due in respect of such mortgage money a sum certain, to be also named in the notice. Chy. O. 457.

Notice of credit must be served before day of payment.

The notice of credit must be given before the day for payment arrives: *Knottinger* v. *Barber*, 1 Chy. Ch. 258. Notice of credit of payments, or rents, which have been received after the day fixed for redemption, need not be given: see *Rule* 353 note. Such payments do not affect the plaintiff's right to a final order, unless indeed they amount to a total extinguishment of the debt.

When notice has been duly given under this *Rule*, the final order may be obtained notwithstanding the alteration in the state of the account, without appointing any new day.

Final order may be granted.

356. Upon the final order for foreclosure or sale being applied for, if the Judge thinks the sums named in the notice proper to be allowed and paid under the circumstances, the order for final foreclosure is to go without further notice, unless the Judge directs notice to be given. Chy. O. 458.

See notes to *Rule* 353; in practice that *Rule* has been construed as authorizing a final order for sale, or foreclosure, according as the judgment might be for sale or foreclosure.

Party receiving sums after report, etc., may apply

357. The party to whom the mortgage money is payable, may apply in Chambers for a reference to a Master, or for an appointment, to fix such sums respectively; and

in the latter case either upon notice, or *ex parte*, as the Judge thinks fit; and the order to be made thereupon is to be served, or service thereof to be dispensed with, as the Judge directs. Chy. O. 459.

Rules 358, 359. for new day for payment.

358. The party to whom such notice is given may apply in Chambers for an appointment to ascertain and fix the amounts proper to be allowed and paid, instead of the amounts mentioned in such notice; or for a reference to a Master for the like purpose; and in case the Judge thinks a reference to a Master proper, the same may be made *ex parte* unless the Judge otherwise directs. Chy. O. 460.

Party served with notice of credit, may apply.

359. In an action for the foreclosure or sale of the equity of redemption in any mortgaged property, or for recovery of possession thereof, for default in the payment of interest, or of an instalment of the principal, the defendant may, [before judgment,] move to dismiss the action upon paying into Court the amount then due for principal, interest and costs. Chy. O. 461; R. S. O. 1877, c. 51, s. 71.

Action brought for default in payment of instalment of principal, or interest may be dismissed on payment of arrears and costs.

The words in brackets are new and have been inserted for the sake of greater clearness.

After judgment *Rule* 360 applies.

Rule 359 applies, to actions for redemption.

The *Rule* in terms is confined to actions for foreclosure, or sale, but it has been held that a mortgagor bringing an action for redemption, is within the equity of this *Rule*: *Moore* v. *Merritt*, 6 Gr. 550; *Dornyn* v. *Fralick*, 21 Gr. 194; but see *contra*, *Tyler* v. *Hinton*, 3 Ont. App. 53; but a plaintiff claiming the benefit of this *Rule* is not entitled to six months for payment of the instalment in default: *Dornyn* v. *Fralick*, *supra*. The *Rule* is held not to apply where the mortgagee is seeking to enforce a power of sale: *Robertson* v. *Hetherington*, 8 C. L. T. 141.

Mortgagee bringing action cannot claim six months' notice, or six months' interest.

Formerly when the principal money due under a mortgage was not paid off at the date at which it was covenanted to be paid, the mortgagee was entitled to six months' notice of payment, or six months' interest: *Latshaw* v. *Davis*, Blake, V.C., 7 June, 1877; and see *Re Houston*, 2 Ont. 84; *Trust & Loan Co.* v. *Kirk* 8 P. R. 203; *Archbold* v. *Building & Loan Association*, 15 Ont. 237; notice was not necessary where the six month's credit was paid: *Johnson* v. *Evans*, 61. L. T. N. S. 18; but a mortgagee bringing an action for sale, or foreclosure, could not insist on getting six months' notice of payment, or in default thereof, six months' interest: *Letts* v. *Hutchins*, L. R. 13 Eq. 176; *Re Alcock*, *Prescott* v. *Phipps*, 23 Ch. D. 372; 49 L. T. N. S. 240; nor could a mortgagee who proved his claim in a partition action: *Re Houston*, 2 Ont. 84; and see *In re Moss*, *Levy* v. *Sewill*, 31 Chy. D. 90; 54 L. T. N. S. 49. This right to six months' notice, or six months' interest does not exist as regards mortgages made after 1st July, 1888, unless there is an express stipulation therein to that effect: see 51 Vict. c. 15, s. 2 (O.)

In default of payment of instalment, whole amount secured becomes due.

Upon default in payment of any instalment of principal, or interest, the mortgagee has a right, without any express stipulation to that effect, to call in the whole amount secured by the mortgage: *Cameron* v. *McRae*, 3 Gr. 311; but this right may be qualified by the express stipulation of the parties, as, for instance, where there was an express proviso that in default of payment of any instalment of interest for six months, the whole principal money should become

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Rules 360, 361.

Proviso accelerating payment, how construed.

payable, it was held that a suit for foreclosure would not lie until the lapse of the six months: *Parker* v. *The Vine Growers' Association*, 23 Gr. 179. Where there was a proviso accelerating payment of principal and interest in the event of the mortgagor mortgaging, or otherwise incumbering, the property, or suffering it to become liable to sale for taxes, it was held that a voluntary assignment in insolvency was not within the proviso: *McKay* v. *McFarlane*, 19 Gr. 345. Under a clause accelerating payment of mortgage money in the event of default, a mortgagee who neglects to call in the mortgage money pursuant to the proviso, cannot in a redemption suit treat the sums, of which the payments is accelerated as overdue, and claim interest thereon: *McLaren* v. *Miller*, 20 Gr. 637.

How far Court can relieve against express proviso for accelerating payment in event of default, *quære?*

It was held by Spragge, C., that even though there be an express stipulation in the mortgage, that in default of payment of any instalment the whole mortgage money shall become payable, that the mortgagor may, nevertheless, after default, claim the benefit of this *Rule*: *Gemmell* v. *Burn*, 7 P. R. 381; and see *Knapp* v. *Cameron*, 6 Gr. 559; but in *Tylee* v. *Hinton*, 3 Ont. App. 53, Moss, C.J.A., expressed a doubt whether the Court had any power to relieve against such a stipulation, either under this *Rule*, or under its inherent jurisdiction to relieve against penalties, and forfeitures; and see *General Credit & Discount Co.* v. *Glegg*, 48 L. T. N. S. 182. It cannot, therefore, be said to be clear that the *Rule* applies to cases where there is an express proviso accelerating the payment of the mortgage debt in the event of default.

Interest to be paid up to last gale day.

Where a defendant moves to stay proceedings under this *Rule*, he may obtain the stay, on payment of the interest calculated up to the last gale day, and is not obliged to pay it, up to the time of making the application: *Strachan* v. *Murney*, 6 Gr. 378; but, if the defendant desires to pay off the whole amount of the mortgage debt, the mortgagee cannot refuse to accept it: *Cruso* v. *Bond*, 9 P. R. 111; 1 Ont. 384, (overruling *Green* v. *Adams*, 2 Chy. Ch. 134); although in a redemption suit he might not be bound to accept more than the instalments in arrear.

Mortgagee plaintiff cannot refuse to accept payment of whole debt.

An application may be made, after judgment has been obtained, to stay proceedings on payment of the arrears: see *Rule* 360.

After judgment proceedings may be stayed on payment of arrears and costs.

360. In an action for the purpose and under the circumstances specified in the last Rule, a defendant may move to stay proceedings in the action, [after judgment,] but before sale or final foreclosure, or recovery of possession of the mortgaged property by the plaintiff, upon paying into Court the amount then due for principal, interest and costs. Chy. O. 462.

See notes to preceding *Rule*.

Stay of proceedings under *Rule* 360, effect of.

After payment has been made, under this *Rule*, of the instalments in arrear, it is irregular for the plaintiff to take any further proceedings in the action, until another instalment falls due: *Carroll* v. *Hopkins*, 4 Gr. 431; and see *Rule* 361.

On subsequent default decree may be enforced.

361. Where an application is made to stay the proceedings under Rule 360, the judgment may afterwards be enforced, by order of the Court, upon subsequent default in the payment of a further instalment of the principal, or of the interest. Chy. O. 463.

Where subsequent default made

Where, after a judgment of foreclosure, the proceedings are stayed under *Rule* 360; on a subsequent default being made on the plaintiff's application to enforce the judgment, and the defendant asking for a further stay on payment

of the arrears, an order may be made directing payment of the whole sum in six months, and in default foreclosure, with liberty to the defendant to pay the arrears forthwith, and in that event staying the proceedings: *Strachan* v. *Devlin*, 1 Chy. Ch. 8. **Rules 362-364. after stay, form of order.**

362. In a redemption action, in default of payment being made according to the report, the defendant is to be entitled on an *ex parte* application in Chambers to a final order of foreclosure against the plaintiff, or to an order dismissing the action with costs to be paid by the plaintiff to the defendant, forthwith after taxation thereof. J. A. Rule 333. **Order on default.**

See *Rules* 353, 363, and notes.

363. In a redemption action where the plaintiff is declared foreclosed, directions may be given either by the final order foreclosing the plaintiff, or by subsequent orders, that all necessary inquiries be made, accounts taken and proceedings had for redemption or foreclosure, or redemption or sale, as against any subsequent incumbrancers, or for the adjustment of the relative rights and liabilities of the original defendants as among themselves, and such order shall have the same force and effect as a judgment obtained by the original defendant. J. A. Rule 334. **Directions where plaintiff in redemption suit is foreclosed.**

The provisions of this *Rule* seem to be based on Chy. Ord. 466.

The dismissal of an action for redemption by a mortgagor usually operates as a foreclosure; and where a bill did not pray redemption, but a decree for redemption was granted, it would seem a subsequent dismissal operated as a foreclosure: *Cornwall* v. *Henriod*, 12 Gr. 338; but this is not the case where the mortgage is by deposit of title deeds, because in such a case a judgment of foreclosure would provide for the execution of a legal mortgage, but the mere dismissal of an action to redeem, cannot have that effect, though it may preclude the mortgagor from bringing another action to redeem: *Marshall* v. *Shrewsbury*, L. R. 10 Chy. 250. **Dismissal of action for redemption operates as a foreclosure.**

Where an action for redemption is brought by a second mortgagee and he is foreclosed, the mortgagor, as well as the first mortgagee, has a right to have a day appointed for the redemption of the first mortgage by the mortgagor: *McKinnon* v. *Anderson*, 18 Gr. 684. The defendant who is sought to be redeemed, need not, unless he pleases, proceed under this *Rule*, and he cannot be deprived of costs of any subsequent action for foreclosure, or redemption, for not having done so. *Ib.* **Subsequent proceedings.**

Where a second mortgagee brings an action to redeem a prior mortgagee and to foreclose the mortgagor in default of redemption, the action may be dismissed as against both the prior mortgagee, and the mortgagor, with costs: *Hallett* v. *Furze*, 31 Ch. D. 312; 54 L. T. N. S. 12.

CROWN ACTIONS.

364. The procedure and forms which are from time to time in force for the prosecution of rights, claims or demands, or for the recovery of the possession of any lands, **Forms and procedure in Crown actions.**

363a) In mortgage actions to fix a date for redemption after the lapse of the first period of six months the further time allowed shall be [illegible]

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Rules 365-367.

deeds or personal property between subject and subject, shall be used in the like cases for the prosecution of rights, claims or demands which her Majesty may have against any person or persons, body or bodies corporate, or for the recovery of the possession of any lands, deeds or personal property whereto Her Majesty claims to be entitled, but the right of reply shall be always allowed to the Attorney-General, and to any Queen's Counsel having written authority from him for that purpose. R. S. O. 1877, c. 58, ss. 6, 8.

Costs in revenue cases.

365. In case in any action, or other proceeding before any Court or tribunal in Ontario, by or on behalf of the Crown, against any corporation or person, in respect of any lands, tenements or hereditaments, or of any goods or chattels belonging to or accruing to the Crown, or standing or being in the name of Her Majesty, or in respect of any sum of money due and owing to Her Majesty by virtue of any vote of the Legislature for the service of the Crown, or by virtue of any statute relating to the public revenue, or in any manner whatsoever, judgment is given for the Crown, Her Majesty's Attorney-General may recover costs in the same manner as and under the same rules, regulations and provisions that apply to the payment or receipt of costs in proceedings between subject and subject. R. S. O. 1877, c. 58, s. 9.

Defendant may recover costs in revenue cases.

366. If in any information, action, or other proceeding, judgment is given against the Crown, the defendant is entitled to costs, subject to the same rules as though such proceeding had been had between subject and subject. R. S. O. 1877, c. 58, s. 10.

In *Atty.-Gen.* v. *Winser*, 60 L. T. N. S. 930, the Atty.-Gen. notified the defendant that the information would not be further prosecuted, and it was held that there was no power to dismiss it for want of prosecution, or to award costs to the defendant as the cause was not determined. *Quære*, in Ontario.

High Court may issue writs of summons in the same cases as *sci. fa.* formerly issued.

367. Notwithstanding the want of enrolment, writs of summons to repeal letters patent, grants or other matter of record under the Great Seal, shall be issued in the same cases and under the same restrictions, as nearly as may be, as writs of *scire facias* were on the 5th day of December, 1859, issuable from the Court of Chancery in England; and all the proceedings thereafter shall be the same as the proceedings in an ordinary action; but before the issue of

any such writ, the party making application for the same shall, in addition to the *fiat* of the Attorney-General, file in the Court from which the writ is to be issued, an exemplification under the Great Seal of the Province of the letters patent, grant or other matter of record with respect to which the said writ is to be issued. *See* R. S. O. 1877, c. 58, ss. 11, 12. Rule 368.

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CHAPTER V.

PLEADINGS.

1. Statement of claim, 368-370.
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3. Demurrer, 384-391.
4. Close of Pleadings, 392, 393.
5. Pleading Generally, 394-419.
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7. Striking out, amending Pleadings, etc., 421-433.
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1. Statement of Claim.

368. The plaintiff shall state the nature of his claim and the relief sought in a pleading to be called the Statement of Claim. New.

Statement of claim, when necessary.

A statement of claim is necessary where the defendant has not dispensed with it at the time of appearance: see Appendix, Form 93 and *Rule* 369; and even where no appearance is entered, if the case is one in which the plaintiff can only obtain judgment by motion for judgment: see *Minton* v. *Metcalfe*, 46 L. J. Chy. 584; *Hunter* v. *Wilcockson*, 9 P. R. 305, except where *Rule* 299 applies.

No statement of claim is necessary where (1) the defendant does not require one; or (2) the Court dispenses with it: *Chorlton* v. *Dickie*, 13 Ch. D. 160; or (3) the defendant has not appeared, and the judgment can be obtained by default of appearance: see *Rules* 704, *et seq.*, and 718; or (4) a defendant has not been allowed to defend under *Rule* 739. So also formerly under original *Rule* 162, where he had obtained leave to defend, and no order was made as to delivery of pleadings: *Atkins* v. *Taylor*, W. N. 1876, 11; *Margate Pier & Harbour Co.* v. *Perry*, W. N. 1876, 52. That *Rule* has, however, been abrogated by the Con. *Rules*.

If the defendant dispenses with the delivery of a statement of claim, the summons is filed, and becomes the only pleading necessary: *Rule* 369 *b*. Where a statement of claim is necessary, if the writ has been specially indorsed,

Rule 369. the plaintiff may deliver notice, under *Rule* 370, that his claim is that which appears by the indorsement upon the writ. Where such notice will not suffice, the statement of claim will be framed in accordance with the models given in Appendix No. 53, *et seq.*

The plaintiff may deliver a statement, even though the defendant has stated in his appearance that he does not require one (*Rule* 369 *c*); subject to the power of the Court, or the taxing officer (*Rule* 1195), with regard to costs occasioned thereby, if the delivery be unnecessary or improper.

Form. **Form of Statement of Claim**—A statement of claim will, to some extent, follow the writ as to the names of the parties and the character in which sued or suing. Probably, as formerly, the plaintiff will not be strictly confined to the particulars of his cause of action specially indorsed: *Rule* 265; see *Sowden* v. *Sowden*, 4 P. R. 276; *Huggins* v. *Guelph Barrel Co.*, 7 P. R. 170; *Johnson* v. *Palmer*, 4 C. P. D. 258; *Large* v. *Large*, W. N. 1877, 198; *Lainchberry* v. *Dunn*, 9 C. L. T. 412; and note to *Rule* 444; but see *Ker* v. *Williams*, W. N. 1886, 16; and *United Telephone Co.* v. *Tasker*, 59 L. T. N. S. 852, where it was held to be irregular to introduce into the statement of claim a different cause of action not mentioned in the writ.

If the defendant does not appear, the plaintiff cannot, in his statement of claim, enlarge his claim as indorsed on the writ: *Law* v. *Philby*, (2), 35 W. R. 450; *Gee* v. *Bell*, 35 Ch. D. 160; see also *Foord* v. *Brown*, 20 L. R. Ir. 185; *Stone* v. *Smith*, 35 Ch. D. 188.

The plaintiff need not ask relief against all the defendants named in the writ, but may claim against some only, if he abandons proceedings against the rest, but not otherwise: Arch. Prac. 13th ed. 215.

In a statement of claim the mention of the date of the issue of the writ of summons, as shewn in Form 53 *et seq.*, is essential. Where it was omitted, leave to amend was given on a motion to set aside the statement of claim: *Scott* v. *Creighton*, 9 P. R. 253. See Form 59.

As to printing the statement of claim: see *Rules* 395, 396. As to the causes of action which may be joined: see *Rule* 340. As to the form in which material facts should be set out: see *Rule* 399.

The facts in support of each separate cause of action should be separately stated as far as may be: *Rule* 405. Under the English Rules it has been said that, in general, a defence should not be anticipated and answered: *Hall* v. *Eve*, 4 Ch. D. 341; *Clarke* v. *Callow*, 46 L. J. Q. B. 53. The relief desired must be asked for: *Rule* 404. The place where the plaintiff proposes to try the action is to be mentioned in the statement of claim; and the plaintiff has a *prima facie* right to have the trial at any place he names in every kind of action, except ejectment: *Rule* 653; and except in certain kinds, actions which under particular Statutes are directed to be tried in a particular place: see notes to *Rule* 653; unless the preponderance of convenience is greatly in favour of some other place, in which case the place of trial will be changed: see *Plum* v. *Normanton Iron, etc., Co.*, W. N. 1876, 105; *Wood* v. *Kay*, W. N. 1879, 206; *Green* v. *Bennett*, 32 W. R. 848; 50 L. T. N. S. 706; *Walton* v. *Wideman*, 10 P. R. 228. This, in effect, was the practice formerly in Chancery: *Noad* v. *Noad*, 6 P. R. 48; but as to the weight which is to be given to the cause of action as an element in determining the place which is most convenient for the trial, the opinions of the judges are conflicting: see note to *Rule* 653.

The signature of Counsel, though unnecessary: *Rule* 399, has been said in England to be desirable; *Duckett* v. *Jones*, W. N. 1876, 17; 33 L. T. N. S. 777; but is seldom if ever added in Ont.

Attention should be given to the matters mentioned in *Rule* 397. For the time for delivery: see *Rules* 369 and 480; and as to the mode of delivery: see *Rules* 397 and 461. A copy should be filed as well as served: *Rule* 398.

369. The delivery of the statement of claim shall be regulated as follows:—

Rule 369. Time within which to be delivered.

(*a*) If the defendant does not state that he does not require the delivery of a statement of claim, the plaintiff shall, unless otherwise ordered by the Court or a Judge, deliver it within three months from the time of the defendant's entering his appearance. J. A. Rule 158.

The Eng. Rules 1875, O. 21, r. 1 (*a*), (1883 R. 225), are different.

As to obtaining further time for delivery: see *Higginbottom* v. *Aynsley*, 3 Ch. D. 288.

An order extending the time will not be made *ex parte*: *Wigle* v. *Harris*, 9 P. R. 276.

A statement of claim filed after the time for doing so has expired without leave, has been held under the Irish Act to be not irregular, unless the defendant has served a notice of motion to dismiss: *O'Connell* v. *O'Connell* and *Sampson* v. *O'Donnell*, 6 L. R. Ir. 470, 471; but in Ontario it has been decided that a statement so filed is irregular, and may be struck out on motion in Chambers unless circumstances are shewn justifying an extension of time: *Clarke* v. *McEwing*, 9 P. R. 281; see *Rule* 369 (*c*). It cannot be treated as a nullity: *Gill* v. *Woodfin*, 25 Ch. D. 707; see also *Graves* v. *Terry*, in notes to *Rules* 371, 381.

Where a statement of claim was delivered after the time limited by an order, and an order afterwards was made extending the time for delivery on payment of $20 costs, and the costs were paid, but no new statement delivered, it was held, that though the delivery was irregular, it was waived by retaining the copy served and the costs: *Pierce* v. *Palmer*, 12 P. R. 275.

Where an order is made giving a further limited time to file a pleading, and providing that, in default, judgment may be signed, a judgment signed without serving a copy of the order is regular: see *Farden* v. *Richter*, 23 Q. B. D. 124.

A guardian *ad litem* of an infant, and a married woman, may waive delivery of a statement of claim: see *Knatchbull* v. *Fowle*, W. N. 1876, 2; *Fryer* v. *Wiseman*, W. N. 1876, 3.

The three months are calendar months: *Rule* 472; and in computing them long vacation is not reckoned: *Rule* 484. For the mode of delivery, see *Rules* 397, 461.

Where plaintiff has obtained an injunction or registered a *lis pendens*, or for other reasons justice so requires, the plaintiff may be ordered to file a statement of claim before the three months above mentioned: *Hall* v. *Forteye*, 9 C. L. T. 231; *Jamieson* v. *Laing*, 7 P. R. 404; *Shepherd* v. *Kennedy*, 10 P. R. 242.

See also notes to *Rules* 371, 381.

(*b*) If the defendant states that he does not require the delivery of a statement of claim, the plaintiff shall file a copy of the summons with all indorsements thereon within the same time.

Not in the English Rules, and seems to be now rather an unnecessary provision, as a copy of the writ with all indorsements is filed when the writ is issued: see *Rule* 234. The filing of another copy will, however, probably be necessary if proceedings in default of a defence are contemplated. As to delivery of defence in such case; see *Rule* 372.

The defendant is in his memorandum of appearance to state whether he requires the delivery of a statement of claim: see *Rule* 286 and Appendix Form, No. 93.

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Rule 370.

(*c*) The plaintiff may, if he thinks fit, deliver a statement of claim, with the writ of summons, or notice in lieu of writ of summons, or at any time afterwards, either before or after appearance, and although the defendant may have appeared and stated that he does not require the delivery of a statement of claim: Provided that in no case where a defendant has appeared shall a statement be delivered more than 3 months after the appearance has been entered, unless otherwise ordered by the Court or a Judge. J. A. Rule 158. *See* J. A. Rule 126.

Substantially the same as Eng. R. 1875, O. 21, r. 1 (*b*), O. 19, r. 2 (1883 R. 225 *d*).

If the plaintiff delivers a statement of claim though not required to, the defendant must deliver a defence, but the plaintiff may be punished by being made to pay costs if his action is improper: see *Rule* 1195.

An application to enlarge the time will, in general, be by motion in Chambers. Or the time may be enlarged by consent: *Rule* 478. The consent should be in writing, and no order is then necessary: *Ambroise* v. *Evelyn*, 11 Ch. D. 759.

Where by mistake of a clerk of the plaintiff's solicitor, the statement of claim was served too late by two days, further time was given. The Court thought it immaterial that plaintiff had delayed bringing the action till shortly before the Statute of Limitations would have barred the claim: *Canadian Oil Works* v. *Hay*, 38 L. T. N. S. 549; W. N. 1878, 107; but the Court has refused to renew a writ of summons after the time for effecting the renewal has expired, where the claim, in the absence of such renewal, would be barred by the Statute of Limitations: *Doyle* v. *Kaufman*, 3 Q. B. D. 7, 340.

See also notes to *Rules* 369 (*a*) and 646.

Notice in lieu of statement of claim.

370. Where the writ is specially indorsed and the defendant has not dispensed with a statement of claim, it shall be sufficient for the plaintiff to [~~file a copy of the writ, with a copy of the special indorsement thereon, if not filed already, and~~] deliver as his statement of claim a notice to the effect that his claim is that which appears by the indorsement upon the writ, unless the Court or a Judge orders him to deliver a further statement.

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(*a*) Such notice may be either written or printed, or partly written and partly printed, and may be in the Form No. 16 in the Appendix, and shall be marked on the face in the same manner as is required in the case of an ordinary statement of claim.

(*b*) When the plaintiff is ordered to deliver such further statement it shall be delivered within such time as by the order is directed; and if no time is so limited then within the time prescribed by Rule 369. J. A. Rule 159.

Same as Eng. R. 1875, O. 21, r. 4, except the words in brackets. These words were originally consequent on the previous filing of a copy of the writ being

made optional, instead of being imperative as in England: see original *Rule* 25. The filing of a copy is, however, now required upon the issuing of the writ: *Rule* 234. **Rule 370.**

The Eng. Rules of 1883 make a specially indorsed writ always suffice as a statement of claim: Rule 225 (*a*).

A "specially indorsed" writ would seem to be one indorsed within the meaning of *Rule* 245. Where a writ claims specific sums and also damages, and an injunction, it is not specially indorsed within the meaning of that *Rule*: *Yeatman* v. *Snow*, 28 W. R. 574.

A writ specially indorsed, and a notice given under this *Rule*, were in the earlier decisions on the Act, held to together constitute a pleading which might be demurred to: *Robertson* v. *Howard*, 3 C. P. D. 280; but it is now decided that a demurrer is not proper, and that the defendant's course is to apply under the present *Rule* for delivery of a further statement of claim: *Fawcus* v. *Charlton*, 10 Q. B. D. 516.

In money cases the plaintiff ought to indorse his writ in such a way that the notice may be given under this *Rule*, and with the view that the indorsement may furnish all necessary information to the defendant in regard to the claim: see *Anon*, W. N. 1875, 202, *per* Lush, J. Where the indorsement is not sufficiently explicit, particulars may be ordered, and further time to put in a defence given, if necessary: see *Cotton* v. *Houseman*, W. N. 1876, 22; 2 Charl. Ch. Ca. 36; but the proper form of application in such case would seem to be for a further statement of claim: *Schomberg* v. *Zoebelli*, W. N. 1876, 106; 1 Charl. Ch. Ca. 36. Particulars of lump sums, for which credit was given, were ordered in *Godden* v. *Corsten*, 5 C. P. D. 17.

For further information with regard to particulars, see notes to *Rules* 245, 399.

In an action for money alleged to have been obtained by fraudulent misrepresentation, the nature of which misrepresentation, and the particulars of the sums sued for being set out in the indorsement of the writ, it was held that notice in lieu of a statement of claim was sufficient, and a motion to compel the delivery of a better statement of claim was refused: *Young* v. *Beattie*, 16 L. R. Ir. 192.

2. Defence and Counter-claim.

The defendant may waive the delivery to him of a statement of claim: *Rule* 286. If none is then delivered he must deliver his statement of defence within 8 days from appearance: *Rule* 372. For the time for delivering a statement of defence: see *Rule* 371. When to be delivered.

The facts relating to the defence must be stated in the same manner as is provided in respect to other pleadings: *Rules* 399, 406-411. If the defendant has no facts to set up he may simply "join issue" or deny the statement of claim. Such a pleading will prevent an implied admission and put the plaintiff to the proof of his claim: *Hare* v. *Cawthorpe*, 11 P. R. 355. All facts not in the statement of claim, on which the defendant means to rely should be set out: *Rule* 402. Where distinct grounds of defence are relied on, founded on separate and distinct facts, such facts should be stated separately and distinctly: *Rule* 405. Though a defendant is not taken to have admitted what he does not deny: see *Rule* 403, he should nevertheless make all proper admissions: *Rule* 400; otherwise he may have to bear the costs rendered necessary by the failure to admit: *Rule* 1189. The character in which the plaintiff sues: *Rule* 411, and the legality or sufficiency of a contract in point of law, if intended to be disputed, must be expressly traversed: *Rule* 413. In an action for the recovery of land the defendant need only state that he is in possession: *Rule* 416, unless he has some equitable ground to set up. Form.

There may be a plea to the jurisdiction: see *Rule* 271, *Dart* v. *Citizens Ins. Co.*, 11 P. R. 513.

Inconsistent pleas may still be used where applicable: *Re Morgan, Owen* v. *Morgan*, 35 Ch. D. 492; *e.g.*, in an action for money, a denial of the loan, and

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Rule 371.

plea that, if lent, it has been repaid or release given: *Barnicott* v. *Hann*, W. N. 1876, 24; 2 Charl. Ch. Ca. 39. A defence amounting to pleas of not guilty, and justification, may be properly pleaded: *Restell* v. *Steward*, W. N. 1875, 231, 1 Charl. Ch. Ca. 87. The offering of an apology, payment into Court and a justification may be pleaded together in an action for libel: *Hawkesley* v. *Bradshaw*, 5 Q. B. D. 302. This was not formerly allowed: see *Doyle* v. *Owen Sound Printing Co.*, 8 P. R. 69. But where payment into Court was pleaded together with a justification, in a libel action, and it was not clear from the pleading in respect of which particular part of the cause of action, the payment was made, the defence was struck out as embarrassing: *Fleming* v. *Dollar*, 23 Q. B. D. 388; and on *Rule* 633.

As a general rule, the defendants may deny the plaintiff's causes of action, and plead payment into Court in respect to the whole or any part of them: *Rule* 632; *Berdan* v. *Greenwood*, 3 Ex. D. 251, in which the decision in *Spurr* v. *Hall*, 2 Q. B. D. 615, was questioned. A defendant may plead "not guilty by Statute" where that defence is applicable: *Rule* 417; also grounds of defence arising after action brought: *Rule* 434, *et seq.*; but pleading in abatement is abolished: *Rule* 414.

As to the form of a counter-claim, see note to Rule 373.

When defence must be delivered.

371. Where a statement of claim is delivered to a defendant he shall deliver his defence, counter-claim ~~or demurrer~~ within 8 days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a Judge. J. A. Rule 160. *See* J. A. Rule 126.

Same as the Eng. R., 1875, O. 22, r. 1 (1883 R. 239), except that the Eng. R. has 10 days. The eight days will be counted from the time for appearance, where a statement of claim has been delivered with the writ, or before appearance: *Rule* 369 *c*. Long vacation is not reckoned in the eight days: *Rule* 484.

The time may be extended by consent: 478, which *Rule* should be in writing: *Ambroise* v. *Evelyn*, 11 Ch. D. 759. No order is then necessary; but if consent cannot be obtained, the Court will probably be liberal in granting further time. The motion for further time is made in Chambers on notice: *Wigle* v. *Harris*, 9 P. R. 276.

A defence put in, without leave, after the proper time but before judgment, cannot be treated as a nullity: *Gill* v. *Woodfin*, 25 Ch. D. 707. See also *Harding* v. *Lyons*, 13 L. R. Ir. 302; *Gibbings* v. *Strong*, 26 Ch. D. 66. See also notes to *Rules* 369 and 381; but where it is delivered after service of a notice of motion for judgment by default of pleading, the motion for judgment may nevertheless be proceeded with, and it is incumbent upon the defendant to move for leave to deliver the defence and stay the motion for judgment: *Potts* v. *Deane*, 11 L. R. Ir. 396. But see *Gibbings* v. *Strong*, 26 Ch. D. 66, where it was held that a defence delivered between notice of motion for judgment and the hearing could not be ignored, but the Court must exercise its discretion under all the circumstances: see *Montagu* v. *Land Corporation*, 56 L. T. N. S. 730, where, on motion for judgment, one week was given to defendant to discharge the judgment by default. Where the plaintiff proceeds under *Rule* 393 to note the defendant as being in default, no defence can be thereafter filed and therefore delivered (see *Rule* 398) without leave. Where the mode of trial had been appointed, and affidavits had been filed for the trial, a defence so delivered was struck out on motion of the plaintiff: *Wilson* v. *Noble*, 11 L. R. Ir. 546.

A defence delivered after the time, and after a motion for leave to deliver it had been refused, was set aside with costs: *Meehan* v. *Meehan*, 14 L. R. Ir. 301.

A defence delivered after the time, and upon the day when the case was to be heard on a motion for judgment, was held irregular and ordered to be struck

out, unless the defendant paid the costs of setting down the action and motion for judgment, within a limited time: *Snider* v. *Snider*, 11 P. R. 34. Rules 372, 373.

Where an order is made giving a further limited time to the defence, and providing that in default judgment may be signed, a judgment signed after default is regular, though no copy of the order is served: *Farden* v. *Richter*, 23 Q. B. D. 124.

By the practice in Chancery, as a general rule, the costs of a first application for further time were costs in the cause, but those of subsequent applications were ordered to be paid by the applicant: Dan. Pr., 5th ed. 643.

Where the time is extended a demurrer may be filed within the extended time: *Hodges* v. *Hodges*, 2 Ch. D. 112. Formerly, a defendant who obtained further time to answer was not at liberty to demur: see note to *Rule* 380.

See also notes to *Rules* 369, 381.

372. A defendant who has appeared in an action and stated that he does not require the delivery of a statement of claim and to whom a statement of claim is not delivered, may deliver a defence, counter-claim ~~or demurrer~~ at any time within 8 days after his appearance, unless such time is extended by the Court or a Judge. J. A. Rule 161. Where no statement of claim.

Except as to the time, the same as the Eng. R. 1875, O. 22, r. 2. The Rule of 1883, R. 240, is different.

In *Harrison* v. *Surrey Masonic Hall Co.*, and *Grimshaw, etc.* v. *McDowell*, 66 L. T. Jour. 277 (cited in Chitty Forms p. 116), it was held that where the defendant dispenses with the delivery of a statement of claim, he must deliver his defence within eight days from the time of appearance, otherwise judgment may be signed under *Rule* 719. These cases overruled *Hooper* v. *Giles*, W. N. 1876, 10; 1 Charl. Ch. Ca. 68 (see note to *Rule* 719).

373. A defendant in an action may (*x*) set up by way of counter-claim, against the claim of the plaintiff, any right or claim whether the same sound in damages or not. Set-off and counter-claim.

(*a*) A counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. J. A. Rule 127 (*a*).

This is a Rule made in furtherance of sec. 52 (7) of the Act.

(*x*) The original *Rule* following Eng. R. 1875, O. 19, r. 3, (1883, R. 199) had here the words "set off or"; and clause (*a*) commenced "Such set off or counter-claim shall" etc.

The alteration in the present *Rule* was made in consequence of what was said in *Chamberlin* v. *Chamberlin*, 11 P. R. 501, where it was held that what was really a set-off, was pleadable as a defence, and could only be set up as a defence, if it arose before the commencement of the action, and that pleading it in the form of a counter-claim made no difference. A counter-claim may set up any matter properly pleadable by counter-claim, though arising after the commencement of the action: *Ib.* and *Rule* 434; and consequently a set-off, if arising after action, may, under the present *Rule*, and in fact can only, be set up by way of counter-claim.

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Rule 373.

Other cases recognize that a set-off and counter-claim are quite distinct: see *Cutler* v. *Morse*, 12 P. R. 594; *Taggart* v. *Marcus*, 36 W. R. 469; and cases *infra*, p. 409, and on the subject of costs: see the notes to *Rules* 1170, 1172.

The effect of the original *Rule* seems to have been to enlarge the right of set-off, so as to make it extend to claims sounding in damages. The present *Rule* seems not to interfere with what was before the Jud. Act, 1881, capable of being pleaded as a set-off, but to enable a defendant to set up any cross claim whether sounding in damage or not, by means of a counter-claim.

Part of the benefit given by this section has been discussed under *Rule* 328. In addition to the class of cases there mentioned, the defendant is by the above sub-section enabled (subject to the discretion of the Court) to set up in an action brought against him, any claims whatever which he may have against the plaintiff, and under certain restrictions claims against other persons: see *Naylor* v. *Farrer*, 26 W. R. 809; *Besant* v. *Wood*, 12 Ch. D. 605; *Gray* v. *Webb*, 21 Ch. D. 802; *Fried* v. *Galloway*, 4 C. L. T. 191.

Former practice as to set-off.

It will be seen that a most important change has been made in the law relating to set-off, and cross-demands. Prior to the statutes of set-off: 2 Geo 2, cap. 22, sec. 13, and 8 Geo. 2, cap. 24, secs. 4, 5, where there were cross-demands unconnected with each other, the parties were put to their cross-actions. The former Act enabled "mutual debts" to be set-off against one another at law, and by the latter this was permitted though the mutual debts were of a different nature, that is, a bond debt could be set off against a simple contract debt. Under the bankruptcy law, set-off was permitted in cases in which it could not have been pleaded in an action at law. In Equity, set-off has been allowed in many cases not within the Statutes of set-off: see Story's Eq. Jur. ss. 14, 38, *et seq.*; *Lundy* v. *McCulla*, 11 Gr. 368; *Macbeth* v. *Smart*, 13 Gr. 332. The Statutes of set-off applied only where the set-off was of a legal debt, excluding equitable debts and unliquidated damages. The Judicature Act abolishes the distinction between legal and equitable debts; and the present *Rule* expressly authorizes the setting up of unliquidated demands as an answer to either liquidated or unliquidated demands, not merely by way of set-off, but so as to enable the defendant to obtain judgment in his favour for any balance, or for any such other relief as he may be entitled to, on the merits of the case: see note to *Rule* 375, and *Staples* v. *Young*, and *Horrocks* v. *Rigby*, there referred to. The effect of *The Judicature Act* would seem to be to abolish any distinction in effect between set-off and cross demands so far as the right to recover is concerned, though any cross demand which could not formerly be pleaded as a set-off must now be pleaded by a counter-claim.

A distinction has, however, been recognized which is still of importance in reference to the disposition of the costs where a counter-claim is set up, not by way of a defence against the plaintiff's cause of action. Mr. Pitt Lewis, in his work on County Court Practice, quoted with approval by Cockburn, C.J. in *Stooke* v. *Taylor*, 5 Q. B. D. 577, says:—"A set-off would seem to be of a different nature from a defence (*qu.* counter-claim) inasmuch as a set-off appears to shew a debt balancing the debt claimed by the plaintiff, and thus leaving nothing due to him; while a counter-claim, it would seem, consists of a cross-claim, not necessarily extinguishing or destroying the plaintiff's demand. In other words a set-off appears to consist of a defence to the original claim of the plaintiff, a counter-claim is the assertion of a separate and independent demand, which does not answer or destroy the original claim of the plaintiff. The right to rely on a set-off has long existed. The right to set up a counter-claim was first given by the Judicature Acts." See also *Gathercole* v. *Smith*, 7 Q. B. D. 626; *Pellas* v. *Neptune Marine Ass. Co.*, 5 C. P. D. 34; and notes to *Rule* 1170.

Under the Jud. Act.

The terms of the present *Rule* are wide enough to allow a defendant to set up any cross demand, whether connected with the plaintiff's claim or not, and whether it sounds in damages or not; but the *Rule* must be read in connection with *Rules* 374, 423, providing for the exclusion of counter-claims and the compulsory amendment of pleadings in the discretion of the Court: *Gray* v. *Webb*, 21 Ch. D. 802.

The *Rule* is only one of procedure, designed to prevent the necessity of bringing a cross-action where a cross demand can conveniently be tried in the original action. It does not give rights as against third parties, or confer rights of set-off between the parties which did not exist before. Thus claims against a Company held by a director and *bonâ fide* for value assigned to a third person, were held not subject to be set-off against damages payable under an order afterwards obtained by the liquidator of the Company against the director: *Re Milan Tramways Co. Ex. p. Theys*, 22 Ch. D. 122; affirmed in appeal, 25 Ch. D. 387: see *Mersey Steel, etc. Co.* v. *Naylor*, 9 Q. B. D. 648; 9 App. Cas. 434. In an action for calls by the liquidator of a Company, a claim by a shareholder against the Company was not allowed to be set up: *Re Whitehouse*, 9 Ch. D. 595. A set-off claimed against arrears of pension, against which, by statute, no set-off was permissible, was disallowed: *Gathercole* v. *Smith*, 7 Q. B. D. 626. **Rule 378.**

A defendant cannot set-off a debt due by the plaintiff to him and another person in equal shares: *Bowyear* v. *Pawson*, 6 Q. B. D. 540; see also *Federal Bank* v. *Harrison*, 10 P. R. 271; 20 C. L. J. 194.

In an action by a receiver over a landlord's estate for rent due the landlord, the defendant set-off money due by the landlord. It was held that the action by the receiver being in the interest of incumbrancers on the lands, the set-off could not be relied on: *Mullarkey* v. *O'Donohue*, 16 L. R. Ir. 365.

The mode in which a defendant proceeds to obtain the cross relief contemplated by the *Rule* is by counter-claim, which has been defined as "a pleading where a defendant claims some remedy or relief either against the plaintiff alone, or against the plaintiff together with some other person or persons, whether already parties to the action or not: see Haynes Chy. Pr. 77 and *per* Blackburn, J., in *Treleven* v. *Bray*, 45 L. J. Chy. 115. Counter-claim.

A defendant is not bound to make his cross claims by counter-claim, but may assert them by cross action: *Adamson* v. *Tuff*, 44 L. T. N. S. 420; see note to sec. 52 (7) of the Act *supra* p. 40; *Neale* v. *Clarke*, 4 Ex. D. 295.

But where an action and cross action have been brought there is power, in a proper case, to stay one, and compel the plaintiff in it to proceed by way of counter-claim in the other action: see *Irwin* v. *Sperry*, 11 P. R. 229; *Conmee* v. *C. P. Ry. Co.*, *Ib.* 149.

The Courts should give a liberal interpretation to these *Rules*, which were no doubt passed with the intention of settling in one litigation all questions arising out of the subject matter of the dispute: *per* Brett, L.J., in *Turner* v. *Hednesford Gas Co.*, 3 Ex. D. 151.

It is of the essence of a counter-claim that it claims relief against the plaintiff. There can be no counter-claim against a co-defendant alone: *Warner* v. *Twining*, 24 W. R. 536; *McLay* v. *Sharp*, W. N. 1877, 216; *Benecke* v. *Craddock*, W. N. 1881, 54; — *Shephard* v. *Beane*, 2 Ch. D. 223, is not to be considered an authority: see *Harris* v. *Gamble*, 6 Ch. D. 748; *Furness* v. *Booth*, 4 Ch. D. 586. So there can be no counter-claim against a third party, unless a claim is made against plaintiff along with such third party: *Dear* v. *Sworder*, 4 Ch. D. 476; *Romann* v. *Brodrecht*, 9 P. R. 2; *Barber* v. *Blaiberg*, 19 Ch. D. 473; and *Rule* 376.

Where a counter-claim is brought against a plaintiff alone, it is not necessary that the claim of the defendant should be connected with the plaintiff's original cause of action; it may relate to any matter which might be the subject of an independent suit: *Quin* v. *Hession*, 40 L. T. N. S. 70; where it was held that the words, "relating to or connected with the original subject of the cause or matter," in sec. 52, sub-sec. 7, of the Act, only qualify that portion of the section with which they are in immediate connection, viz., a counter-claim which seeks relief against a third party as well as the plaintiff. But the defendant may not set up by way of counter-claim against the claim of a plaintiff, suing only in a distinct personal character, claims against him personally, and also as executor: *Macdonald* v. *Carington*, 4 C. P. D. 28; and see *Rule* 344. Against plaintiff.

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Rule 379. Where a counter-claim is made against a person other than the plaintiff it is subject to certain restrictions:

Against the plaintiff and others.

(1) The relief sought to be obtained against him must relate specifically to, or be connected with, the subject matter of the action: *Padwick* v. *Scott*, 2 Ch. D. 736; see *Harris* v. *Gamble*, 6 Ch. D. 748; *Quin* v. *Hession*, and *Barber* v. *Blaiberg*, *supra*.

(2) The counter-claim must, as before mentioned, claim relief against the plaintiff along with such other perso : *Rule* 376; *Treleven* v. *Bray*, 45 L. J. Chy. 113; 1 Ch. D. 176; *Dear* v. *Sworder*, and *Harris* v. *Gamble*, *supra*; *Turner* v. *Hednesford Gas Co.*, 3 Ex. D. 145. Where relief is not claimed against the third party along with the plaintiff, the proceedings must be under *Rule* 328: *Central African Trading Co.* v. *Grove*, 40 L. T. N. S. 540; 48 L. J. Ex. 510. It is not enough that the counter-claim be in form, if it be not in substance, for relief against the third person along with the plaintiff; thus where the matter of the counter-claim may be set up against the plaintiff as a defence without the third party, and the plaintiff is not interested in what is claimed from the third party, the counter-claim is improper: *Romann* v. *Brodrecht*, 9 P. R. 2; *Torrance* v. *Livingstone*, 10 P. R. 29.

Furthermore, it has been held, perhaps under the terms of original *Rule* 167 (now 379), that a third party cannot counter-claim against the defendant who brought him in: *Street* v. *Gover*, 2 Q. B. D. 498; but, in *Green* v. *Thornton*, 9 C. L. T. 139, a third party, made with the plaintiff a defendant to a counter-claim, was allowed to amend a reply to the defendant's counter-claim, by asserting another counter-claim against the defendant: see *Toke* v. *Andrews*, 8 Q. B. D. 428; *Rule* 379 and notes. In *Evans* v. *Buck*, 4 Ch. D. 432, it was held that a person cannot be brought in as a defendant to a counter-claim against whom relief is claimed in one of two inconsistent alternatives: see note to *Rule* 301.

A defendant is not entitled to set up in his counter-claim a hypothetical case for relief against a third party: *Sackville* v. *Pacey*, 18 C. L. J. 14.

A defendant may not serve a third party out of the jurisdiction with a counter-claim: *Potters* v. *Miller*, 31 W. R. 858. See, however, *Re Luckie*, W. N. 1880, 12; and notes to *Rule* 271.

Where a defendant counter-claims against plaintiff as liable alone, the plaintiff cannot have added another person who, he alleges, is also liable as to a part of the counter-claim: *Eyre* v. *Moreing*, W. N. 1884, 58.

Counter-claim only where a separate action would lie.

In any case, a counter-claim can only be set up where an action might be brought. A counter-claim has therefore been disallowed where it set up a debt alleged to have been incurred by the plaintiff when an infant, and not ratified under Lord Tenderden's Act: *Rawley* v. *Rawley*, 1 Q. B. D. 460. So in an action by an administrator for the balance of an intestate's banking account, a debt due from the intestate on a note which became due after his death was not allowed to be set up, because an administration order had been before action obtained, of which the defendants had notice; and under 23 & 24 Vict. c. 38, s. 14, Equity, would restrain the defendant from proceeding on the note, leaving him to prove for it in the administration proceedings: *Newall* v. *National Provincial Bank of England*, 1 C. P. D. 496; 1 Charl. Ch. Ca. 82; see also *Monteith* v. *Walsh*, 10 P. R. 162. So also, where the claim set up in the counter-claim had been extinguished by the obtaining of a judgment in another Division, which judgment the defendant was not at liberty to enforce without leave, it was disallowed: *Birmingham Co. Estates* v. *Smith*, 13 Ch. D. 506; see also *Beddall* v. *Maitland*, 17 Ch. D. 174, where a counter-claim for damages for forcible entry under the Statute of Richard II. failed, because that Act gave no civil remedy. So also, where a counter-claim was by a surety against the plaintiff and third parties (the debtors) to require the plaintiff to first proceed against the debtors (they being able to pay) and for indemnity from the debtors, it was disallowed: *Federal Bank* v. *Harrison*, 10 P. R. 271.

See also *Re Milan Tramways Co., ex parte Theys*, 22 Ch. D. 122, affirmed in appeal 25 Ch. D. 587; followed in *Re Gillespie*, 54 L. J. Q. B. 342; *Gathercole* v. *Smith*, 7 Q. B. D. 626; *Beatty* v. *Mair*, 10 L. R. Ir. 208.

Rule 373. Counter-claim, how far an independent action.

Whether a counter-claim is to be considered merely as a defence, or as something like a separate action, has been much discussed. It is not an action: *Irwin* v. *Brown*, 12 P. R. 639, though by the terms of the present *Rule* it has the same effect as a statement of claim in a cross-action, to enable judgment to be given on both claim, and counter-claim; see *Lumsden* v. *Winter*, 8 Q. B. D. 654, and it was early viewed as in the nature of an independent action in dealing with the question of the costs of it: see *Stooke* v. *Taylor*, 5 Q. B. D. 577; *Baines* v. *Bromley*, 6 Q. B. D. 695 and notes *supra* p. 406, and to *Rule* 1170; *Waring* v. *Pearman*, 32 W. R. 429; 350 L. T. N. S. 633.

It has since been so viewed for other purposes. For instance, in *Beddall* v. *Maitland*, 17 Ch. D. 174, it was held by Fry, J., that a counter-claim is an independent action, and relief may be given upon it in respect of a cause of action that arose after the issue of the writ in the original action; and this view seems now established in England by decisions: see *McGowan* v. *Middleton*, 11 Q. B. D. 469; see also *Chamberlain* v. *Chamberlin*, 11 P. R. 501, and all doubt is removed in Ont. by *Rule* 434.

In *Ellis* v. *Munson*, W. N. 1876, 253; 35 L. T. N. S. 585, the Court of Appeal had previously held that such a counter-claim should, under Order 16, state that it was founded on facts which have arisen since the action was brought; and in 1877, in *Original Hartlepool Collieries Co.* v. *Gibb*, 5 Ch. D. 713, Jessel, M.R, had expressed the opinion that damages claimed by counter-claim must be limited to the date when the writ issued.

In accordance with the principle of *Beddall* v. *Maitland*, it has further been now decided (and the decision was confirmed in England by an express Rule: Eng. R. 1883, 249), that the discontinuance of an action by the plaintiff does not put an end to the counter-claim: *McGowan* v. *Middleton*, 11 Q. B. D. 464, overruling *Vavasseur* v. *Krupp*, 15 Ch. D. 474; that a counter-claim may be revived on the death of the defendant, independently of the revivor of the action by the plaintiff: *Andrew* v. *Aitken*, 30 W. R. 701; 46 L. T. N. S. 689; and that a plaintiff may in his reply to a counter-claim set up a counter-claim against defendant: *Toke* v. *Andrews*, 8 Q. B. D. 428; see also 19 C. L. J. 162.

An order will not, however, be made upon the counter-claim until the original claim is dealt with: *Aitkin* v. *Dunbar*, 46 L. J. Chy. 489; but whether issues raised by the claim and counter-claim shall be tried together is a matter of convenience: *Re Woodfine, Thompson* v. *Woodfine*, 38 L. T. N. S. 753; 47 L. J. Chy. 832.

Where two or more plaintiffs sue for a joint claim, the defendant may set up separate claims against the plaintiffs severally: *Manchester & Sheffield Railway Co.* v. *Brooks*, 2 Ex. D. 243.

It is not necessary that the amount claimed by the defendant should be equal to the claim of the plaintiff: *Mostyn* v. *West Mostyn Co.*, 1 C. P. D. 145.

Where the issues of fact in the claim and counter-claim were identical, it was held that the plaintiff was not entitled to adduce in reply to the counter-claim fresh evidence which would have been material to the original case: *Green* v. *Sevin*, 13 Ch. D. 589: see also, as to the evidence where claim and counter-claim are tried together, *Re Woodfine, Thompson* v. *Woodfine*, 38 L. T. N. S. 753.

A counter-claim may be set up by the Crown in a petition of right: *Thomas* v. *The Queen*, W. N. 1875, 218; 1 Charl. Ch. Ca. 71.

Striking out counter-claims.

In order to prevent the abuse of the extensive powers of counter-claim given to defendants, the Court has a discretion under *Rule* 374 to consider whether the counter-claim should be proceeded with or struck out, leaving the defendant to make it the subject of an independent action.

There is jurisdiction to stay proceedings in a cross-action and allow the claim to be set up by counter-claim in another action, yet it should only be done when the points at issue are the same: *Adamson* v. *Tuff*, 44 L. T. N. S. 420; see *Irwin* v. *Sperry*, 11 P. R. 229; *Commee* v. *C. P. Ry.*, 11 P. R. 149.

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In respect to security for costs also, a defendant who sets up a counter-claim becomes to some extent in the position of a plaintiff in a cross-action: *Winterfield* v. *Bradnum*, 3 Q. B. D. 324; and, when out of the jurisdiction, was in one case ordered to give security for costs: *The J. Fisher*, 2 P. D. 115; but a defendant will not be entitled to security where his counter-claim is in respect of the same subject-matter as the plaintiff's claim: *Mapleson* v. *Masini*, 5 Q. B. D. 144; see also *Shepherd* v. *Hayball*, 13 Gr. 681; and where he admits the plaintiff's claim and sets up a counter-claim founded on a distinct claim, he cannot demand security for costs from a plaintiff if out of the jurisdiction: *quære*, however, where he sets up a counter-claim for an amount greater than the plaintiff's claim: see *Winterfield* v. *Bradnum*, *supra*; see also notes to *Rule* 1245.

Form.

Form of Counter-Claim.—A counter-claim and statement of defence must be included in the same pleading, and the same rules apply in many respects to a counter-claim as to a statement of claim: see *Holloway* v. *York*, 25 W. R. 627.

A counter-claim is subject to the same rules as a claim in respect to the causes of action which may be joined, and therefore a counter-claim for recovery of land with an independent claim for damages was disallowed as contrary to *Rule* 341: *Compton* v. *Preston*, 21 Ch. D. 138.

By the express terms of the *Rules*, the relief prayed for by way of counter-claim must be specifically stated: *Rule* 404; and the facts supporting each cause of action are, as far as may be, to be kept distinct: *Rule* 405; but a counter-claim under the Ontario Acts and *Rules* is not governed by as strict regulations as in England. Rules 10 and 20 of the English Order 19 (of 1875) were not adopted here. Rule 10 provided that "where any defendant seeks to rely upon any facts as supporting a right of set-off or counter-claim, he shall, in his statement of defence, specifically state that he does so by way of set-off or counter-claim." Under this Rule a defendant is not allowed in England to mix the facts supporting his counter-claim, indiscriminately with those constituting his defence. Where a pleading was headed "statement of defence and counter-claim," and set forth in thirteen paragraphs facts on which the defendant relied for his defence without making any reference to counter-claims, and concluded in the fourteenth paragraph with a claim by way of counter-claim for damages," it was held by Fry, J., to be not a proper counter-claim and was dismissed: *Crowe* v. *Barnicot*, 6 Ch. D. 753; see also *Hillman* v. *Mayhew*, 24 W. R. 485; but the same Judge afterwards qualified his decision in another case, and held that it is not necessary that a set-off or counter-claim should have a separate heading, or be separated by a marked line from the defence, or that paragraphs containing the facts relied on should be separately numbered: *Lees* v. *Patterson*, 26 W. R. 399; 7 Ch. D. 866.

The necessity for strict compliance with Rule 10 of the English Orders may have been partly due to the principle of the English system in regard to admissions (see note to *Rule* 403) and to Rule 20, which required the plaintiff to deal specifically in his reply with each allegation in the counter-claim of which he did not admit the truth.

The result under the English Act is, therefore, that though the statement of defence and counter-claim may be combined in the same document, they are quite distinct pleadings. The paragraphs of the document, may be numbered consecutively; and the counter-claim need not be separated from the defence by any marked line or separate heading; but it is necessary that all the facts which the defendant relies upon by way of counter-claim should appear in that part of the document which in fact constitutes the counter-claim; and it is not enough if the facts be found scattered through the defence and counter-claim. If the facts relied on by way of defence are also relied upon to support the counter-claim, they may be incorporated in the counter-claim by reference to the paragraph in which they are set forth in the defence: *Birmingham Estates Co.* v. *Smith*, 13 Ch. D. 506.

The result under the Ontario Act would seem to be, that it is not necessary, by separate numbering of paragraphs, headings, or otherwise, to distinguish the defence from the counter-claim. It should be sufficient if the facts on which the defendant relies, whether by way of defence or counter-claim, are

concisely stated and without prolixity: *Rule* 399, keeping, as far as may be, separate and distinct, the facts relating to several and distinct causes of action relied on by way of counter-claim: see *Rule* 405. A prayer for the counter-relief desired should be added: *Rule* 404. Then by analogy to the decision in *Watson* v. *Hawkins*, 24 W. R. 884, if the facts stated show either a defence, or a right to any relief prayed for by way of counter-claim, the defendant should be entitled to the benefit of such defence or to such relief. If relief, by way of counter-claim, whether general or otherwise, is not asked, it will be taken that it is not wanted: *Holloway* v. *York*, *supra*. A form of counter-claim is given in the App. No. 84. Rule 374.

As to the time for delivering a counter-claim in the case of a person already a party to the cause: see *Rule* 376, and in the case of a third party: *Rule* 377.

374. Where a defendant sets up a counter-claim, if the plaintiff, or any other person named in manner aforesaid as party to such counter-claim, contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time [before trial] apply to the Court or a Judge for an order that such counter-claim may be excluded; and the Court or a Judge may on the hearing of such application, make such order as shall be just. J. A. Rule 168. Striking out counter-claim.

Instead of "before trial" the original *Rule* had "within three weeks from the delivery of statement of defence." The words "before trial" come from *Rule* 127, last clause, which is here consolidated with *Rule* 168. The Eng. R. 1875 O. 22, r. 9 (1883, R. 248), has "before reply;" otherwise the *Rules* are the same.

An application under this *Rule* may, in England, be made in Court: see *Dear* v. *Sworder*, 4 Ch. D. 476; *Huggons* v. *Tweed*, 10 Ch. D. 359; but, as a general thing, should be made in Chambers: see *Naylor* v. *Farrer*, 26 W. R. 809; and Coe's Prac. in Cham. 78. It is to be made before trial. In *Lynch* v. *Macdonald*, 37 Ch. D. 22, it was said that it was too late to apply after reply, (the period fixed by the Eng. Rule,) but doubtless also at the trial the Judge has power to deal with the pleadings and the action as he may deem proper: see *Barber* v. *Blaiberg*, 19 Ch. D. 473.

For the principles upon which the Court acts in excluding counter-claims: see *Naylor* v. *Farrer*, *supra*; *Padwick* v. *Scott*, 2 Ch. D. 736; *Dear* v. *Sworder*, 4 Ch. D. 476; *Harris* v. *Gamble*, 6 Ch. D. 748; *Birmingham Estates* v. *Smith*, 13 Ch. D. 506; *Rotherham* v. *Priest*, 28 W. R. 277; also the examples *infra*.

The decision of a Judge under this *Rule*, if appealed from, will rarely be interfered with: *Huggons* v. *Tweed*, 10 Ch. D. 359.

In *Naylor* v. *Farrer*, Jessel, M.R., said that, in his opinion, under order 19, Rule 3, a defendant might set up any number of counter-claims. There was no limit laid down in that Rule either to their number or nature; but it was left to the discretion of the Court or a Judge to do so, otherwise fifty causes of action of the most diverse nature might be joined together and set up, and witnesses of all kinds called in support of each. How would it be possible for the Court to try all those in one action? There must also be some limit to the character of the claim set up. Suppose, for instance, an action for account brought by a surviving partner against the widow, who was also the executrix of the other, to which the widow set up a counter-claim for damages for breach of promise of marriage, could that be said to be a counter-claim which could be conveniently disposed of in the pending action? It was impossible. The Judge must exercise the discretion given to him by the Rule in allowing or rejecting a counter-claim.

In that case, the matters set up by defendant were totally unconnected with the partnership, the subject of the plaintiff's claim. In his Lordship's opinion

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they could not be conveniently disposed of as a counter-claim, but were fit subjects for a cross-action. No injustice, he said, would be done to the defendant by striking out the counter-claim, because his Lordship would not be allowing the plaintiff, as in some cases, to get money from the defendant which he might not be entitled to, and which the defendant might not afford to spare; for the defendant would be able to get his money in the cross-action before the plaintiff, who would only get an order for taking accounts, could get any order for payment in the present action.

In *Bartholomew* v. *Rawlings*, W. N. 1876, 56; 2 Charl. Ch. Ca. 32, Archibald, J., said, "There is no doubt whatever that a defendant is entitled to set up any counter-claim that is not so incongruous as to be incapable of being conveniently tried with the original claim." The question of the convenience of trial depends greatly upon whether the subject of the counter-claim is germane to the subject of the action. But though a counter-claim be not in relation to matters foreign to the subject of the action, still the fact that it will necessitate a long account, and thus unduly delay the action, may furnish grounds for excluding it: *Gray* v. *Webb*, 21 Ch. D. 802.

In *Canadian Securities Co.* v. *Prentice*, 9 P. R. 329, Cameron, J., said: "I have assumed that allowing or disallowing a counter-claim where third parties are to be brought in, is matter of discretion, not of course to be exercised arbitrarily, but upon consideration of all the circumstances, including rights involved in the counter-claim and the question of delay and convenience of trial. In jury cases there can be no question that much difficulty may arise by the mixing up of different claims—if I may use the term "mixing" in such connection—and cross or counter-claims in the same action: and unless the clear legal rights of the defendant for his protection against the plaintiff's action would seem to require it, counter-claims ought not to be favoured."

A counter-claim for damages arising out of the same subject matter or contract as the plaintiff is proceeding upon, is therefore in general, proper. So also a counter-claim in the nature of a cross demand, pecuniary or otherwise, unconnected with the subject matter of the plaintiff's claim, provided there is no inconvenience in having a trial of both in the same action.

Counter-claims allowed.

Counter-Claims allowed.—Examples:—Action by a stockbroker for price of shares. Counter-claim for fraudulent misrepresentations as to the value of the shares: *Anon*, 1 Charl. Ch. Ca. 73; *Evans* v. *Gann*, W. N. 1875, 199; 1 Charl. Ch. Ca. 70; see also *Lee* v. *McMahon*, 2 Ont. 654.

Action for price of iron. Counter-claim for inferiority of iron: *Anon*, 1 Charl. Ch. Ca. 73; or non-delivery of part: *Midland Ry. Co.* v. *Ontario Rolling Mills*, 2 Ont. 1.

Action for price of coals. Counter-claim for non-delivery of balance of coals: *Norton* v. *Merriman*, W. N. 1875, 219; 1 Charl. Ch. Ca. 80; see *Fulton* v. *U. C. Furniture Co.*, 32 C. P. 422; 20 C. L. J. 11.

Action for negligent construction of ship. Counter-claim for extras due beyond the contract price: *Trinacria* v. *Richardson*, W. N. 1875, 219; 1 Charl. Ch. Ca. 74.

Action by builder. Counter-claim for breach of covenant in building contract: *Trevena* v. *Watts*, W. N. 1875, 250; 1 Charl. Ch. Ca. 79.

Action by lessor for rent. Counter-claim for an alleged debt and damages for non-performance of lessor's agreement: *Atwood* v. *Miller*, W. N. 1876, 11; 1 Charl. Ch. Ca. 82; see *Atkinson* v. *Ellison*, W. N. 1875, 199; 1 Charl. Ch. Ca. 69.

Action of ejectment for non-payment of rent. Counter-claim for rectification of lease so as to state terms by which no rent would be due: *Carew* v. *Christopher*, 10 L. R. Ir. 38.

Action of ejectment by heir against widow. Counter-claim for dower: *Glass* v. *Glass*, 9 P. R. 14.

Action for recovery of land and *mesne* profits. Counter-claim for damages for illegal distress against plaintiff and his bailiff: *Dockstader* v. *Phipps*, 9 P. R. 204.

A counter-claim was allowed claiming against an assignee a set-off of damages due from the assignor: *Young* v. *Kitchen*, 3 Ex. D. 127; *Exchange Bank* v. *Stinson*, 32 C. P. 158; see *Pellas* v. *Neptune Marine Ass. Co.*, 5 C. P. D. 34. **Rule 374. Counter-claims allowed.**

Where A. sued B. on a bill and B. defended by alleging that A. was really trustee for C. who owed B. money, B. was allowed to bring in C. and claim set-off: *Macdonald* v. *Bode*, W. N. 1876, 23; but this case was disapproved of in *Tugart* v. *Marcus*, 36 W. R. 469; see *infra*, p. 414.

Action to declare a will. Counter-claim propounding two earlier wills, under which defendant claimed in the event of the last in date being invalid *Appleman* v. *Appleman*, 12 P. R. 138.

Action by an executor for detention of the goods of his testator. Counter-claim for funeral expenses paid by the defendant and a debt due to him from the testator before his death: *Watkin* v. *Newcomen*, 1 Cab. & El. 113.

Action for the recovery of land. Counter-claim for damages in respect of a trespass by the plaintiff on the lands in question and for an assault: *Goring* v. *Cameron*, 10 P. R. 496.

Action by executors to charge a married woman's estate with a debt to their testator. Counter-claim by her and her husband, also a defendant, for money belonging to the wife, not part of her separate estate, and for chattels in the possession of the testator at his death, and alleged to be the property of the husband: *Hodson* v. *Mochi*, 8 Ch. D. 569.

Action by *cestuis que trustent* against a surviving trustee to make good purchase money of testator's share of a partnership business, allowed to remain outstanding. Counter-claim to be indemnified by all *cestuis que trustent* including the plaintiffs, as the retention of the money by the surviving partner was by consent of testator's children: *Re Holmes*, *Wright* v. *Weatherhead*, W. N. 1883, 110.

Action propounding will of defendant's wife, who had obtained a protection order. Counter-claim to set aside the protection order as fraudulent, pronounce against the will, and for letters of administration: *Mudge* v. *Adams*, 50 L. J. Pro. 49; 17 C. L. J. 369.

A mortgagor was allowed to set up, in a foreclosure suit, a claim to open signed accounts: *Eyre* v. *Hughes*, 2 Ch. D. 148.

A County Court judgment was allowed to be set off against a judgment of a Superior Court: *Sandys* v. *Louis*, W. N. 1875, 249; 1 Charl. Ch. Ca. 81.

Action by a trustee in Bankruptcy for unpaid price of a chattel purchased from the bankrupt. Counter-claim for fraudulent representation made by the bankrupt on the sale: *Jack* v. *Kipping*, 9 Q. B. D. 113.

M. and C. are partners with B. in London and Honduras; the two firms are separate. Actions by M. and C. against the London firm as agents of the Honduras firm for an account. B. had a decree in Honduras for the taking of partnership accounts there, and the London firm asked by counter-claim for the accounts of the Honduras firm to be taken: *Mutrie* v. *Binney*, 35 Ch. D. 614; 36 W. R. 131.

On the other hand, counter-claims will not be allowed to be set up which cannot be the subject of an action: see *Rawley* v. *Rawley*, and other cases, p. 408, or which raise questions not capable of being conveniently tried in the action. **Counter-claims not allowed.**

Counter-Claims Disallowed.—Examples.—In an action of assault and battery, Quain, J., said that he would not allow a counter-claim to be set up for seduction of the defendant's daughter: *Cappeleus* v. *Brown*, W. N. 1875, 231; 1 Charl. Ch. Ca. 77.

Action for assault. A counter-claim for breach of agreement to repair a house was struck out, though an endeavour was made to connect the causes of action by showing that the parties were talking about the state of the house at the time of the assault: *Lee* v. *Colyer*, W. N. 1876, 8; 1 Charl. Ch. Ca. 86.

Action for libel consisting in the circulation of a letter by defendant among the shareholders of a colliery company. The plaintiff was one of the

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Rule 375. Counter-claims not allowed.

directors in the company, who were charged in the letter with conspiracy and fraud. Counter-claim for damages for loss sustained in respect of shares bought on false representations. Lindley, J., said: "This is one of those cases where it would be very difficult to keep the jury from mixing up the two claims." The counter-claim was therefore struck out without prejudice to any action defendant might bring, and the plaintiff was put on terms not to issue execution on any judgment he might obtain without leave of the Court or a Judge: *Nicholson* v. *Jackson*, W. N. 1876, 38; 2 Charl. Ch. Ca. 37.

Action for the specific performance by S. of an agreement for purchase by him of certain patent rights. H. and N., who were made co-defendants as claiming some interest in the subject-matter of the contract, alleged that the plaintiff had agreed to sell to them, and not to S., and that they had afterwards agreed to sell to S. By counter-claim H. and N. asked for specific performance by the plaintiff of his agreement with them, and by S. of his subsequent agreement with them. The counter-claim was excluded: *McLay* v. *Sharp*, W. N. 1877, 216.

Action against trustees of a settlement for breach of trust. Counter-claim against the husband of a plaintiff (also a plaintiff) for £45, due on a bill of exchange: *Fendall* v. *O'Connell*, 52 L. T. N. S. 538.

Action against an indorser on a promissory note. Defence, that it was to be paid out of a certain agency in which the defendant and the maker of the note were engaged, and that the plaintiff by libel and slander of the defendant had prevented that business from going on. Counter-claim for damages for the libel and slander: *Central Bank* v. *Osborne*, 12 P. R. 160.

Action of trover and for goods sold and delivered. Defendant was not allowed to set-off a claim against a third party, though such third party was the principal of the plaintiff: *Tagart* v. *Marcus*, 36 W. R. 469.

Action for foreclosure. Counter-claim for damages by reason of false and depreciative statements in regard to the value of the mortgaged premises: *Odell* v. *Bennett*, 13 P. R. 10; see also *Lynch* v. *Macdonald*, 37 Ch. D. 227.

Action to recover land for non-payment of rent. Counter-claim not connected with plaintiff's demand, in the absence of special circumstances disallowed: *Hildige* v. *O'Farrell*, 8 L. R. Ir. 158.

Action by A. against B. for trover of goods which C. assigned by bill of sale to A., and which B. had seized. Counter-claim by B. alleging a bill of sale from C. to him and claiming relief against C. upon it. So far as claim against C. was concerned, it was held not sufficiently connected with the original cause of action: *Barber* v. *Blaiberg*, 19 Ch. D. 473.

Action for specific performance by vendor against purchaser. Counter-claim for a comparatively small amount of money owing, as the result of an account, by plaintiff to defendant, and which the latter claimed to set-off against the purchase money. Counter-claim excluded as irrelevant to original claim and because it would be inexpedient to try the two claims together, and would unduly delay the action to investigate the account: *Gray* v. *Webb*, 21 Ch. D. 802.

Action by liquidator for calls against a newspaper proprietor. Counter-claim for price of advertisements and damages: *Government Security Invest. Co.* v. *Demfrey*, 50 L. J. Q. B. 199.

Action for damages for negligence. Counter-claim for libel: *McLean* v. *Hamilton Street Ry. Co.*, 11 P. R. 193.

Where a counter-claim is not excluded, it is still a question of convenience and in the discretion of the Court, whether the action and counter-claim should be tried together or separately: *Re Woodfine, Thompson* v. *Woodfine*, 47 L. J. Chy. 832; 38 L. T. N. S. 753.

Judgment for balance of counter-claim.

375. Where in any action a counter-claim is established against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for

the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case. J. A. Rule 169. Rule 376.

Same as the Eng. R. 1875, O. 22, r. 10 (1883, R. 250).

"The balance in favour of the defendant;" these words mean the balance upon the hearing of the action: *Rolfe* v. *McLaren*, 3 Ch. D. 106. Judgment upon the counter-claim may give the defendant complete relief as in an independent action, by ordering payment of any balance found in his favour: *Staples* v. *Young*, 2 Ex. D. 324; or by awarding to him such other relief as he may be entitled to. In *Horrocks* v. *Rigby*, 26 W. R. 714, a defendant, who had purchased the entirety of a leasehold, resisted a claim against him for specific performance of a contract for sale of a moiety of the leasehold; he was also mortgagee, and in the latter capacity, as alternative relief by way of counter-claim, he called upon the plaintiff to redeem him, and it was held that he was so entitled, with his costs as of a foreclosure suit.

As to costs, where a balance is found in favor of the defendant, and in other cases of claims and counter-claims tried together, see *Staples* v. *Young*, *supra*; *Blake* v. *Appleyard*, 3 Ex. D. 195; *Potter* v. *Chambers*, 4 C. P. D. 69 and 457; *Chatfield* v. *Sedgewick*, *ib.*, 459; *Baines* v. *Bromley*, 6 Q. B. D. 197, 691 and notes to *Rule* 1170.

Where the plaintiff claimed £49 12s. and defendant admitted the claim and counter-claimed for £75, and judgment was given for the plaintiff in his claim and for defendant in £40 on his counter-claim, it was ordered that the plaintiff should have costs of his claim and the defendant costs of his counter-claim, which was interpreted to mean that the plaintiff should have costs up to the delivery of their defence, and the defendant his costs after that time: *Bowker* v. *Kesteven*, 47 L. T. N. S. 545.

376. Where a defendant sets up any counter-claim which raises questions between himself and the plaintiff along with any other person or persons, he shall [entitle it as a statement of claim] setting forth the names of all the persons who, if such counter-claim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver his counter-claim to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff. J. A. Rule 164. Where counter-claim affects third persons.

The original *Rule* 164, instead of the words in brackets, had "add to the title of his defence a further title similar to the title in a statement of claim," following the Eng. R. 1875, O. 22, r. 5 (1883, R. 244).

For the practice where persons not already parties to the action are made defendants to the counter-claim: see note to *Rule* 373, and *Verney* v. *Thomas* 36 W. R. 393; 58 L. T. N. S. 20.

Where defendant in an action on a note shewed that the note had been transferred to the plaintiffs to secure a debt of the payee, one T. N., to them, which debt had been satisfied since the commencement of the action, and the defendant swore that he had a good defence on the merits against T. N. it was held that this *Rule* had no application, but that the plaintiffs admitting these facts were entitled to their costs under *Rule* 440, and the cause of action having devolved upon T. N., he was entitled to continue it by taking out an order under *Rule* 622: *Oshawa Cabinet Co.* v. *Note*, 18 C. L. J. 60.

A third person made a defendant to a counter-claim is not entitled to enter an appearance until he has been served with the counter-claim; and if he appears without having been so served, the appearance may be discharged on motion by the plaintiff in the counter-claim: *Fraser* v. *Cooper*, 23 Ch. D. 685.

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Rules 377-379.

Where, in an action for the price of iron, the defendant set up a counter-claim for a deduction, which he had had to allow a purchaser, owing to the inferiority of the quality of the iron, it was held unnecessary to add the purchaser's name to the title of the action: see *Anon*, 60 L. T. Jour. 66; 1 Charl. Ch. Ca. 85, *per* Lush, J., who said Order 22, Rule 5 (corresponding to the present *Rule*), does not apply to such a case: see also *Williams* v. *Wright*, W. N. 1875, 232.

Service of counter-claim on third party.

377. Where any such person as in the last preceding Rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the counter-claim, and such service shall be regulated by the same rules as are hereinbefore contained with respect to the service of a writ of summons, and every counter-claim so served shall be indorsed in the Form No. 19 in the Appendix or to the like effect. J. A. Rule 165.

Same as the Eng. R. 1875, O. 22, r. 6, (1883, R. 245).

For the *Rules* in respect to service of writs of summons, see Nos. 225 and 272.

It was held in *Fraser* v. *Cooper*, 23 Ch. D. 685, that a person not a party when made a defendant to a counter-claim is not entitled to appear gratis.

Appearance by third party.

378. Any person not a defendant to the action, who is served with a counter-claim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action. J. A. Rule 166.

Same as the Eng. R. 1875, O. 22, r. 7, (1883, R. 246).

Probably it would have been better if the words "not already a party" had been used instead of the words "not a defendant." The plaintiff doubtless need not appear, and the person referred to, who must appear, is the third party mentioned in *Rule* 377.

See *Rules* 275 *et. seq.*, as to appearance.

From *Verney* v. *Thomas*, 36 W. R. 393; 58 L. T. N. S. 20, it would seem that the same steps may be taken on default of appearance as might be taken by a plaintiff.

Defence by third party.

379. Any person, including the plaintiff, named as a party to a counter-claim, may deliver a [defence] thereto as if it were a statement of claim. J. A. Rule 167.

The original *Rule* had "reply" instead of "defence" following the Eng. R. 1875, O. 22, r. 8, (1883, R. 247).

Notwithstanding this *Rule* the plaintiff's defence to a counterclaim is technically his reply in the action: *Irwin* v. *Brown*, 12 P. R. 639.

The time for delivery of defence to the counter-claim will be eight days from the delivery of the defence containing the counter-claim: see *Rules* 371, 380.

A third party was held, under the original *Rule*, to be limited to a "reply;" and might not counter-claim against a defendant who brought him in: *Street* v. *Gover*, 2 Q. B. D. 498. The contrary has since been decided in Ont. under the present *Rules*, possibly by reason of the altered terms of this *Rule*: *Green* v. *Thornton*, 9 C. L. T. 139. See *supra* p. 408. See also *Eden* v. *Weardale*, 28 Ch. D. at p. 338.

The plaintiff may counter-claim in reply to the defendant's counter-claim : **Rule 380.**
Toke v. *Andrews*, 8 Q. B. D. 428.

380. The plaintiff shall deliver his defence to the counter-claim within 8 days from service thereof on him. Time for delivery.

New.

This *Rule* places a construction upon *Rules* 371, 379, 381.

There is no similar English Rule, and the construction placed upon the English Rules corresponding to *Rules* 371, 379 and 381, has been different, the plaintiff being held to have the 21 days mentioned in *Rule* 381, within which to reply to the counter-claim : *Rumley* v. *Winn*, 22 Q. B. D. 265. See *Irwin* v. *Brown*, *supra*, and *Rule* 435.

REPLY AND SUBSEQUENT PLEADINGS.

At Common Law, no time was limited for reply ; but the defendant might compel a reply by giving with his plea notice to reply in four days, otherwise judgment. In Chancery, replication was required to be filed, or the cause set down to be heard on bill and answer, or motion for decree, within one month after the filing of the last answer of all the defendants : Chy. O. 152 ; otherwise the defendant might move to dismiss : Chy. O. 273.

At Common Law, the replication was either a simple joinder of issue, or set up special matter, according to the form of the previous pleas. In Chancery, the Gen. Ord. 150 and 151 made provision for admissions in the replication of facts set forth in the answer : but in practice, admissions were seldom, if ever, made in that way ; and the replication was merely a formal joinder of issue which closed the pleadings. If the plaintiff wished to reply special matter, that could only be done by an amendment of the bill : *Cox* v. *Keating*, 6 P. R. 316

In *Williamson* v. *L. & N. W. Ry. Co.*, 12 Ch. D. at p. 790 ; Hall, V.C., said : "When the Rules were prepared, the view was taken that, after defence new matter should generally be introduced by way of amendment, and that is in my opinion the more consistent course, but it has not been in fact always enforced as the rule under the General Orders." The tendency of the English authorities seems, however, to be towards the Common Law plan of alleging in a reply any new matter on which the plaintiff relies by way of confession and avoidance : see *Hall* v. *Eve*, 4 Ch. D. 341 ; 46 L. J. Chy. 145 ; 35 L. T. N. S. 926 ; 25 W. R. 177. Under the Ontario Rules of pleading the plaintiff may either reply, or amend his statement of claim. All the forms of reply given in the Appendix are prefaced by a note to the effect that the form of reply given is to be used where the plaintiff does not introduce into his statement of claim, by way of amendment, the allegations necessary by way of reply to the defence ; and, in the cases in which forms of replies are given, the mode in which the matter in reply might be introduced into the statement of claim by amendment is also given (see Nos. 60, 65, 67, 76, 79, 83 ; also *Rule* 435). Where a reply is used it may traverse the allegations made in the defence, or confess and avoid them, or both : *Hall* v. *Eve*, *supra*.

A reply must not set up new claims ; or refer to an independent document as containing facts on which the pleader relies, without properly setting out such document as part of the reply ; and, like other pleadings, it must not state evidence, argument, or conclusions of law ; see *Rule* 399 and *Williamson* v. *L. & N. W. Ry. Co.*, 12 Ch. D. 790, and *Collambell* v. *Flight*, W. N. 1877, 125.

A reply is to be delivered within three weeks after the last of the defences : *Rule* 381.

As to the reply to a counter-claim : see *Rules* 379, 380 and 435.

As to the further reply to a counter-claim founded on matter arising after the reply : see *Rule* 437.

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Rules 381-383.

Delivery of reply.

381. A plaintiff shall deliver his reply, if any, within 3 weeks after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or a Judge. J. A. Rule 173.

Same as Eng. R. 1875, O. 24, r. 1, (1883 R. 276).

The last of the defences means the last defence of all the defences: see *Collett* v. *Preston*, 3 Mac. & G. 432; *Arnold* v. *Arnold*, 9 Beav. 206; *Bertolacci* v. *Johnstone*, 2 Ha. 633; Chy. O. 152; and *Ambroise* v. *Evelyn*, 11 Ch. D., at p. 762.

Long vacation is not reckoned in computing the time: *Rule* 484. As to extending the time: see notes to *Rules* 369, 371 and 485.

A reply delivered after the three weeks, and without an extension of time was held irregular and set aside, the pleadings having, by *Rule* 392, become closed: *Webb* v. *Kerr*, 14 L. R. Ir. 294.

Where a reply was delivered *without leave* after the time, and before notice of motion for judgment, it was held to have the effect of preventing notice of motion being given for judgment, under the English Rules, on admission of the defence by default of reply: *Graves* v. *Terry*, 9 Q. B. D. 170; see also notes to *Rules* 369, 371.

Where the time to deliver reply would have expired on 25th July but was extended to 22nd August, and afterwards to 19th September, and on 26th September, no reply having been filed, the defendant took proceedings warranted by the English, (though not by the Ontario Rules,) to obtain judgment as on admissions by reason of the default, and on the same day the plaintiff, by leave, served notice for leave to deliver a reply; leave was refused by the Judge of first instance on the ground of unexplained delay, but was granted on payment of costs by the Court of Appeal: *Eaton* v. *Storer*, 22 Ch. D. 91.

Leave for subsequent pleadings.

382. No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a Judge, and then upon such terms as the Court or Judge thinks fit. J. A. Rule 174.

Same as Eng. R. 1875, O. 24, r. 2, (1883 R. 277).

Pleadings cannot go beyond reply without leave, except that the defendant may join issue if he chooses. That, however, would not seem to be essential, as the pleadings are deemed to be closed without joinder of issue, at the expiration of the time within which the delivery of subsequent pleadings is necessary: *Rules* 383 and 392. If the plaintiff replies specially, it may be necessary for a defendant, either to amend his statement of defence or to rejoin, so as to set up some new feature in the case, in the nature perhaps of a confession and avoidance, or something destroying the effect of the reply: see *Williamson* v. *L. & N. W. Ry. Co.*, 12 Ch. D. 792-3. In such case a defendant is only allowed to introduce by amendment, without leave, new matter where he has set up a counter-claim or set-off: *Rule* 425; in other cases it will be necessary for him to apply for leave to amend or rejoin.

In *Norris* v. *Beazley*, 35 L. T. N. S. 845, leave to rejoin was refused, the proposed rejoinder being regarded as unnecessary, and only amounting to a statement of matters contained in the statement of defence in a more detailed way.

In *Evans* v. *Gann*, W. N. 1875, 199, leave was granted to add a counter-claim after issue joined.

Time for delivery.

383. Subject to the last preceding Rule, every pleading subsequent to reply shall be delivered within 4 days after

the delivery of the previous pleading, unless the time is extended by the Court or a Judge. J. A. Rule 175. Rule 384.

Identical with Eng. R. 1875, O. 24, r. 3 (1883 R. 278).

3. DEMURRER.

384. Any party may demur to any pleading of the opposite party, or to any part of a pleading setting up a distinct cause of action, ground of defence, counter-claim, reply, or as the case may be, on the ground that the facts alleged therein, do not shew any cause of action or ground of defence to a claim or any part thereof, or counter-claim, or reply, or as the case may be, to which effect can be given by the Court as against the party demurring. J. A. Rule 189. Demurrer when allowed.

Same as Eng. R. 1875, O. 28, r. 1.

The Eng. Rules of 1883 have abolished demurrers and substituted a procedure by which (1) points of law raised in pleadings may be disposed of before trial, and (2) a pleading disclosing no reasonable cause of action may be struck out on motion: see Order 25.

Where a pleading on its face clearly shews no ground of action, the opposite party may, and generally should, demur: see *Cunnington* v. *G. N. Ry. Co.*, 49 L. T. N. S. 392; *Attorney-General* v. *Birmingham*, 17 Ch. D. 685; *Griffiths* v. *London & St. Katherine Docks Co.*, W. N. 1884, 85; 51 L. T. N. S. 533. A counter-claim may be demurred to if it discloses no cause of action: *The Charles Napier*, 5 P. D. 73. When demurrer may be made use of.

A party, whose pleading is demurred to, may still serve a notice of exception to the pleading of the opposite party: *O'Donnell* v. *Duchenault*, 14 Ont. 1.

If a paragraph of a pleading deals with a distinct ground of action or defence, the proper course for the party objecting thereto is to demur, and not to apply to strike it out: *Watson* v. *Hawkins*, 24 W. R. 884.

Where on the pleading some relief might be given, though not what was specifically mentioned, a demurrer was over-ruled: *Hale* v. *Bousteud*, 30 W. R. 677; 51 L. J. Q. B. 255; 46 L. T. N. S. 533; *Young* v. *Robertson*, 2 Ont. 434.

In an action against the owner of a tug by a ship owner for improper navigation, the defence was, that the liability of defendant was limited under sec. 54 of the Merchant Shipping Act, 1862, to £8 per ton of the tug's tonnage. On demurrer by the plaintiff, the Court held (though it over-ruled the demurrer) that the defence was properly pleaded as a distinct defence *pro tanto*, a statement of defence being the only mode in which it could be set up; and that if so properly pleaded as a distinct ground of defence, it was a proper subject of demurrer under the present *Rule*: *Wahlberg* v. *Young*, 24 W. R. 847. Illustrations.

Where justices had under a special statute made an order directing the guardians of a union to pay £100 for the support of a pauper lunatic, and an action was brought under the Act to enforce the order, the guardians defended; the Queen's Bench Division refused to strike out the defence as frivolous, the guardians being entitled to defend, and held that, if the defence shewed no answer to the plaintiff's case, the plaintiff should demur: *Finch* v. *Guardians of the York Union*, 35 L. T. N. S. 360.

A statement of claim alleging simply that a good and valid *donatio mortis causa* had been made, without stating the facts which constituted it, was held to be demurrable: *Re Parton, Townsend* v. *Parton*, 30 W. R. 287; 45 L. T.

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Rule 384.

N. S. 755. In such a case a demurrer could only lead to an amendment, and, therefore perhaps, a proper course would be to apply to strike out the pleading as embarrassing.

When should not be employed.

Since the Judicature Act the use of demurrers is discouraged by the Court, except in cases where the whole question or a substantial question in controversy may be decided upon the demurrer: see note to *Rule* 385.

Wherever, therefore, a demurrer will not dispose of a substantial question in the action it should not be employed: see *Grant* v. *Eddy*, 21 Gr. 568; *Rumohr* v. *Marx*, 29 Gr. 179. Thus, a demurrer to an uncertain or ambiguous pleading is improper; application should be made to strike it out: *Attorney-General* v. *Midland*, 3 Ont. 511. So in *Scane* v. *Duckett*, 3 Ont. 370, it was held (1) that the objection that a solicitor's bill sued on was not delivered a month before action, should be taken by defence and not by demurrer, unless the claim shows that it was delivered less than a month; and (2) that the omission in a claim by a simple contract creditor to state that he sues on behalf of all creditors in an action to set aside a conveyance as fraudulent against creditors, is not the proper subject of a demurrer, but the objection should be taken, as soon as the writ is served, under *Rule* 324, *et seq.* If the representative character in which the plaintiff sues is indorsed on the writ, the statement of claim will be read for the purposes of a demurrer as if that fact were stated therein: *Johnson* v. *Burges*, 47 L. J. Chy. 552.

Demurrer for want of parties or misjoinder abolished.

For similar reasons there is now no such thing as a demurrer for want of parties: *Werderman* v. *Société Générale D'Electricité*, 19 Ch. D. 246; *Hunter* v. *Young*, 4 Ex. D. 256; or for misjoinder of parties: *Young* v. *Robertson*, 2 Ont. 434; *Blake* v. *Moore*, 8 L. R. Ir. 95; the proper course being for the defendant making the objection to apply under *Rule* 324, to add the necessary parties, or amend as the case may require: see cases *supra*. See also as to this practice: *Aboulaff* v. *Oppenheimer*, 30 W. R. 429, where a statement of defence alleging that the plaintiff was at the time of bringing the action a married woman, was held to be only an informal plea in abatement, and therefore no defence; and it was pointed out that the proper course was for the defendant to obtain an order to join the husband. In *Hancocks* v. *Lablache*, 3 C. P. D. 197, however, a demurrer by a married woman defendant, on the ground that she could not be sued without her husband, was allowed.

The defendant should at any rate take the objection by defence as early as possible, so that the plaintiff may, if so advised, add parties or amend: see *Sheehan* v. *G. E. Ry. Co.*, 16 Ch. D. 63; *Nobel's Explosives Co.* v. *Jones*, 28 W. R. 653; and note to *Rule* 324.

A demurrer on the ground that the plaintiff is not a person who can maintain the action, will, however, lie, and is not a demurrer for want of parties: *McClenaghan* v. *Grey*, 4 Ont. 329.

Action for recovery of land.

A demurrer will not lie, except perhaps for impertinence, in an action to recover land: *Scott* v. *Creighton*, 2 C. L. T. 548.

Multifariousness.

Want of interest in the greater part of the matters in question is no ground for demurrer: *Cox* v. *Barker*, 3 Ch. D. 359.

Demurrer to pleading previously answered.

The former rule of the Court of Chancery that a defendant cannot demur to what he has previously answered: see Dan. Prac., 5th ed., p. 643, is no longer in force; so that a defendant who had not originally demurred to a statement of claim was held entitled to demur to part of the statement of claim in his amended statement of defence: *Powell* v. *Jewesbury*, 9 Ch. D. 34. This was not formerly allowed: *Attorney-General* v. *Cooper*, 8 Ha. 166, unless the nature of the case made by the bill had been changed by amendment: *Cresy* v. *Bevan*, 13 Sim. 354.

As to demurrer to part of a pleading: see note to *Rule* 385.

Doubtful questions need not be decided on demurrer.

The Court need not on demurrer decide a doubtful question, but may require the case to be brought to a hearing in the usual way: *Cochrane* v. *Willis*, 10 Jur. N. S. 162; *Cox* v. *Barker*, 3 Ch. D. 359. Where a Judge has considered that the question ought not to be decided on demurrer, his decision will not ordinarily be reviewed in appeal: *Sheffield Water Works* v. *Yeomans*, L. R. 2 Chy. 8.

As to raising the question of the Statute of Limitations or Statute of Frauds by demurrer: see notes to *Rules* 402 and 413, and *Vane* v. *Vane*, L. R. 8 Chy. 383. Rule 385.

Where a point which will determine the suit is apparent on the face of the plaintiff's statement of claim, so that it might be raised by demurrer if the action be dismissed on that point, the defendant will be entitled only to the costs as of a demurrer allowed: *Attorney-General* v. *Campbell*, 19 Gr. 302; and charges of fraud have been held not to justify a defendant in answering instead of demurring: *Saunders* v. *Stull*, 18 Gr. 590. Full costs were, however, allowed where several important questions of law and fact were involved, and the case was not one which raised a single or simple question capable of being disposed of by demurrer: *Simpson* v. *Grant*, 5 Gr. 267. The later Chancery cases in England, prior to the Judicature Acts, tend to show that the question of costs is in the discretion of the Court, and the Court will generally exercise its discretion so as not to deprive the defendant of his full costs: *Bush* v. *Trowbridge Water Works Co.*, L. R. 10 Chy. 459; *Pearce* v. *Watts*, L. R. 20 Eq. 492; but see *Gildersleeve* v. *Cowan*, 25 Gr. 460; and 15 C. L. J., 95. Costs where parties plead instead of demurring.

385. A demurrer shall state specifically whether it is to the whole or to a part, and if to part only, to what part, of the pleading of the opposite party. It shall state some ground in law for the demurrer, but the party demurring shall not, on the argument of the demurrer, be limited to the ground so stated. A demurrer may be in the Form No. 89 in the Appendix. If no ground, or only a frivolous ground of demurrer is stated, the Court or a Judge may set aside such demurrer, with costs. J. A. Rule 190. Form of demurrer.

Same as Eng. R. 1875, O. 28, r. 2.

This *Rule* authorizes a demurrer to part of a pleading, but the Courts usually discourage the use of such a demurrer unless by that means a substantial question may be decided. In *Leyman* v. *Latimer*, 26 W. R. 305; 37 L. T. N. S. 819; 47 L. J. Ex. 470, Brett, L.J., said (as reported in the W. R. 307): "Under the new system, unless you are prepared to say that there are no facts in dispute, that even if everything alleged is proved then there is no case, a demurrer is idle and useless." Cotton, L.J., in the same report says (p. 308): "On the demurrers I shall add nothing except to express my entire concurrence in the opinion of my brother Brett, that now demurrers, unless the whole question as to whether there is any ground of action arises on the statement of claim or on the defence to the entire action, do no good. They only raise a question which could be as well decided without a demurrer, and are therefore useless."

See also *Metropolitan Ry. Co.* v. *Defries*, 25 W. R. 841.

Where alternative relief was prayed, a demurrer to one of the alternatives was held not irregular under the former Chancery Practice: *Abbott* v. *Canada Central Railway Co.*, 24 Gr. 579, and see Chy. Gen. Order 546, now effete.

A demurrer to part must specify precisely the part demurred to. This was also the former practice under which it was held insufficient to file an answer to "such part of the bill as the defendant is advised he is bound to answer," and to demur "as to all the rest of the matters charged in the bill": *Devonsher* v. *Newenham*, 2 Sch. & Lef. 199; and *Martin* v. *Kennedy*, 2 Gr. 80.

A demurrer can rarely be to a single paragraph of a pleading. The whole defence will in general be looked at. Where one or more paragraphs are demurred to, the Court may properly look at any other paragraph bearing on the same matter, and if when taken together they disclose a sufficient defence Demurrer to a paragraph of a pleading.

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Rule 385.

the demurrer must be over-ruled: *Attorney-General* v. *Midland*, 3 Ont. 511; see also *Rumohr* v. *Marx*, 29 Gr. 179; and *Flower* v. *Local Board*, 5 Ch. D. 351; *Nathan* v. *Batchelor*, W. N. 1876, 172; *Beasley* v. *Hamilton*, 9 Ont. 112.

In *Watson* v. *Hawkins*, 24 W. R. 884, it was held that a party need not distribute his facts so as to show which are intended to support particular prayers for relief. Lord Coleridge said: "So long as a paragraph supports some one or more of the claims in the prayer it is not demurrable. The plaintiff is not bound to assign such and such paragraphs to such and such prayer. He states all the facts he deems material, and then asks for such and such relief; and if each of the facts set out tends to show that he is entitled to some relief, and that relief is asked for by one of the prayers, the paragraph setting out that fact must stand." In the opinion of Mr. Justice Lindley, in the same case, if there was a prayer for general relief, and the pleading showed the plaintiff entitled to any relief, the statement was not demurrable. See also *Young* v. *Robertson*, 2 Ont. 434, where it was held that a demurrer did not lie, if, in any aspect of the case, the plaintiff was entitled to some relief.

On the argument of a demurrer, any document referred to must be taken to be truly stated, and cannot be looked at to contradict or alter the averments in the pleading, even though there be a reference to the instrument for greater certainty as to its contents: *Lougheed* v. *Stubbs*, 27 Gr. 387. Statutes may be looked at which are in part recited in the pleading: *Kiely* v. *Kiely*, 3 Ont. App. 438, and the Court has assumed that a rule of a Building Society existed, referring disputes between the Society and a member to arbitration pursuant to a Statute (Imp. Act, 10 Geo. 4, c. 56, s. 27), though not appearing by the statement of claim: *Johnson* v. *Altrincham Perm. Benefit Society*, 49 L. T. N. S. 568; see also *Huckle* v. *Wilson*, 2 C. P. D. 410.

Stating grounds of demurrer.

By the former practice in Chancery a demurrer for want of equity was in very general terms, and was not required to state the particular ground of demurrer. A plaintiff was therefore sometimes at a loss to know what the point to be argued on the demurrer was. The preferable Common Law practice has here been adopted, and some ground in law for the demurrer must be stated, though the party demurring may still, as formerly, demur *ore tenus*, on other grounds not so stated: see the present *Rule*, and *Dawkins* v. *Lord Penrhyn*, 4 App. Cas. at p. 58.

A demurrer to "such part of the amended statement of claim as claimed damages alleged to have been sustained by reason of the alleged wrongful acts of the defendants in opening the accounts therein in that behalf referred to," was held good in form, and to a substantial part of the claim: *Powell* v. *Jeveasbury*, 9 Ch. D. 34; see *Hogg* v. *Darley*, W. N. 1878, 80; 47 L. J. Chy. 567.

Where there was a demurrer to a statement of claim "on the ground that the facts therein alleged do not show any cause of action to which the Court can give effect as against the defendant, and on other grounds sufficient in law to sustain the demurrer," it was held that though a general demurrer for want of equity not alleging any specific ground might not always be sufficient, there were cases in which it would be, and that this was such a case, the equity having to be gathered from a long and complicated series of facts set out in the claim: *Bidder* v. *McLean*, 20 Ch. D. 512.

A demurrer alleged that "the statement of claim was bad in law"; and, after other statements, concluded with these words, "and on other grounds sufficient in law to sustain this demurrer;" it was held that the last words were sufficient to raise the defence of the Statute of Limitations: *Dawkins* v. *Lord Penrhyn*, 4 App. Cas. 51. If no ground or a frivolous ground was stated, a demurrer might, under the Common Law Practice, have been struck out in Chambers: see Arch. Prac., 12th ed., p. 926. However frivolous, it could not be treated as a nullity, even though no ground was stated: *Lyons* v. *Cohen*, 3 Dowl. 243. In an action for breach of an agreement to pay deposit money, the statement of claim, instead of asking for damages, asked for the deposit

money as a debt. Archibald, J., at Chambers, would not strike out the demurrer as frivolous, but gave the plaintiff leave to amend: *Wilks* v. *Parker*, 386-388. W. N. 1876, 74. Rules

As to what is a frivolous demurrer: see *Brice* v. *Munro*, 10 P. R. 548; followed in *Book* v. *Book*, 7 C. L. T. 114. The jurisdiction to set aside as frivolous should rarely be exercised where the point is a new one and is apparently raised in good faith for the opinion of the Court; *S. C.* 552. See *Brice* v. *Munro*, 7 Ont. 435, where after argument the demurrer was allowed.

386. A demurrer shall be delivered in the same manner and within the same time as any other pleading in the action. J. A. Rule 191. Delivery of demurrer.

Same as the Eng. R. 1875, O. 20 r. 3.

As to the manner of delivering pleadings: see *Rules* 461 and 397. For time of delivery: see *Rules* 371, 372, 379, 381. A defendant who has obtained an order extending the time within which to deliver his defence, may demur within such extended time: *Hodges* v. *Hodges*, 2 Ch. D. 112; see *Powell* v. *Jewesbury*, 9 Ch. D. 34. A consent to an extension of time to deliver a defence will in like manner authorize the filing of a demurrer: *Privett* v. *Pearson*, 4 C. L. T. 353. This was formerly not allowed; and a demurrer filed under such circumstances might have been taken off the files with costs: *Boultbee* v. *Cameron*, 2 Chy. Ch. 41; *Chamberlain* v. *McDonald*, 2 Chy. Ch. 204; see *Attorney-General* v. *Cooper*, 8 Ha. 166. These cases, however, no longer apply: *Privitt* v. *Pearson*, 4 C. L. T. 353.

See *Rule* 540 as to setting down demurrers, and delivering demurrer books.

387. A defendant desiring to demur to part of a statement of claim, and to put in a defence to the other part, shall combine such demurrer and defence in one pleading. And so in every case where a party entitled to put in a further pleading desires to demur to part of the last pleading of the opposite party, he shall combine such demurrer and other pleading. J. A. Rule 192. Demurrer and defence to be combined.

Same as Eng. R. 1875, O. 20, r. 4.

A party may by the same pleading, join issue to some part of the previous pleadings, and demur to others, and on the argument of the demurrer will be taken to admit only the facts stated in the parts demurred to: *Watson* v. *Hawkins*, 24 W. R. 884; *Day* v. *Brownrigg*, 27 W. R. 217.

388. Either party may without leave plead and demur to the same pleading at the same time, by filing an affidavit by the party distinctly denying some one or more material statement or statements in the pleading; or stating that the several matters sought to be pleaded by way of confession and avoidance are respectively true in substance and in fact; and that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law. The affidavit is to be annexed to and filed with the plea and demurrer, and a copy of the affidavit is to be served with the plea and demurrer. J. A. Rule 193. Plea and demurrer to same pleading without leave.

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Rules 389, 390. Pleading and demurring to the same pleading at the same time had not before this *Rule* been allowed without leave: see R. S. O. 1877, c. 50, s. 118, and notes to next *Rule*.

See *Metropolitan, etc.*, v. *Defries*, 25 W. R. 841, where it was pointed out that by demurring alone the truth of the pleading is admitted, which may be a source of danger if the demurrer is over-ruled. An informal demurrer, such as a clause stating that the claim shows no cause of action, is a transgression of this *Rule* if filed without an affidavit: *Vandusen* v. *Malcolm*, 4 C. L. T. 211.

Leave to demur and plead to the same matter.

389. If the party demurring desires to be at liberty to plead as well as to demur to the matter demurred to [without filing such affidavit], he may, before demurring, apply to the Court or a Judge for an order giving him leave to so plead and demur; and the Court or Judge, if satisfied that there is reasonable ground for the demurrer, may make an order accordingly, or may reserve leave to the party to plead after the demurrer is over-ruled, [and may direct which issue shall be first disposed of]; or may make such other order and upon such terms as may be just. J. A. Rule 194; C. L. Rule May 21, 1877. R. S. O. 1877, c. 50, s. 118.

This *Rule* contains substantially the former English practice. The corresponding English Rule (1875, O. 28, r. 5), does not contain the words in brackets; it is otherwise in effect the same.

The original *Rule* 194 required also that the affidavit in support of the motion should be such as was required by Reg. Gen. 21st May, 1877, namely, an affidavit distinctly denying some one or more material statement or statements in the pleading demurred to: see 41 U. C. Q. B. 565.

This made the *Rule* require really the same affidavit as *Rule* 388 requires, and if it could be made there was no reason for an application for leave. The present *Rule* was therefore altered, so as to enable a party to plead and demur by leave, where he can not make the affidavit mentioned in *Rule* 388.

Leave was given by Lindley, J., to plead and demur where the ground of demurring was that the statement of claim disclosed no cause of action: *Anon*, W. N. 1876, 37; 2 Charl. Ch. Ca. 46.

Where defendants had combined with their defences demurrers to the whole claim, but the demurrers were not filed soon enough to enable them to be argued before the trial, the Court acted under the concluding clause of this *Rule* and *Rule* 655, and gave leave to the plaintiff to enter the action for trial, and directed the demurrers to be argued at the trial: *Bank of Montreal* v. *Cousins*, 3 C. L. T. 265; see also *Rule* 555.

Where a question of law has been decided on a demurrer on a preliminary objection and an appeal is brought, the Court will not in general stay the trial of issues of fact pending the appeal: *Re J. B. Palmer*, 22 Ch. D. 88.

After a demurrer had been overruled, the bill was amended and the defendant answered, not stating in his answer the objection which had been raised on the demurrer. It was held that the defendant might at the hearing renew the objection without pleading: *Johnasson* v. *Bonhote*, 2 Ch. D. 298.

Amending.

390. The party whose pleading is demurred to may, at any time within four days from delivery of the demurrer or before the demurrer is set down, on payment of $5 to

the party demurring, obtain an order on præcipe to amend the pleading or that portion of it which is demurred to. New. Rules 391-392.

This *Rule* is adopted from the former practice in Chancery: see *Baldwin* v. *Borst*, 1 Chy. Ch. 82, which under the Jud. Act, prior to the present *Rule*, was held not to be in force: *Privett* v. *Pearson*, 4 C. L. T. 353.

Orig. *Rule* 196 provided that no amendment of a pleading demurred to should be made pending the demurrer except by order. It is presumed that now no amendment can be made except under this *Rule*. A *præcipe* order is required to ensure the payment of the $5 costs before amending. The order will not be issued except on proof payment of the $5: this may be done by production of a receipt for it, or by affidavit.

Amendments are made under *Rule* 424 without any order.

391. Where a demurrer is overruled, the Court may make such order, and upon such terms as to the Court shall seem right, for allowing the demurring party to raise by pleading any case he may be desirous to set up in opposition to the matter demurred to. J. A. Rule 201. Pleadings after demurrer is overruled.

Same as Eng. R. 1875, O. 28, r. 12.

After demurrer overruled, if the defendant desires further to defend, he must ask leave to do so. Leave will be given almost as of course upon payment of costs, and expediting proceedings: *Bell* v. *Wilkinson*, 26 W. R. 275; W. N. 1878, 3, and after demurrer allowed, leave to amend will be generally given unless the case is one which cannot be bettered by any amendment, in which case leave will be refused: *Dawkins* v. *Lord Penrhyn*, 4. App. Cas. 62; *Tyler* v. *Bell*, 2 M. & C. 89; *Spencer* v. *Hart*, 26 Sol. Jour. 140. Where a demurrer is overruled, the same objection may be raised at the hearing without being pleaded: *Johnasson* v. *Bonhote*, 2 Ch. D. 298.

4. Close of Pleadings.

392. As soon as either party has joined issue upon any pleading of the opposite party simply, without adding any further or other pleadings thereto, [or as soon as the time for amending the pleadings under these Rules or under any order made in the action or for delivering a reply or subsequent pleading ~~or demurrer~~, has expired,] the pleadings as between such parties shall be deemed to be closed [without any joinder of issue being pleaded by any or either party]. J. A. Rule 176. When pleadings closed.

The clauses in brackets are not in Eng. R. 1875, O. 25 (1883 R. 280), and O. 29, r. 12, which is in other respects the same.

Under this *Rule*, in an action in which there is no counter-claim, the pleadings are closed when the plaintiff has delivered a joinder of issue with the defence, or three weeks have elapsed from the delivery of the defence: *Schneider* v. *Proctor*, 9 P. R. 11.

In *Webb* v. *Kerr*, 14 L. R. Ir. 294, it was held that when the pleadings were closed by expiry of time under this *Rule*, neither party could reopen them without the leave of the Court.

By the delivery by the plaintiff of a simple joinder of issue upon the statement of defence and counter-claim, the pleadings are closed, and notice of trial may be

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Rule 393. given: *Hare* v. *Cawthorpe*, 11 P. R. 353. They are also closed by the expiration of three weeks without joinder: *Lockington* v. *King*, 7 C. L. T. 47.

If the plaintiff delivers a reply, not being merely a joinder of issue, it does not seem to have been yet decided whether the reply closes the pleadings, or whether they are not closed until a joinder of issue has been delivered, or four days have elapsed from the delivery of reply: see *Rule* 383. The point may be left in some doubt where leave is required to deliver a further pleading: see *Rule* 382 The opinion that a reply, not being a joinder, does not close the pleadings may perhaps be inferred from *Weller* v. *Proctor*, 10 P. R. 323, though was not necessary there to decide the point; but where a reply has been made to a counter-claim the defendant may, of right amend his counter-claim under *Rule* 425, and the pleadings are not closed till the time for so amending has expired. This was decided in *Palmer* v. *Gibbs* (Mr. Dalton, 22nd Oct., 1881), where a statement of claim was delivered on 4th Oct., defence and counter-claim on 11th Oct., reply to counter-claim and joinder of issue to defence on 14th Oct., and a notice of trial on 14th Oct., was held to be premature; and again in *Garner* v. *Tune*, 12 P. R. 280.

Where a third party has been made a defendant to a counter-claim, the action is not at issue till the counter-claim has been struck out, or the third party has pleaded, or become in default: *Canadian Securities Co.* v. *Prentiss*, 2 C. L. T. 90.

Where a plaintiff issued a writ against several defendants, but only served one, and proceeded against him to the close of the pleadings, it was held that he must be assumed to have abandoned as to the others, and the pleadings in the action were closed, and notice of trial could be regularly given: *Vandusen* v. *Johnson*, 3 C. L. T. 505.

See also notes to *Rules* 647, 654.

A counter claim must be a defence, and therefore a joinder of issue on the defence, not mentioning the counter-claim, closes the pleadings, and notice of trial thereafter is therefore regular: *Macara* v. *Snow*, 12 P. R. 616.

Note may be entered of default.

393. Where any party makes default in delivering a statement of defence, ~~demurrer~~, or subsequent pleading, within the time limited therefor, in cases where interlocutory or final judgment cannot be signed, the opposite party may, at any time before the pleading is filed, upon proof of the default, by *præcipe* to the officer with whom the pleadings are filed, require him to note that the pleadings in the action are closed as to the party in default; and thereupon the officer shall enter such note in the pleadings book accordingly, and thereafter no pleading by the party in default shall be received or filed without the order of a Judge. J. A. Rule 596.

There is no similar English Rule. The practice hereby prescribed is somewhat similar to that under the former Chancery G. O. 104, which enabled a plaintiff to note a bill *pro confesso*, against a defendant not answering, in which case the plaintiff was at liberty to bring the cause to a hearing without any further notice to such defendant. The present *Rules*, however, make no provision for carrying on proceedings *ex parte* against defendants in default, as to whom a note has been entered under this *Rule*.

In *Lloyd* v. *Ward* (before Galt, C.J., 25 Oct., 1889), Saturday being the last day to deliver a defence, the plaintiff caused a note under this *Rule* to be entered at 2.25 p.m., conceiving that no defence could be validly delivered on that day, none having been served by 2 o'clock; but it was held that under *Rule* 398, filing was part of the delivery, and the defendant had under *Rule* 7, up to 3 o'clock to file the defence, whether it had been delivered or not.

See notes to *Rules* 371, and 380-383.

5. Pleading Generally.

Rules 394-397.

Old rules abolished.

394. The following Rules of pleading substituted for those used in the Court of Chancery and in the Courts of Common Law, prior to *The Ontario Judicature Act, 1881*, shall continue to be used. J. A. Rule 125,

Same as Eng. R. 1875, O. 19, r. 1, (1883, R. 197).

For the definition of "pleading" see sec. 2 of the Act.

The former system of pleading at Common Law required the parties to set forth the legal result of the facts, and not the facts themselves. Under *The Judicature Act* the facts must be stated, and the Court decides what is the legal result: *Hanmer* v. *Flight*, 35 L. T. N. S. 127. The new system is thus to a great extent similar to that of the Court of Chancery; and the forms of Chancery pleadings, except in some points noticed hereafter, (notes to *Rule* 399), will in general serve as guides: *Heap* v. *Morris*, 2 Q. B. D. 630.

Copies of pleadings.

395. Every pleading may be either printed or written, or partly printed and partly written, but no more than four copies of any pleading or other document are to be allowed to any party in a cause or matter, exclusive of the draft, but inclusive of all other copies that may be required or made, in the progress of the cause. J. A. Rule 129.

See Eng. R. 1875, O. 19, r. 5, (1883, R. 205).

This *Rule* contains the same provisions as Chy. Gen. Orders 66 and 403, except that by Gen. Ord. 66 dates and sums were required to be expressed in figures instead of words, where the pleading was wholly printed.

Printing pleadings.

396. If more than three copies exclusive of the draft are required of any pleading or other document, the party may have the pleading or other document printed for the purposes of the cause or matter, and in that case he shall in lieu of all charges for copies be allowed thirty cents per folio of the pleading or document, and his reasonable disbursements of procuring the same to be printed. J. A. Rule 130.

This is the same as the Chy. Gen. Ord. 404. The Eng. R. 1875, O. 19, r. 5, (1883, R. 205), is not similar.

How pleadings delivered should be marked.

397. Every pleading in an action shall be delivered between parties, and shall be marked on the face with the date of the day on which it is filed, and with the reference to the Division to which the action is assigned, the title of the action, the description of the pleading, and the name and place of business of the solicitor and agent (if any) of the party filing the same, or the name and address of the party filing the same if he does not act by a solicitor. J. A. Rule 132.

Substantially the same as the Eng. R. 1875, O. 19, r. 7, (1883, R. 207), except that under the latter, pleadings are to be delivered only, and need not be filed. Filing is necessary in Ont. under *Rule* 398.

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Rules 398, 399.

Delivery includes filing.

398. Delivering a statement of claim or defence or other pleading includes filing. J. A. Rule 150.

The English practice does not require pleadings to be filed.

See *Lloyd* v. *Ward*, in note to *Rule* 393.

Form of pleadings.

399. Pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved; dates, sums and numbers shall be expressed in figures; the signature of counsel shall not be necessary; forms similar to those in Part VI. of the Appendix may be used. J. A. Rule 128, *part*.

This is to the same effect as the Eng. R. 1875, O. 19, r. 4, (see 1883, R. 200).

The Eng. Rules of 1883, R. 200, provides for the signing of pleadings, and that a pleading "shall contain, and contain only, a statement in a summary form of the material facts, etc." The pleadings in England since this Rule are now like a special indorsement on a writ which indeed always serves as a statement of claim: see O. 20, r. 1. The English pleadings and decisions thereon, and as to particulars can not now be safe guides in Ontario.

Facts to be stated.

The new system of pleading requires not the legal result of the facts, but the facts themselves, to be stated: see note to *Rule* 394. A statement of claim therefore which merely alleged that a good and valid *donatio mortis causa* had been made to the plaintiff, without stating the facts which constitute it, was held to be demurrable: *Re Parton, Townsend* v. *Parton*, 30 W. R. 287; 45 L. T. N. S. 755. In an action of libel it was held that the defendant must set out all the facts which he relies upon as showing justification or privilege: *Belt* v. *Lawes*, 51 L. J. Q. B. 359; and in a similar action, evidence of the plaintiff's general bad character was held not admissible unless referred to in the statement of defence: *Scott* v. *Sampson*, 8 Q. B. D. 491.

A plea of purchaser for value without notice may be relied on at the hearing, though not expressly pleaded, if it be a just inference on the facts admitted on the pleadings, or subsequently by agreement of the parties: *Taylor* v. *Blacklock*, 34 W. R. 175.

The pleadings in dower are governed by the same rules as those in other actions. The right of dower is a legal conclusion from certain facts, and those facts should be stated in the pleading: *Lawder* v. *Currier*, 10 P. R. 612.

In an action of slander it is not sufficient to allege that the defendant falsely and maliciously spoke and published the defamatory words complained of. The time and place, and the persons to whom, or in whose presence, they were spoken must be stated with reasonable certainty: *Thornton* v. *Capstock*, 19 C. L. J. 254.

A plaintiff who claimed to be entitled to a right of way over a road, and an injunction against the obstruction of the road, was required to state in his pleading, the way and the route and limitations of the road over which he claimed the right. A general statement that there was a road over a certain farm connecting two other farms, and that the plaintiff and his tenants were entitled to a right of way over it, was held to be embarrassing: *Harris* v. *Jenkins*, 22 Ch. D. 481: see also *Spalding* v. *Fitzpatrick*, 38 Ch. D. 410. So a plaintiff claiming an easement must set out the facts on which he relies as entitling him, by grant, prescription or otherwise, *Furwell* v. *Hoogan*, 12 L. R. Ir. 14.

Where the pleadings alleged "that the company has otherwise acknowledged the insolvency," it was held that as a matter of pleading the manner of acknowledgment should have been stated: *Re British Canadian Loan & Investment Co.*, 4 C. L. T. 248.

In a foreclosure action where the mortgagee applies for judgment, on default of appearance, not only for foreclosure but also for a personal order for payment, the statement of claim ought, however shortly, to contain an express statement of the covenant upon which the order is claimed: *Law* v. *Philby*, 56 L. T. N. S. 230; 35 W. R. 401. **Rule 399.**

The "material facts" are not confined to facts which must be proved in order to establish the cause of action; any facts which may affect the damages, and which the plaintiff is entitled to prove at the trial, are properly pleadable in a statement of claim: *Midlington* v. *Loring*, 6 Q. B. D. 190; *Lumb* v. *Beaumont*, 49 L. T. N. S. 772; *Glossop* v. *Spindler*, 29 Sol. Jour. 556; so facts in mitigation of damages in an action for malicious arrest: *Pursley* v. *Bennett*, 11 P. R. 64. The Eng. Rules of 1883 (R. 237), provide that no defence as to damages shall be necessary; and, therefore, such a defence is not allowed to be pleaded: *Wood* v. *Earl of Durham*, 37 W. R. 222. There is no similar provision in Ontario. What are "material facts."

In an action for malicious prosecution, a part of the statement of claim, setting out the observations of the Judge, before whom the plaintiff was tried on a criminal charge, was struck out, but a part, stating damage from publication of such charge, was allowed to stand: *Morrow* v. *Cheyne*, 12 P. R. 487.

Though each paragraph should as nearly as possible contain a separate allegation, it need not contain a separate cause of action or defence: *Union, etc.* v. *Lyman*, 46 U. C. Q. B. 453. The facts must be stated concisely, without any rhetoric: *per* Mellish, L.J., in *Watson* v. *Rodwell*, 45 L. J. Chy. 744; 3 Ch. D. 380; but if a pleading states only material facts, it will not be struck out merely because the facts are stated at too great a length: *Heap* v. *Marris*, 2 Q. B. D. 630; unless the pleading is so prolix as to embarrass: *Davy* v. *Garrett*, 7 Ch. D. at p. 488; *Marsh* v. *Pontefract, etc.*, W. N. 1876, 7. Prolixity may consist in (1) necessary facts being stated at undue length; or (2) statements of unnecessary facts: *per* Baggallay, L.J., in *Davy* v. *Garrett*, 38 L. T. N. S. 77. It is improper to state argument, or inferences and conclusions of law: *Davy* v. *Garrett*, *supra*; per Mellish, L.J., in *Watson* v. *Rodwell*, *supra*; *Hanmer* v. *Flight*, 35 L. T. N. S. 127; *Williamson* v. *L. & N. W. Ry. Co.*, 12 Ch. D. 787; or matters of law that might be raised by demurrer: *Stokes* v. *Grant*, 4 C. P. D. 25; or "charges" such as were sometimes introduced in Equity pleadings and were merely statements of the pleader's view of the equity: *Watson* v. *Rodwell*, *supra*; or evidence, *e.g.*, facts showing that a person is the heir-at-law of a deceased person: *Evelyn* v. *Evelyn*, W. N. 1880, 62; see also *Blake* v. *Albion Life Ins. Co.*, 35 L. T. N. S. 269; 45 L. J. C. P. 663; *Jones* v. *Turner*, W. N. 1875, 239: *Williamson* v. *L. & N. W. Ry. Co.*, *supra*; or evidence in the shape of admissions: *Askew* v. *N. E. Ry. Co.*, W. N. 1875, 238. Documents relied on as admissions are nothing but evidence: *Davy* v. *Garrett*, 7 Ch. D. 473. Prolixity. Admissions and other evidence.

The Court has a discretion to strike out statements which are open to any of these objections: *Rule* 423. There are many cases in which facts and evidence are so mixed up as to be almost indistinguishable: *per* Archibald, J., in *Smith* v. *West*, W. N. 1876, 55; 2 Charl. Ch. Ca. 41.

The plaintiff in an action to recover land, must set out all the material facts upon which his title is founded: see note to *Rule* 416.

The plaintiff need not state under what particular form of action he is proceeding; nor in what legal relation he claims to stand to the defendant: *Metropolitan Ry. Co.* v. *Defries*, 36 L. T. N. S. 150, 494; *Hanmer* v. *Flight*, 24 W. R. 346.

What is material, is a statement of the facts and of the relief claimed; and the facts need not be distributed so as to show which of them support each claim to relief. So long as they show that the plaintiff is entitled to any one kind of relief claimed, or, where there is a claim for general relief, to any relief at all, the paragraph containing them will not be demurrable: *Watson* v. *Hawkins*, 24 W. R. 884.

Where the old forms of Common Law pleadings will serve as models, they are not necessarily abolished. Where a defendant has received a sum of money for the plaintiff, it was considered that the statement of that fact was all that Former Common Law Forms.

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Rule 399.

could be required; and an application for the amendment of the statement of claim by setting forth the circumstances under which the money was received, was dismissed: *Bartlett* v. *Roche*, W. N. 1876, 54.

Defences, however, of "never indebted" and "set off," in the old forms have been struck out as violating the present *Rule*: *Davis* v. *Yeo*, Mr. Dalton, 11 April, 1882. See *Copley* v. *Jackson*, W. N. 1884, 39.

The pleading of the "common counts" is not admissible: *Sproule* v. *Ferrier*, 20 C. L. J. 284.

The plea of "not guilty" without statutory authority to plead it is not admissible: *Peterborough* v. *Midland Ry. Co.* 12 P. R. 127.

As to "*non est factum*," pleaded after the Jud. Act in an action begun before: see note to *Rule* 413.

It has been held by some Judges in England that the old general allegation of the performance of conditions precedent is improper, not being an allegation of facts: see 72 L. T. Jour. 343.

Quære, whether hypothetical defences can be pleaded: *Smith* v. *Farr*, 14 Ont. 729.

Particulars of pleadings, when ordered.

Particulars of Pleadings.—The practice in Ontario as to ordering particulars depends upon the inherent jurisdiction of the Court to prevent injustice; no Rules similar to those in force in England having been adopted: *Queen Victoria Park, etc.* v. *Howard*, 13 P. R. 14. The defendant is entitled to have the plaintiff's case presented in an intelligible form: *Harbord* v. *Monk*, 38 L. T. N. S. 411; and if the charges are not sufficiently explicit, particulars may be ordered: see *Anon*, W. N. 1875, 202, 220; or an amendment of the claim may be applied for: *Schomberg* v. *Zoebelli*, W. N. 1876, 106; 2 Charl. Ch. Ca. 36.

In *Kohfreitsch* v. *McIntyre*, 19 C. L. J. 116; 3 C. L. T. 173; it was held by Mr. Dalton, in Chambers, that, in a case where formerly a party would have been entitled to particulars of a pleading, the proper course will in general be to move to compel an amendment of the pleading so as to state the particulars required. In that case the defence was that a note sued on had been obtained by fraud. The defence was ordered to be amended so as to state the circumstances of the fraud: see *Wallingford* v. *Mutual Soc.*, 5 App. Cas. 685. Particulars have sometimes been ordered: see *Baston* v. *Bradshaw*, 8 L. R. Ir. 30; *Appleman* v. *Appleman*, 12 P. R. 138. A like order would seem to be proper where justification is pleaded in general terms in an action of libel: see *Corcoran* v. *Robb*, 8 P. R. 49; or an action for wrongful dismissal: see *Saunders* v. *Jones*, 7 Ch. D. 435, 448.

There may, however, be cases in which a general allegation may be allowed in the pleading to avoid prolixity, leaving the opposite party to apply for particulars if necessary: see *The Rory*, 7 P. D. 120, where a statement of claim, claiming damages for delivery of cargo in a damaged condition, alleged that the damage was occasioned by the defective condition of the vessel or by the negligence or breach of duty of the defendants: see also *Appleman* v. *Appleman*, 12 P. R. 138.

Particulars will be ordered giving information to prevent the opposite party from being taken by surprise at the trial: *Spedding* v. *Fitzpatrick*, 38 Ch. D. 410; but not such as will oblige a party to disclose the evidence upon which he relies: *Queen Victoria Park Commissioners* v. *Howard*, 13 P. R. 14.

Alimony cases.

In suits for alimony, the former Chancery practice required that the various acts of violence or adultery relied on, should be set forth specifically in the bill, that the defendant might have notice of them, otherwise no evidence of such acts could be given: *Rodman* v *Rodman*, 20 Gr. 428, 440, 441. This is in accordance with the new *Rules* of pleading: see *Brook* v. *Brook*, 35 W. R. 351; 57 L. T. N. S. 425; in *Rosenstadt* v. *Rosenstadt*, 9 P. R. 31., an order was made for delivery of particulars of acts relied on, within one month, and confining the plaintiff's evidence to such acts; and though in that case it was considered convenient to order particulars, the decision shews clearly enough that the plaintiff's statement of claim was not properly framed to enable her to go into evidence.

Examples.—Defendants pleading that certain lands were Ordnance Lands were not ordered to give particulars of facts and means by which, and the time at which, the lands so became Ordnance Lands, it not appearing that the defendants had any special means of information not open to the plaintiffs: *Queen Victoria Park Commissioners* v. *Howard*, 13 P. R. 14. Rule 399. Examples.

Defendants claiming a road to be a highway by dedication were ordered, if they relied on any specific acts of dedication or declarations of intention to dedicate, whether alone or jointly with user, to give the nature and dates of the acts or declarations and the names of the persons by whom they were done or made: *Spedding* v. *Fitzpatrick*, 38 Ch. D. 410.

Particulars have also been ordered:—of payments which the defendants, who were mortgagees in a redemption action admitted having received, and in respect to which they counter-claimed: *Kemp* v. *Goldberg*, 36 Ch. D. 505; of negligence and damages in an action for damages for injuries caused by negligent driving: *O'Meara* v. *Stone*, W. N. 1884, 72; 28 Sol. Jour. 359; of general allegations of trust, and breaches thereof: *Re Anstice, Anstice* v. *Hibbell*, 33 W. R. 557; 52 L. T. N. S. 572; of errors in progress certificates, though these were the result of information derived from documents prepared for the litigation which were privileged: *C. P. R.* v. *Commee*, 11 P. R. 297; of items alleged to be false entries and of the nature of objection to each: *Newport* v. *Paynter* 34 Ch. D. 88; of false and fraudulent misrepresentations: *Seligman* v. *Young*, W. N. 1884, 93; 28 Sol. Jour. 411; in a libel suit, of matter material to the defendant's case upon the issue on a plea of justification, though involving disclosure of names of persons intended to be called by the plaintiff as witnesses: *Marriott* v. *Chamberlain*, 17 Q. B. D. 154; 34 W. R. 783; 54 L. T. N. S. 714: in an action for infringement of a trade mark, of "divers persons" alleged to have been deceived: *Humphries* v. *Taylor*, 39 Ch. D. 693; of items of a claim in respect of which the defendant pays money into Court, but only if the trial will be facilitated and neither party embarrassed: *Orient Steam Nav. Co.* v. *Ocean Marine Ins. Co.* 34 W. R. 442. This case was decided under *Rule* 203, of Eng. Rules of 1883, providing expressly for a demand of particulars and order therefor, if not given on demand, which is the practice pursued in Ontario without special *Rule*: see Tariff of costs, item 69.

In an action for goods sold and delivered, a counter-claim for damages for inferior quality was set up. Particulars of the damages claimed were ordered: *Anon*, W. N. 1875, 220; see also notes to *Rules* 245 and 370.

In an action for false imprisonment as a lunatic, reasonable and probable cause as a defence was held, and immaterial allegations and particulars of it were refused: *Cave* v. *Torre*, 54 L. T. N. S. 87, 515. False imprisonment.

In an action of seduction defendant was held not entitled to particulars of times and places, unless he made affidavit denying the seduction so as to shew that he did not know the nature of the charges brought against him, which otherwise would be deemed to be matters within his own knowledge: *Thompson* v. *Birkley*, 31 W. R. 230; 47 L. T. N. S. 700. Seduction.

In some cases the particulars may be obtained by examination for discovery: see *Saunders* v. *Jones*, 7 Ch. D. 435, explained in *Benbow* v. *Low*, 16 Ch. D. 97; *Frost* v. *Brooke*, 32 L. T. N. S. 312; *Hill* v. *Wates*, L. R. 9 C. P. 688. Particulars obtained by examination.

Where by examination for discovery the defendant had obtained the information which would be given by particulars, particulars were refused: *Gould* v. *Beattie*, 11 P. R. 329.

In determining what particulars may be demanded, the decisions under the English practice of delivering interrogatories may be usefully referred to. These shew that a party cannot be compelled to disclose the details of his evidence as contra-distinguished from the facts: *Eade* v. *Jacobs*, 3 Ex. D. 335; explained in *Atty.-Gen.* v. *Gaskill*, 30 W. R. 558; *Bidder* v. *Bridges*, 29 Ch. D. 29; *Benbow* v. *Low*, 16 Ch. D. 93; *Re Leigh, Rowcliffe* v. *Leigh*, 6 Ch. D. 256; *Steward* v. *Lord Lonsdale*, 5 C. P. D. 47; 42 L. T. N. S. 172; *Commissioners of Sewers* v. *Glasse*, L. R. 15 Eq. 302; or matters which do not pertain to the questions to be raised at the trial, though they may be relevant if a judgment is obtained: *Parker* v. *Wells*, 18 Ch. D. 477; but the material facts upon

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Rule 399. which the issues in the case will be raised must be disclosed: *Ashley* v. *Taylor*, 38 L. T. N. S. 44, such as, in an action for dissolution of a partnership in the practice of surgeons, occasions when the defendant conducted himself in such a way as to make it impossible for the plaintiff to practice with him: *Lyon* v. *Tweddell*, 13 Ch. D. 375; and, in an action for wrongful dismissal, instances of misconduct relied on to justify the dismissal; *Saunders* v. *Jones*, 7 Ch. D. 435.

Wrongful dismissal.

Slander Libel.

In an action of slander, particulars may be ordered of the persons to whom the slanderous words were spoken, or if such persons were unknown, or the words were spoken to the plaintiff, then the name of any person who was present and heard, or might have heard the words spoken: *Thornton* v. *Capstock*, 9 P. R. 535; which, it has been held in *Gould* v. *Beattie*, 11 P. R. 329, is in Ontario, to be followed in preference to the contrary views expressed in *Bradbury* v. *Cooper*, 12 Q. B. D. 94, and *Roselle* v. *Buchanan*, 16 Q. B. D. 656; but see *McMillan* v. *Colwell*, 7 C. L. T. 141; but it has been held even in England that those decisions are not to be extended to occasions of publication of an alleged libel: *Gourand* v. *Fitzgerald*, 37 W. R. 55; but particulars as to names of persons alleged to have been passing by when the slanderous words were used, and particulars as to the alleged damages have been refused: *Wingard* v. *Cox*, W. N. 1876, 106; 2 Charl. Ch. Ca. 33; see also *Colonial Insurance Corporation* v. *Prosser*, W. N. 1876, 55; 2 Charl. Ch. Ca. 35; *Restell* v. *Steward*, W. N. 1875, 231; 1 Charl. Ch. Ca. 87.

Patent cases.

The general law applicable to discovery governs actions for infringement of patents. Full disclosure of the lines of attack must be made, but no such individualizing of the persons who are alleged to be prior users as would enable the plaintiff to fix upon the defendant's witnesses: *Smith* v. *Greey*, 4 C. L. T. 589; 21 C. L. J. 58: see 11 P. R. 169.

In *Moseley* v. *Victoria Rubber Co.*, 55 L. T. N. S. 482, particulars of breaches of two patents were delivered. The defendant answered the plaintiff's interrogatories, whereupon he discontinued as to one patent. The defendants then required the plaintiff to distinguish between the breaches complained of, referring him to their answers and interrogatories and interrogating him as to which of the processes they described infringed the patent relied on by him. It was held that the plaintiff was not obliged to particularize the breaches: see *Birch* v. *Mather*, 31 W. R. 362; 22 Ch. D. 629; see *Anglo-American Brush Co.* v. *Crompton*, 34 Ch. D. 152; 35 Ch. D. 283; under Imp. Act 46 & 47 Vict. c. 57, s. 29

Particulars were ordered of respects in which the defendants denied that the plaintiffs' patent was for any new invention, etc., (as alleged) and dates and occasions when, and also names of persons by whom, prior user was had: *Smith* v. *Greey*, 11 P. R. 169; see also *Holliday* v. *Heppenstall*, 41 Ch. D. 109; *Union Electrical, etc. Co.* v. *Electrical Storage Co.*, 38 Ch. D. 325; *Boyd* v. *Farrar*, 57 L. T. N. S. 866.

Particulars of objections to a patent must be given: see *Cropper* v. *Smith*, 51 L. T. N. S. 729; see form of order in *Ehrlich* v. *Ihlee*, 56 L. T. N. S. 819.

An application by the defendant to amend his particulars of objections to a patent on the ground that pending the trial the defendant had discovered new facts shewing want of novelty, was refused, it not being shown that he could not with reasonable diligence have discovered the new facts sooner: *Moss* v. *Malings*, 33 Ch. D. 603.

All defects in the specifications of a patent on which the defendant intends to rely at the trial must be specified in the particulars of objection: *Anglo-American Brush Light Co.* v. *Crompton*, 34 Ch. D. 152; 35 Ch. D. 283.

In an action for libel in a newspaper publication, which the defence said was an accurate report of certain public proceedings and fair comment thereon, particulars by interrogation were denied as to the names of persons on whose information the report was based: *Hennessy* v. *Wright* (No. 2), 36 W. R. 879; and where the action is against the proprietor of a newspaper who admits the publication of the libel, and pleads an apology, the plaintiff is not entitled to

interrogate the defendant as to the name of the writer, unless the identity of the writer is a fact material to some issue raised in the case: *Gibson* v. *Edwards*, 23 Q. B. D. 384. Rule 400.

Particulars were ordered of a defence of justification in a libel suit, where it was not clear whether the defence was that what was charged against plaintiff was true, or was truly reported: *Hennessay* v. *Wright* (No. 1), *Ib.* 878; 57 L. J. Q. B. 594. In *Mills* v. *Carman*, 17 Ont. 223, a defendant not pleading justification, but saying that the alleged libel was a fair comment on matters of public interest, was held entitled to show that the matters commented upon were true.

The practice in the Probate Division in England is not to order particulars of undue influence charged: *Lord Salisbury* v. *Nugent*, 9 P. D. 23; or of allegations of a testator's unsoundness of mind: *Hankinson* v. *Barningham*, 53 L. J. Pro. 16.

Particulars having been ordered of false entries alleged by the statement of claim to have been made by the defendant in the books, it was held not sufficient to set out a list of items complained of, but that the plaintiff must state shortly as to each item the nature of the objection made to it: *Newport, etc., Co.* v. *Paynter*, 34 Ch. D. 88.

An order striking out particulars complained of as too general was refused, it being held that if too general the admission of evidence thereunder was in the discretion of the Judge at the trial: *Citizens Insurance* v. *Campbell*, 10 P. R. 129.

Where an order was made for particulars of certain paragraphs of defence, and in default the paragraphs to be struck out, it was held that the officer with whom the pleadings were filed could strike out the paragraphs without further order upon default being shown by affidavit: *Hamilton Road Co.* v. *Platt*, 10 P. R. 581.

A defendant does not waive his right to particulars by delivering a defence: *Sachs* v. *Speilman*, 37 Ch. D. 295.

When the defendant has the means of knowing the facts in dispute, and the plaintiff has not, the defendant is not entitled to particulars till after he has given discovery: *Miller* v. *Harper*, 38 Ch. D. 110; *Sachs* v. *Speilman, supra*; *Whyte* v. *Ahrens*, 26 Ch. D. 717; *Leitch* v. *Abbott*, 31 Ch. D. 374.

Signature of Counsel—The provision that signature of counsel is not to be necessary, does not mean that it is improper and ought to be struck out: *Bernard* v. *Harwick*, W. N. 1876, 134. In *Duckitt* v. *Jones*, W. N. 1876, 17; 33 L. T. N. S. 777, counsel's signature was said to be desirable; and in case of a petition by trustees for advice, necessary: *Re Boulton's Trusts*, W. N. 1882, 62; 30 W. R. 596; 51 L. J. Chy. 493.

400. Each party is to admit such of the material allegations contained in the statement of claim or defence of the opposite party as are true; or he may give notice, by his own statement or otherwise, that he admits for the purposes of the action the truth of the case generally, or of any part of the case, stated or referred to in the statement of claim or defence of the opposite or any other party. J. A. Rule 240. Admission of statements of opponent.

This Rule corresponds in principle with the former practice in Chancery. The Eng. R. 1875, O. 32, r. 1 (1883, R. 371), is permissive only, and authorizes, but does not require (as this *Rule* does) a party to the action to give notice, by his own statement or otherwise, that he admits the truth of the whole or part of his adversary's statement.

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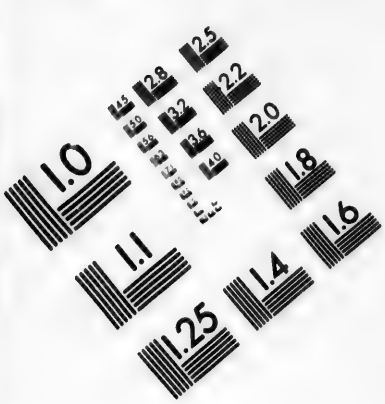
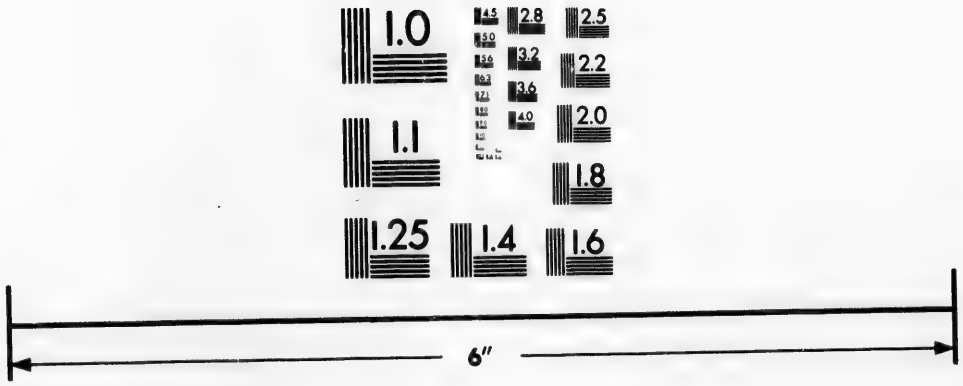
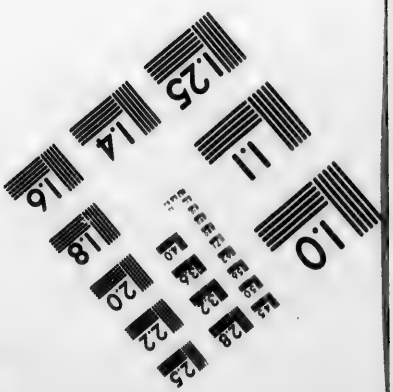




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Rules 401, 402.

In *Lee* v. *Button*, 12 Ch. D. 383, Malins, V.C., said that a defendant ought not to deny the plain and acknowledged facts, which it is neither to his interest nor in his power to disprove.

As to the construction of admissions not made by reference to paragraphs of the opposite party's pleading: see *Dovey* v. *Irwin*, 4 Ont. 8; see also notes to *Rule* 756.

Where allegations in the plaintiff's claim were admitted he was not allowed to go into evidence: *The Hardwick*, 9 P. D. 32.

As to costs where proper admissions are not made: see *Rule* 1189.

Manner of making admissions

401. Admissions are, in all cases where it is practicable, to be by reference to the numbers of the paragraphs in the pleading to which they relate, with such qualifications as may be necessary or proper for protecting the interests of the party making such admissions: thus—"the defendant admits the allegations made in the first, second and third paragraphs of the plaintiff's claim." J. A. Rule 146.

Not in the English Rules. See notes to *Rule* 403.

See *Rule* 400, which requires each party to admit such of the material allegations contained in the pleading of the opposite party as are true.

What facts must be pleaded.

402. Each party in any pleading must allege all such facts not appearing in the previous pleading (if any), as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not so raised on the pleadings would be likely to take the oppposite party by surprise, or would raise new issues of fact not arising out of the pleadings, as (for instance) fraud, or that any claim has been barred by a Statute of Limitations, or has been released. J. A. 147.

Same as the Eng. R. 1875, O. 19, r. 18. The Con. Rule of 1883, R. 211, is more full and specific.

In *Byrd* v. *Nunn*, 5 Ch. D. 781, where a statement of defence denied the making of an agreement alleged, and proceeded to say that the person by whom it was alleged to have been made was of unsound mind, it was held that the only issue was the unsoundness of mind of the alleged contractor. In *Collette* v. *Goode*, 7 Ch. D. 842, the defendant alledged that a song was not duly registered by reason of the time of registration not being entered; he was not allowed to prove that the registration was void by reason of the name of the publishers not being truly stated. Both the above cases depended to a great extent upon the English Rules as to admissions, which have not been adopted in the Ontario Act: see note to *Rule* 403.

Want of notice of action must be pleaded: *Verratt* v. *McAulay*, 5 Ont. 313; *McKay* v. *Cummings*, 6 Ont. 400.

As to pleading statutes relied on other than the Statute of Limitations, see 83 L. T. Jour. 93; *Coburn* v. *Collins*, 35 Ch. D. 373 (registration necessary under Bill of Sales Act); *Hayward* v. *Lely*, 56 L. T. N. S. 418 (registration under the Copyright Act); from which it would appear to be well to mention any statute relied on in the pleading, in order to prevent the imputation of an attempt to surprise. The pleadings in the above cases were held insufficient, but amendments were allowed: see also *McKay* v. *Cummings*, 6 Ont. 400.

As to the averment of performance of conditions precedent, see note to **Rule 403.** *Rule* 399.

As to the mode in which fraud must be pleaded, see note to *Rule* 407.

Where the Statute of Limitations bars the remedy only, it must be pleaded, and cannot be taken advantage of by demurrer; *Wakelee* v. *Davis*, 25 W. R. 60, notwithstanding the remarks in *Noyes* v. *Crawley*, 10 Ch. D. 31, which was decided before the appeal in *Dawkins* v. *Lord Penrhyn*, 4 App. Cas. 51; see also *Re Burge, Gillard* v. *Lawrenson*, 57 L. T. N. S. 364. But where the Statute takes away the title, as in an action for recovery of land, it is clear that the defence may be raised by demurrer: *Dawkins* v. *Lord Penrhyn*, 6 Ch. D. 318; 4 App. Cas. 51, 58, 64; *Willis* v. *Earl Howe*, 50 L. J. Chy. 4. In *Dawkins* v. *Lord Penrhyn*, Lord Cairns said: "The analogy of the Statute of Frauds is not an analogy of any weight. The Statute of Frauds must be pleaded, because it never can be predicated beforehand that a defendant who may shelter himself under the Statute of Frauds, desires to do so. He may, if it be a question of an agreement, confess the agreement, and then the Statute of Frauds will be inapplicable. With regard also to the Statute of Limitations, as to personal actions, the cause of action may remain, even although six years have passed. It cannot be predicated that the defendant will appeal to the Statute of Limitations for his protection. Many people, or some people at all events, do not do so, therefore you must wait to hear from the defendant whether he desires to avail himself of the defence of the Statute of Limitations or not. But with regard to real property it is a question of title. The plaintiff has to state his title, the title upon which he means to rely; and the Statute of Limitations with regard to real property says, that when the time has expired within which an entry or claim must be made to real property, the title shall be extinguished and pass away from him who might have had it, to the person who otherwise has the title by possession, or in whatever other way he may have it": 4 App. Cas. 58-59.

See also notes to *Rule* 413.

403. Save as otherwise provided, the silence of a pleading as to any allegations contained in the previous pleading of the opposite party is not to be construed into an implied admission of the truth of such allegation; and any allegation introduced for the purpose of preventing such implied admission, and not for the purpose of making intelligible the grounds of defence, is to be considered impertinent. J. A. Rule 148. Silence of pleading no admission.

See Eng. R. 1875, O. 19, r. 21 (1883, R. 209), which is different.

This *Rule* introduces the practice of the Court of Chancery as to admissions: G. O. 123; see also *Rule* 400. It was a principle of Common Law pleading that each party was to be taken to admit those allegations in the pleadings of the opposite party which he did not deny.

"Save as above otherwise provided," the exceptions referred to in these words are those which require the pleading to specifically deny the right of the party to claim in a representative capacity; or the alleged constitution of a partnership firm: *Rule* 411; or the legality of a contract; or its sufficiency in point of law: *Rule* 413.

Where a material fact therefore is alleged in a pleading, and the pleading of the opposite party is silent in respect thereto, the fact must be considered in issue: *Waterloo Mutual, etc.* v. *Robinson*, 4 Ont. 295; *Seabrook* v. *Young*, 7 C. L. T. 152.

Where a pleading, however, does not maintain silence, but contains an answer to allegations in opposite pleadings which has no sense if not read as admitting certain statements, those statements must be taken as admitted: *Richardson* v. *Jenkins*, 10 P. R. 292.

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Rule 404.

The English Rules under the Judicature Acts, in regard to admissions, differ from the above: see Order 19, Rules 17, 20, 22, the effect of which is that, so far as regards statements of claim and defence and counter-claim, and as regards parties who are not infants or lunatics, the want of a specific denial of a fact will operate as an admission, and will entitle the party whose pleading is thus admitted to move for judgment under *Rule* 756; and thus upon a technical construction of pleading, final judgment may be signed: see *Thorpe* v. *Holdsworth*, 3 Ch. D. 637, and *Rutter* v. *Tregent*, 12 Ch. D. 758; and the merits might sometimes not be reached: see *Tildesley* v. *Harper*, 7 Ch. D. 403; reversed however in appeal, 10 Ch. D. 393; *Lumsden* v. *Winter*, 8 Q. B. D. 650; *Caroli* v. *Hirst*, W. N. 1883, 115; *Thornton* v. *Church*, 10 L. R. Ir. 378; *Williamson* v. *London, etc.*, 27 W. R. 724; *Elliot* v. *Harris*, 17 L. R. Ir. 351.

The rule of the Court of Chancery adopted in the present *Rule* has not been found in practice to render the arriving at an issue a difficult thing, or to unduly increase evidence.

By *Rule* 400 (which is founded upon Chancery G. O. 124) each party is to admit such allegations in the pleadings of the opposite party as are true; and if he does not do so, *Rule* 1189 gives to the Court or Judge power to make a proper order with respect to any extra costs occasioned by the failure to admit.

Relief claimed to be stated specifically.

404. Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief. And the same rule shall apply to any counter-claim made, or relief claimed by the defendant, in his statement of defence. If the plaintiff's claim be for discovery only, the statement of claim shall shew it. J. A. Rule 133.

Same as the Eng. R. 1875, O. 19, r. 8. The Rule of 1883, R. 230, is different, providing that general or other relief need not be prayed for and may always be given.

A claimant is not entitled to any relief unless it is specifically prayed for, or can be given under a prayer for general relief; and if general relief is not asked for, it will be considered that the party does not want it: *Holloway* v. *York*, 25 W. R. 627; *Cargill* v. *Bower*, 10 Ch. D. 508. Where general relief is claimed, a pleading will not be demurrable, if the facts stated in it show that the plaintiff is entitled to any relief: *Watson* v. *Hawkins*, 24 W. R. 884, unless the relief be foreign to the scope of the claim: *Gaughan* v. *Sharpe*, 6 Ont. App. 417; *Gunn* v. *Trust & Loan Co.*, 2 Ont. 393. It is sufficient to set out in the statement of claim facts which entitle to relief and pray for any relief that the facts warrant: *Phelps* v. *White*, 7 L. R. Ir. 160. Under a prayer for general relief the Court will grant the appropriate relief which the facts warrant, although unable to grant the specific relief claimed: *Slater* v. *The Canada Central Ry Co.*, 25 Gr. 363.

Facts, arising after action brought, entitling the plaintiff to further relief, in respect of the subject matter of the litigation, beyond what they were entitled to at its commencement, have been allowed to be set up by amendment: *Yorkshire Wagon Co.* v. *Cornwall Minerals Co.*, 73 L. T. Jour. 120.

In an action for an injunction under the usual prayer for general relief damages are included under sec. 53 (9) of the Jud. Act (Lord Cairn's Act): *Serrao* v. *Noel*, 15 Q. B. D. 549.

As to the efficiency of a prayer for general relief, see *Cook* v. *Martyn*, 2 Atk. 3, and the observations thereon in *Byrne* v. *Frere*, 2 Moll. 166.

It does not follow because a plaintiff has asked for reformation of a document that a defendant is entitled to claim the same relief though he has not

asked for it: *Wolfe* v. *Hughes*, 1 Ont. 322, 18 C. L. J. 177. See as to asking two inconsistent kinds of relief, *Evans* v. *Davis*, 27 W. R. 285, referred to in note to *Rule* 423, and *Breslauer* v. *Barwick*, 24 W. R. 902. Rules 405-407.

405. Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of defence, or counter-claim founded upon separate and distinct facts. J. A. Rule 134. Distinct claims or defences.

Same as the Eng. R. 1875, O. 19, r. 9, (1883, R. 231).

Rules 301 and 340, enable the plaintiff to unite in the same statement of claim several causes of action. The present *Rule* requires such a statement of claim to keep the facts supporting one cause of action, as far as may be, together, and distinct from the facts supporting another cause of action. It is not necessary, however, to distribute the various facts so as to show which are intended to support any particular prayer for relief: *Watson* v. *Hawkins*, 24 W. R. 884. The same rule applies to a counter-claim.

406. Where the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof unless the precise words of the document or any part thereof are material. J. A. Rule 135. Effect of document may be stated.

Same as the Eng. R. 1875, O. 19, r. 24, (1883, R. 217).

This does not dispense with the necessity for setting forth the precise defamatory words in an action of libel or slander: *Harris* v. *Warre*, 4 C. P. D. 125; *M'Laugh* v. *The Queen*, 3 Q. B. D. 607; see also *Davy* v. *Garrett*, 7 Ch. D. 473.

Where *res judicata* in an Irish Court was alleged, a brief statement of the Irish judgment was held sufficient: *Houstoun* v. *Sligo*, 29 Ch. D. 448.

407. Where it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact, without setting out the circumstances from which the same is to be inferred. J. A. Rule 136. Allegation of malice, etc.

Same as the Eng. R. 1875, O. 19, r. 25, (1883, R. 218).

Fraud should be distinctly charged as fraud: *Davy* v. *Garrett*, 7 Ch. D. at p. 489; and if "fraudulently," or words of similar import are omitted, there must be allegations of fact which necessarily and *per se* amount to fraud: *Byrne* v. *Muzio*, 8 L. R. Ir. 396, and see *Rule* 402; and the facts constituting the fraud should be stated, or no evidence in support will be received: *Re Rica Gold Washing Co.*, 11 Ch. D. 36, 43, 47; *Redgrave* v. *Hurd*, 25 Sol. Jour. 372; *Arkwright* v. *Newbold*, *Ib.*, 338; *Symonds* v. *City Bank*, W. N. 1886, 19; 80 L. T. Jour. 245; see *Smith* v. *Chadwick*, 9 App. Cas. 187. Fraud.

A general allegation of fraud, however strong the words used, where there is no statement of the circumstances relied on as constituting the alleged fraud is insufficient even to amount to an averment of fraud, of which any Court ought to take notice: *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, 697, 701.

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Rules 408, 409.

Fraudulent concealment of fraud, which within *Gibb* v. *Guild*, 9 Q. B. D. 59, may be relied on as ground of equitable relief against the running of the Statute of Limitations, being a question of fact, must be averred as such in the pleadings: *Barber* v. *Houston*, 14 L. R. Ir. 273.

In *Herring* v. *Bischoffscheim*, W. N. 1876, 77, the statement of claim alleged the purchase of bonds through fraudulent misrepresentations in the prospectus of the company, and, on a motion to strike out parts of the statement of claim as prolix, it was held sufficient to allege generally that the prospectus which was set out was fraudulent to the knowledge of the defendants without specifying the particulars, and without going into either the motive which led to the issue of the prospectus, or the particulars of the fraudulent scheme of which the prospectus formed a part.

As to obtaining more specific allegations of or particulars of fraud charged: see note to *Rule* 399. See *Kaltenbach* v. *Lewis*, 30 W. R. 356; 45 L. T. N. S. 666, for allegations which were considered to amount to a charge of fraud.

Malice.

It will be sufficient under this *Rule*, in an action for malicious prosecution, to allege that the proceedings were taken without reasonable or probable cause, without setting forth the circumstances from which the same would be inferred: *Aderis* v. *Thrigley*, W. N. 1876, 56; 2 Charl. Ch. Ca. 43.

In an action for malicious prosecution the burden of proof of the absence of reasonable cause, and the presence of malice rests on the plaintiff: *Abratt* v. *N. E. Ry. Co.*, 55 L. T. N. S. 63; *Hicks* v. *Faulkner*, 8 Q. B. D. 167; in an action for false imprisonment, neither allegation nor proof of malice is necessary, and the burden of shewing reasonable cause is on the defendant; *Hicks* v. *Faulkner*, *supra*.

Negligence.

A statement of claim was held sufficient, which alleged that while the plaintiff was using an hotel, of which the defendant was a proprietor, as a guest for reward to the defendant, by the negligence of defendant the ceiling of the room, in which the plaintiff then was, fell upon and injured him: *Sandys* v. *Florence*, 47 L. J. C. P. 598. Negligence averred generally, was held sufficient in *Quillinan* v. *Canada Southern Ry.*, 6 Ont. 567.

Allegation of notice.

408. Where it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact unless the form or precise terms of the notice (*a*) is or are material. J. A. Rule 137.

Same as the Eng. R. 1875, O. 19, r. 26, that of 1883, R. 219, has at (*a*) the words "or the circumstances from which the same is to be inferred."

Implied contract.

409. Where any contract or any relation between any persons does not arise from any express agreement, but is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege the contract or relation as a fact, and to refer generally to the letters, conversations, or circumstances without setting them out in detail; and if in such a case, the person so pleading desires to rely in the alternative upon more contracts or relations than one, as to be implied from such circumstances, he may state the same in the alternative. J. A. Rule 138.

To the same effect as the Eng. R. 1875, O. 19, r. 27, (1883, R. 22

An agreement is not strictly speaking a fact: it is an inference of law from facts. The material facts should therefore be stated: *Rule* 399. If the "express agreement" is in writing, that fact will best be stated, and the effect of the document set forth: *Rule* 406. If the agreement is to be gathered from a series of letters, conversations or circumstances, the present *Rule* applies: *Turquand* v. *Fearon*, 40 L. T. N. S. 543; see also *Smyth* v. *Levinge*, 39 L. T. N. S. 579; *Noad* v. *Murrow*, 40 L. T. N. S. 100; and App. Form 58. **Rules 410-413.**

Where an agreement to have any effect in law must be in writing, it is sufficient to allege that there was an agreement without alleging that it was in writing. That it was in writing is matter for evidence at the trial: *Pascoe* v. *Richards*, 50 L. J. Chv. 340; and it lies upon the party setting up the agreement to prove one sufficient in law at the trial: *Privett* v. *Hay*, Mr. Dalton, 4 March, 1884.

410. Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied. **Facts presumed need not be stated.**

[*E.g.*—Consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.] J. A. Rule 139.

Same as the Eng. R. 1875, O. 19, r. 28, (1883, R. 221).

411. If either party wishes to deny the right of any other party to claim as executor, or as trustee, or as assignee in insolvency, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically, [or the same will be taken to be admitted.] J. A. Rule 140. **Denial of representative capacity.**

The Eng. R. 1875 O. 19, r. 11 (1883, R. 238), does not contain the words in brackets; otherwise the *Rules* are the same.

See notes to *Rule* 403.

The rule was the same as Law under Reg. Gen. T. T. 1856, No. 5, as to assignees in insolvency, executors, and administrators and persons authorized by any Act of Parliament to sue or be sued as nominal parties: see *Jones* v. *Brown*, 1 Bing. N. C. 484, and Harr. C. L. P. Act, 712.

412. Unless the incorporation of a corporate party to an action is specifically denied in the pleadings, it shall not be necessary to prove it. *New*. **Incorporation.**

413. Where a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise. J. A. Rule 141. **Bare denial of contract only denial of the making.**

Same as the Eng. R. 1875, O. 19, r. 23. The Eng. Rule of 1883, R. 216, is a little more explicit.

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Rule 414.

A plea of *non est factum* pleaded to a declaration filed before *The Judicature Act*, in an action on a policy of insurance, was held not embarrassing; as under this *Rule* it must be treated as a denial of the making of the contract of insurance in fact: *Burnett* v. *Union Mut. F. Ins. Co.*, 32 C. P. 134.

In an action of ejectment by an assignee of a lessee against the assignors, the statement of claim alleged an assignment by deed by defendants to the plaintiffs. The defendants denied "that they had assigned or made over the premises" to the plaintiff. This was held under the corresponding Irish Rule to put in issue the execution of the assignment only, and not its invalidity as contrary to a covenant against alienation in the lease: *Hayes* v. *Corcoran*, 8 L. R. Ir. 75.

Statute of Frauds.

The effect of this *Rule* is to require the defendant who wishes to rely on the Statute of Frauds to plead the statute specifically. Before this Act there was a difference in this respect between the practice at Law and in Equity. "At Law if the contract was denied, it was a matter of evidence whether the contract was one which could be sued upon, or whether the remedy was barred by the statute; but in Equity, if the defendant intended to rely upon the Statute of Frauds or any other special statute, he was compelled to make a special averment of his intention": *per* Mellish, L.J., in *Clarke* v. *Callow*, 46 L. J. Q. B. 54; see also *Morgan* v. *Worthington*, 38 L. T. N. S. 443.

Formerly in Equity the statute might have been relied on by demurrer where the facts, which made the statute apply, appeared on the face of the bill: *Wood* v. *Midgeley*, 2 Sm. & G. 115; Agnew on Statute of Frauds, 494; and might have been relied on as a defence, though not pleaded in the answer: *Wilde* v. *Wilde*, 20 Gr. 521; *sed vide Butler* v. *Church*, 18 Gr. 190; but in *Clarke* v. *Callow*, *supra*, the plaintiff by anticipation of the defence of the statute alleged facts to show that the contract though verbal was a binding one under the statute, and the defendants traversed these facts merely, not setting up the statute. It was held that defendant was not entitled to rely on the statute.

The facts which make the statute apply should be stated, and the particular provisions relied upon should be pointed to. It is not sufficient to merely make a general statement of reliance on the statute: *Pullen* v. *Snelus*, 40 L. T. N. S. 363.

The defence of the statute cannot since the Judicature Acts be raised by demurrer: *Catling* v. *King*, 5 Ch. D. 660; *Morgan* v. *Worthington*, 38 L. T. N. S. 443; *Towle* v. *Topham*, 37 L. T. N. S. 308; *Dawkins* v. *Lord Penrhyn*, 4 App. Cas. 51; *Shardlow* v. *Cotterill*, W. N. 1881, 2; *Futcher* v. *Futcher*, 29 W. R. 884, and see notes to *Rule* 402. But where the objection of the statute has been once raised by demurrer and overruled, it may be afterwards insisted on at the hearing without being pleaded: *Johnasson* v. *Bonhote*, 2 Ch. D. 298.

Where the statute is not pleaded, it cannot now be relied on as a defence: see *Olley* v. *Fisher*, 34 Ch. D. 367.

As to particulars in pleading *The Master and Servant Act* so as to negative a partnership, see *Neil* v. *Park*, 10 P. R. 476.

No plea in abatement.

414. No plea or defence shall be pleaded in abatement. J. A. Rule 142.

Same as the Eng. R. 1875, O. 19, r. 13, (1883, R. 253).

A plea in abatement was one which showed some ground for abating or quashing the writ, or the writ and declaration. Such pleas were generally based on the non-joinder of parties, or the personal competency of the parties to sue, or be sued. An instance of an ineffectual attempt to raise what amounted to a plea in abatement, will be found in *Preston* v. *Lamont*, 1 Ex. D. 361.

Though the form of objecting by means of a plea in abatement to the non-joinder of a defendant, who ought to be included in the action, is abolished,

yet an application to have such person included as a defendant ought to be granted or refused upon the same principles on which a plea in abatement would have succeeded or failed: *per* Lord Cairns in *Kendal* v. *Hamilton*, 4 App. Cas. 516. **Rules 415, 416.**

A defence stating that the plaintiff is a married woman and her husband is a necessary party is in reality an informal plea in abatement and is no defence: *Aboulof* v. *Oppenheimer*, 30 W. R. 429.

415. No new assignment shall be necessary or used. But everything which was formerly alleged by way of new assignment is to be introduced by amendment of the statement of claim. (*a*) J. A. Rule 143. No new assignment.

Same as the Eng. R. 1875, O. 19, r. 14. The Rule of 1883, R. 281, adds at (*a*) the words "or by way of reply."

Sometimes, owing to the generality of a declaration, the defendant was not sufficiently guided by it to the real cause of complaint, and was therefore led to apply his plea to a different matter from that which the plaintiff had in view; for example, a plaintiff might have been twice assaulted by defendant; one of these assaults may have been justifiable, as having been committed in self-defence, while the other might be without excuse. Supposing the plaintiff to sue in respect of the latter, the declaration from its general terms would not necessarily inform the defendant that it was the second assault, and the defendant might plead to the first, *son assault demesne*. The plaintiff then had no course but by new assignment to declare that he brought his action, not for the first, but for the second assault: see Stephen on Pleading, 187. Such an occurrence is not easily conceived under the present system, where the facts are stated, and not the legal result of facts only. Should it happen, however, the statement of claim may be amended. This *Rule* is not to be construed as rendering an amendment of the statement of claim necessary in other cases than those in which a new assignment would have been necessary under the old system pleading at law. In other cases, if new matter is raised by defendant, the plaintiff may either amend, or may reply by traverse, or confession or avoidance, or both: see *Hall* v. *Eve*, 4 Ch. D. 341, and *Earp* v. *Henderson*, 3 Ch. D. 254.

416. No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession. And he may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned. J. A. Rule 144. Defence to action for recovery of land.

Identical with the Eng. R. 1875, O. 19, r. 15, and with Eng. Rule of 1883, R. 254, except that the latter provides that by so pleading he shall be taken to deny the allegations in the statement of claim: see *Danford* v. *McAnulty*, and note *infra*.

This *Rule* only applies to a defendant. In an action of ejectment the statement of claim is as much subject to the foregoing *Rules* as any other action, and the plaintiff must therefore set forth the material facts upon which he relies to prove his title. The effect of a deed is not a fact, and a statement of claim which merely alleged that by virtue of certain deeds, etc., plaintiff was

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Rule 417. entitled to possession of land and did not state the purport of the deeds or set out the plaintiff's pedigree, or show the devolution of title by which the land in question became vested in the plaintiff, was therefore held embarrassing: *Philipps* v. *Philipps*, 4 Q. B. D. 127; 39 L. T. N. S. 329 and 556; *Davis* v. *James*, 26 Ch. D. 778. So also a statement of claim which simply alleged that the plaintiff had been wrongfully dispossessed of the land by the defendant was set aside for not stating the facts which shewed the plaintiff's interest in the land: *O'Connor* v. *O'Hara*, 8 L. R. Ir. 249.

In an action for dower, the fact showing the right of dower (which is a legal conclusion from the facts) must be stated: *Lauder* v. *Carrier*, 10 P. R. 612.

A statement of claim stating that "by virtue of a certain settlement, the plaintiff is entitled" without setting out or stating the effect of the limitations in the settlement is insufficient: *Riddell* v. *Strathmore*, 31 Sol. Jour. 183.

A statement that the plaintiff, or any person through whom he claims, was on such a day seized in fee simple in possession, would seem to be sufficient statement of a plaintiff's title: see the Form in Wilson's Jud. Act 7th ed. 572, and *Smith* v. *Cairns*, (before Chief Justice Galt, 8th April, 1889.) In *Beatty* v. *Leacy*, 16 L. R. Ir. 132, a general allegation of the plaintiff's derivative title was held sufficient.

In several cases under the Irish Jud. Act a defence in actions of ejectment for non-payment of rent has been set aside as embarrassing, where it in effect merely denied that defendant was tenant, without alleging anything as to the defendant's title, or saying that he was in possession: see *Hildige* v. *O'Farrell*, 8 L. R. Ir. 158; *Barnes* v. *Barnes*, 8 L. R. Ir. 165; *Rowley* v. *Laffan*, 10 L. R. Ir. 9.

Where the plaintiff's case depended on the heirship of A., and that fact was stated simply, without showing how A. became heir, the pleading was held sufficient: *Evelyn* v. *Evelyn*, 42 L. T. N. S. 248; 28 W. R. 531. The defendant relying on an equitable title must, in his statement of defence allege the nature of the deeds and documents on which he relies; and it is not sufficient to allege that by virtue of divers *mesne* acts and *mesne* assurances, all the estates and interests of the plaintiff's predecessor in title are now vested in the defendant: *Sutcliffe* v. *James*, 40 L. T. N. S. 875; 27 W. R. 750. A defendant who pleads merely that he is in possession, was always at liberty to question the plaintiff's title, even under the English system of pleading, by which what is not denied is taken to be admitted: *Danford* v. *McAnulty*, 6 Q. B. D. 645, affirmed in H. L. 8 App. Cas. 456; and this is now expressly provided in the Eng. Con. Rule of 1883, 254; *a fortiori* under the Ontario system, where mere non-admission puts the plaintiff to proof.

See *Attorney-General* v. *Midland Ry. Co.*, 3 Ont. 511, and *Adamson* v. *Adamson*, 17 Ont. 425.

Plea of not guilty by statute.

417. Nothing in these Rules contained shall affect the right of a defendant to plead not guilty by statute. And every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had. But if the defendant so pleads he shall not plead any other defence without the leave of the Court or a Judge. J. A. Rule 145

Same as Eng. R. 1875, O. 19, r. 16, (1883, R. 208).

There are numerous statutes authorizing this defence of "not guilty" by statute to be pleaded: *e.g.*, R. S. O. c. 73, s. 15, empowers Justices of the Peace and other public officers to plead it: *Dale* v. *Coon*, 2 P. R. 160.

By R. S. O. c. 170, s. 42, in actions against a Railway Company for indemnity for damage or injury sustained by reason of the railway, the defendants may plead it: but see *Reist* v. *Grand Trunk Ry. Co.*, 15 U. C. Q. B. 355;

Pew v. *Buffalo & Lake Huron Ry. Co.*, 17 U. C. Q. B. 282; and by R. S. O. c. 246, s. 90, in any action brought for anything done in pursuance of that Act, which relates to private lunatic asylums, the defendant may plead it: see Bullen & Leake Prec. of Pleadings, 3rd ed. 704. Rule 418.

The statute must be formally pleaded to enable the defendant to avail himself of any defence under it: *McKay* v. *Cummings*, 6 Ont. 400.

Where the plaintiff was not aware of the defence intended, qualified particulars of a defence of "not guilty by statute" were ordered: *Jennings* v. *G. T. Ry. Co.*, 11 P. R. 300.

"Not guilty by statute" cannot be pleaded to an action for specific performance of a contract: *Peterborough* v. *Midland Ry. Co.*, 12 P. R. 127; and see *Brown* v. *Blackwell*, 35 U. C. Q. B. 239.

The plea of "not guilty by statute" puts in issue not only the defence which the statute gives, but also all the defences which were admissible under the general issue at Common Law: *Ross* v. *Clifton*, 11 A. & E. 631.

An equitable defence is not admissible under the general issue by statute: *Brown* v. *Blackwell*, 35 U. C. Q. B. 239.

The Court will not in general with this plea allow other pleas: *Neale* v. *McKenzie*, 2 Dowl. P. C. 702; *Fisher* v. *Thames June. Ry. Co.*, 5 Dowl. P. C. 773; *O'Brien* v. *Clement*, 15 M. & W. 435; *Legge* v. *Boyd*, 1 M. & G. 898; *O'Donohue* v. *Maguire*, 1 P. R. 131; *Dale* v. *Coon*, 2 P. R. 160.

In *Hazelfoot* v. *Chelmsford Local Board*, (not reported but cited, Charley's Jud. Act, 3rd ed. 503), an action for taking gravel, Jessel, M.R., gave leave to defendants to plead the defence of sale by, and payment to, the authorized agent of the plaintiff, in addition to "not guilty."

A plea of the general issue by statute is not demurrable though no statute is applicable: *Cairns* v. *Water Commissioners of Ottawa*, 25 U. C. C. P. 551.

In an action in the County Court a plea of "not guilty by statute" does not necessarily raise any question as to the title of land, so as to exclude the jurisdiction of the Court; the general rule being that that particular defence must not only be pleaded but verified by affidavit: *Bell* v. *Grand Trunk Ry. Co.*, 16 C. P. 252.

418. Where a defendant pleads not guilty by statute, intending to give the special matter in evidence, by virtue of an Act of Parliament, he shall insert in the margin of the paragraph of the statement of defence containing the plea the words "By Statute," together with the year or years of the reign in which the Act or Acts of Parliament upon which he relies for that purpose were passed, and also the chapter and section of each of such Acts, and shall specify whether such Acts are public or otherwise, otherwise the plea shall be taken not to have been pleaded by virtue of an Act of Parliament. (Rules of pleading T. T. 1856, 21.) Plea of "not guilty by statute," to contain reference to statute relied on.

The provisions of this *Rule* must be strictly followed: *Bond* v. *Conmee*, 15 Ont. 716. Both the statute by which the plea is allowed and that containing the matter relied on by way of defence must be mentioned in the margin: *VanNatter* v. *Buffalo & L. Huron Ry. Co.*, 27 U. C. Q. B. 581; *Belch* v. *Arnott*, 9 C. P. 68.

If the defendant omits to follow the requirements of this *Rule*, he cannot give special matter in evidence to bring himself within the terms of an Act of Parliament which allows a plea of "not guilty": *Coy* v. *Lord Forester*, 8 M. & W. 312; *Joy* v. *McKinn*, 1 U. C. C. P. 13. An amendment may sometimes be allowed to supply the omission, even after verdict: *Edwards* v. *Hodges*,

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Rules 419-421.

15 C. B. 477; *VanNatter* v. *Buffalo & Lake Huron Railway Company*, 27 U. C. Q. B. 581. But where a defendant pleaded "not guilty," intending to justify under a statute, but the Nisi Prius record had not the words "by statute" in the margin, the Judge at Nisi Prius refused to allow an amendment by the addition of those words, as it was not shown that they were in the margin of the defendant's plea: *Forman* v *Dawes*, 1 Car. & M. 127. The parties may so act at the trial, and subsequently, as to be precluded from raising the objection of the omission to name a particular statute in the margin of the plea: *Burridge* v. *Nicholetts*, 6 H. & N. 383.

The words "according to statute" instead of "by statute," written in the margin, are sufficient: *Robertson* v. *Cooley*, 7 U. C. Q. B. 305.

Inconsistent pleadings.

419. No pleading (*a*) shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same. J. A. Rule 149.

This is the same as the Eng. R. 1875, O. 19, r. 19 (1883, R. 212), except that at (*a*) are the words "not being a petition or summons," and the former practice was substantially the same.

A second pleading may add a fact to, but must not contradict, the first: *per* Bre t, L.J., in *Breslauer* v. *Barwick*, 36 L. T. N. S. 52; 24 W. R. 901; nor raise a fresh cause of action: *Collambell* v. *Flight*, W. N. 1877, 125. See also *Williamson* v. *L. & N. W. Ry. Co.*, 12 Ch. D. 787.

In an action for goods sold, the defence was coverture; plaintiff replied, that he was not aware that defendant was a married woman, and thought she was a widow, and that she obtained credit by representing herself to be entitled to an annuity under a separation deed: and it was held that the reply did not raise a claim inconsistent with the previous pleading: *Collett* v. *Dickenson*, W. N. 1878, 52.

6. Issues.

Settlement of issues.

420. Where in any action it appears to a Judge that the pleadings do not sufficiently define the issues of fact in dispute between the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the Judge. J. A. Rule 177.

To the same effect as Eng. R. 1875, O. 26, (1883, R. 380).

Issues were directed to be framed under this *Rule* for trying preliminary questions, under *Rule* 519, in *Wood* v. *Anglo-Italian Banking Co., Limited*, 34 L. T. N. S. 255.

7. Striking out, Amending Pleadings, etc.

Court may order scandalous matter to be expunged.

421. If upon the hearing of a cause or matter, the Court is of opinion that any pleading, petition or affidavit, or any part of a pleading, petition or affidavit is scandalous, the Court may order the pleading, petition or affidavit to be taken off the file, or may direct the scandalous matter to be expunged, and is to give such directions as to costs as it may think right. Chy. O. 69.

As to scandalous matter in the statement of claim, or defence, see *Rule* 423.

Rules 422, 423.

Although there is no *Rule* specially giving the Court power to take pleadings or affidavits off the files for prolixity, it has nevertheless an inherent power to do so: *Hill* v. *Hart Davis*, 26 Ch. D. 470; and pleadings may also be ordered to be struck out for prolixity: *Marsh* v. *Pontefract*, W. N. 1876, 7; 1 Charl. Ch. Ca. 66; *Davy* v. *Garrett*, 7 Ch. D. 473.

As to the power of the Court to strike out scandalous matter see *Bright* v. *Marner*, W. N. 1878, 211; *Cracknall* v. *Janson*, 11 Ch. D. 1; and as to scandalous matter in affidavits, *Warner* v. *Mosses*, W. N. 1881, 69; *Kenrick* v. *Kenrick*, 12 W. R. 335; *Sadlier* v. *Smith*, 7 P. R. 409; *Blake* v. *Albion*, 24 W. R. 677.

Application to strike out scandalous matter.

Nothing can be scandalous which is relevant: *per* Cotton, L.J., in *Fisher* v. *Owen*, 8 Ch. D. 653; *Jones* v. *Huntingdon*, 3 Chy. Ch. 117; *B*—— v. W——, 31 Beav. 342; *Millington* v. *Loring*, 6 Q. B. D. 190; and the test is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation which is material with reference to the relief prayed: *Christie* v. *Christie*, L. R. 8 Chy. 499; *Cashin* v. *Craddock*, 3 Ch. D. 376. The Court has power to strike out scandalous matter from an affidavit, or to order the person who has filed it to pay the costs of it, on the application of any person, even a stranger to the action, or *mero motu*. It is not necessary that the applicant should be the injured person: *Cracknall* v. *Janson*, 11 Ch. D. 1; *Middlemas* v. *Wilson*, L. R. 10 Chy. 230; *Sadlier* v. *Smith*, 7 P. R. 409; 15 C. L. J. 52; *Goddard* v. *Parr*, 24 L. J. Chy. 783.

Where proceedings are ordered to be taken off the files it is said to be the proper practice to destroy them: *Hill* v. *Hart Davis*, 26 Chy. D. 471: *sed quære* is not the proper practice to seal them up? otherwise should they be destroyed, and the order be subsequently reversed, they could not be restored to the files.

The Court has jurisdiction to order any proceeding which contains scandalous matter to be amended; thus, scandalous statements in a bill of costs were ordered to be struck out: *Re Miller & Miller*, 51 L. T. N. S. 853; 33 W. R. 210; W. N. 1884, 234; *Erskine* v. *Gartshore* 18 Ves. 114.

Costs of motion.

The costs of the motion are between solicitor and client: *Ex parte Thorp*, 1 Ves. 394; *Ex parte Porter*, 2 M. & Ayr. 220; *Ex parte Simpson*, 15 Ves. 476, and both the party and his solicitor concerned are liable to pay costs of an application: *Ib.*; *Ruttray* v. *George*, 16 Ves. 232, and see *Bishop* v. *Willis*, 5 Beav. 83; *Anon*, 4 P. R. 242. As to the disallowance of the costs of unnecessary matter in pleadings and affidavits, see *Rule* 1195.

Motion may be made at any time before hearing.

422. A motion to have any pleading, petition or affidavit taken off the file for scandal, or to have the scandalous matter expunged, may be made to the Court or a Judge at any time before the hearing of the cause or matter. Chy. O. 70.

Scandal in pleading.

As to scandalous matter in statements of claim or defence, see *Rule* 423.

As to disallowance of costs of unnecessary matter contained in pleadings and affidavits, see *Rule* 1195.

Master no power to strike out interrogatories for impertinence.

Under this *Rule* the Master in Chambers, or Local Judge, or Master, has no power to strike out for impertinence, interrogatories which have been delivered for the examination of a witness under commission; *Williams* v. *Corby*, 8 P. R. 83.

For form of notice of motion, see Leggo's Forms, 2nd ed., No. 526.

Amendment with leave.

423. The Court or a Judge may, at any stage of the proceedings, order to be struck out or amended any matter in the pleadings respectively which may be scandalous, or

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Rule 423. which may tend to prejudice, embarrass, or delay the fair trial of the action. J. A. Rule 178.

Scandal. Same as Eng. *Rule* 1875, O. 27, r. 1. Rule 309 of the Rules of 1883 is different in language. As to striking out scandalous matter see *Rule* 421 and notes.

Amendments. The original *Rule* contained an additional clause providing that all such amendments shall be made as may be necessary for the purpose of determining the real question or questions in controversy between the parties": as to which see *Collette* v. *Goode*, 7 Ch. D. at p. 847; *Bannicott* v. *Harris*, W. N. 1876, 9; 1 Charl. Ch. Ca. 95; *Laird* v. *Briggs*, 19 Ch. D. 22, 29. This is in effect the provision made by *Rule* 444, and has probably therefore been omitted here. The peremptoriness of the *Rules* was, however, and will still be subject to the limitation that the whole nature of the action may not be changed by amendment: *Blenkhorn* v. *Penrose*, 29 W. R. 237; 43 L. T. N. S. 668; and subject also to whether justice will be advanced having regard to the nature of the proposed amendment: *Mellhargey* v. *McGinnis*, 9 P. R. 157; *Caughill* v. *Clark*, 9 P. R. 471; 3 Ont. 269; *Hendricks* v. *Montagu*, 17 Ch. D. 642; *Weldon* v. *Neal*, 19 Q. B. D. 394; and the time when the application is made: see *Cropper* v. *Smith*, 26 Ch. D. 700; 10 App. Cas. 249, and other cases, *infra*.

Certain amendments may be made *without leave*. The plaintiff may so amend his statement of claim before the expiration of the time for reply: *Rule* 424; and a defendant may so amend a counter-claim to which a reply has been made within the time allowed for pleading to such reply: *Rule* 425. In other cases *leave is necessary*, and two classes of amendments are provided for by leave:—(1) On the application of the party pleading, to enable him to raise his real case; (2) on the application of the opposite party, to have struck out or amended any pleading which is improper, or framed so as to prejudice, embarrass, or delay: *Rule* 423.

Rules 444 and 780 also contain provision for amendment of defects and errors.

As to amendment of writs see note to *Rule* 444.

Amendments respecting the parties are treated of in *Rules* 308, 324 and 445.

Amendments which require the addition of parties as well as the restatement of allegations are made by the combined action of *Rule* 324 and the present *Rule*. The latter kind are alone here discussed.

On a party's own application. **(1) Amendment on the application of a party to amend his own pleading, so as to properly frame his case.**

In *Tildesley* v. *Harper*, 10 Ch. D. at p. 396; Bramwell, L.J., said his practice in Chambers had been to give leave to amend, unless satisfied that the party applying was acting *mala fide*, or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise: followed in *Re Trufort, Trafford* v. *Blanc*, 34 W. R. 56; 53 L. T. N. S. 498; *Kurtz* v. *Spence*, 36 Ch. D. 770, 773. This rule has been subsequently held by the Court of Appeal to be the correct one to be adopted until a final judgment is obtained by one party. After that he acquires a vested right, of which he is not lightly to be deprived on account of blunders by the opposite party committed without fault on his side: *Claparede* v. *Commercial Union*, 32 W. R. 151, 262. This rule is similar to that where an extension of time is applied for: see *Ib.* and notes to sec. 71 of the Act, *supra* p. 81.

The Court of Appeal in *Tildesley* v. *Harper* applied in respect of an amendment at the trial the same principles as if the application had been made before trial on motion: see *Green* v. *Sevin*, 13 Ch. D. 589, 595.

When allowed. Amendments of the first kind are liberally viewed, and have been allowed after issue joined, and the cause entered for trial, and accidentally postponed: *Roe* v. *Davies*, 2 Ch. D. 729; or at the trial: *King* v. *Corke*, 1 Ch. D. 57; *Nobel's Explosives Co.* v. *Jones*, 17 Ch. D. 721, 724; *Long* v. *Crossley*, 13 Ch. D. 388; *Green* v. *Sevin*, *supra*; *Russell* v. *Canada Life Assurance Co.*, 32 C. P. 256. In such a case perhaps the opposite party may obtain costs incurred in

respect to the old pleadings: see Dan. Prac. 5th ed. 351-52; or if a plaintiff, he may have the opportunity given him to consider whether he will discontinue: see *Edison Telephone Co.* v. *India Rubber Co.*, 17 Ch. D. 137. **Rule 423.**

Leave to amend will generally be granted where there has been a slip in pleading, but not, in general, so as to raise a fresh cause of action: *Clarke* v. *Yorke*, 31 W. R. 62; 44 L. T. N. S. 381.

Where by a slip in a pleading the legality of a will intended to be impeached was admitted, leave to amend was granted: *Smith* v. *Smith*, 5 Ont. 690, 698.

Leave to amend at the hearing may be granted, though the proposed amendments set up a case not raised by the claim, and may require an adjournment to obtain fresh evidence: *Budding* v. *Murdoch*, 1 Ch. D. 42: see, however, the remark as to the headnote to that case, *Re St. Nazaire Co.*, 12 Ch. D. at p. 92; *Betts* v. *Doughty*, 5 P. D. 26. Such leave will in general be granted on proper terms so as to enable the real question between the parties to be tried: *Laird* v. *Briggs*, 19 Ch. D. 22; *Kurtz* v. *Spence*, 36 Ch. D. 770, 773.

Where all the evidence that could throw light on the case has been given, it is a mere matter of form to adapt the pleadings to the matters proved: *Gough* v. *Beach*, 6 Ont. 699.

The Court has, however, a discretion as to the amendment: see *Ashley* v. *Taylor*, 10 Ch. D. 772; *Oates* v. *Foresters*, 4 Ont. 535; and leave was refused at the hearing, where no reason appeared why the bill was not amended when the answer came in: *Offord* v. *Offord*, 1 Charl. Ca. (Court) 102; see *Lowther* v. *Heaver*, 37 W. R. 55; 59 L. T. N. S. 631; and where the effect of allowing an amendment would be to compel the plaintiff to new assign and adduce new evidence: *Edevain* v. *Cohen*, 41 Ch. D. 563. When refused

Leave was refused, where the Judge thought the amendment would merely enable the defendants to raise, to the plaintiff's title to sue, a technical objection which was not raised on the pleadings (as required by *Rule* 402), and which the defendant never intended to raise, till he adroitly sought to avail himself of it at the hearing: *Collette* v. *Goode*, 7 Ch. D. 842; see also *Caughill* v. *Clark*, 9 P. R. 471; *Oates* v. *Foresters*, 4 Ont. 535. So also where the effect would be to raise a new question which would involve an estate in further intricacies, and might more conveniently be raised in a separate action: *Re Blight, Blight* v. *Hartnoll*, 42 L. T. N. S. 531; or to convert a claim based on a subsisting lease into one based on an eviction: *Newby* v. *Sharpe*, 8 Ch. D. 39; see also *Clarke* v. *Wray*, 31 Ch. D. 68; *Crowe* v. *Barnicot*, 6 Ch. D. 753; *Mellhargey* v. *McGinnis* in note to *Rule* 426; *Blackmore* v. *Edwards*, W. N. 1879, 175, 24 Sol. Jour. 67; and where the plaintiff had elected to claim in a manner inconsistent with the proposed amendment: *Cargill* v. *Bower*, 10 Ch. D. 502; *Hipgrave* v. *Case*, 28 Ch. D. 356; and where the effect would be to raise a new issue merely to determine how the costs of the action should be borne: *Webber* v. *Wedgewood*, W. N. 1883, 8; or to raise a charge of fraud *Montagu*, when the case has been launched independently of fraud: *Hendricks* v. at a time 17 Ch. D. 642; or *vice versa*: *Duncan* v. *Meek*, 32 C. P. 195; or require the addition of parties, and raise a new case: *Nobel's Explosives Co.* v. *Jones*, 17 Ch. D. 721; *Edevain* v. *Cohen*, *supra*; and where the trial was approaching and the amendment would have the effect of delaying the trial: *Tottenham Local Board* v. *Lea Conservancy Board*, 80 L. T. Jour. 244.

Where a claim was for specific performance *or* damages for breach of an agreement, and the plaintiff, pending the action, re-sold the subject of the contract notifying the defendant of his intention to do so, but went to trial without amending his claim, it was held that, as he had disabled himself from enforcing specific performance, the action must be dismissed. Leave to amend at that stage by striking out the specific performance claim was not considered proper: *Hipgrave* v. *Case*, 28 Ch. D. 356. See also *Cropper* v. *Smith*, 26 Ch. D. 700; 10 App. Cas. 249.

In an action for personal injuries, the defendants denied the charge of negligence. After more than six months they proposed to amend by alleging a contract that would transfer the liability to a local body. An action against such local body was required by statute to be brought within six months from the accrual of the cause of action. Leave to amend was accordingly refused as the

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Rule 423. plaintiff would be irremediably injured, and could not be restored to the same position as before the defendants' mistake in pleading: *Steward* v. *Metropolitan Tramways Co.*, 16 Q. B. D. 556.

Materiality or nature of amendment need not be shewn.

A defendant who had put in a joint defence with another was allowed to amend by raising defences separately from his co-defendant; and an affidavit showing the nature of the new defence sought to be raised or its materiality was not required: *Cargill* v. *Bower*, 4 Ch. D. 78; see also *Long* v. *Crossley*, 13 Ch. D. 391, *supra*, p. 446; and *Chesterfield* v. *Black*, 25 W. R. 409. In the last case an application was made by the plaintiffs in January, 1877, to amend their statement of claim after reply delivered in May, 1876, and hearing fixed for February, 1877. Within a few weeks of the hearing documents had been produced by the defendant for inspection, which contained particulars previously unknown to the plaintiffs, and which strengthened their case; it was contended that the old practice was not altered by which due despatch and the materiality of the amendment must be shown. Bacon, V.C., said: "By the provisions of the Judicature Act I am relieved from the necessity of inquiring into the materiality of the proposed amendment. I think the enlarged power given to the Court by the Judicature Act is one of the most useful and beneficial which has ever been conferred on the Court. It is against justice that a man should not be at liberty to bring his case forward in the way he thinks best, and that he should be precluded from bringing before the Court those materials which he considers necessary for the proper prosecution of his case. I do not think it was the intention of the Act that the old qualification should apply. In this case, till a recent period, the plaintiffs did not know of certain documents affecting the subject matter of the action. These documents have been laid before Counsel, and on his advice application is made to the Court for leave to amend. Is not this a ground on which the Court will exercise the discretion which it takes under the Act? With the rest of the case I have nothing now to do."

The Court would seem, however, to have power in its discretion, to consider the amendment and refuse to allow an amendment which does not appear to be true, or capable of being substantiated: see *McIlhargey* v. *McGinnis*, in note to *Rule* 426, or which would set up an unmeritorious defence, where the time for raising it without leave has expired: see *Caughill* v. *Clarke*, 9 P. R. 471; 3 Ont. 269; *Oates* v. *Foresters*, 4 Ont. 535.

As to appealing from orders granting, or refusing leave to amend, see *infra* p. 450.

An action may, by amendment of the writ and statement of claim, be turned into an action by the Attorney-General at the suit of a relator without prejudice to a pending motion in the action; the necessary sanction of the Attorney-General being obtained: *Caldwell* v. *Pugham Harbour, etc.*, 2 Ch. D. 221; see *Mounsey* v. *Earl of Lonsdale*, L. R. 6 Chy. 141. Where an amendment of a matter of account as stated in the pleadings would be allowed before decree, a similar amendment in respect of accounts filed should be allowed in the Master's Office: *Court* v. *Holland*, 4 Ont. 688.

On application of the opposite party to strike out.

(2) Amendment by striking out a pleading as improper or embarrassing, on the application of the opposite party.—An embarrassing pleading has been defined as one in which matter is pleaded which the party is not entitled to make use of: *Heugh* v. *Chamberlain*, 25 W. R. 742; W. N. 1877, 128; *e.g.*, in an action to enforce a contract for the sale of a patent without warranty, a defence putting in issue the validity of the patent: *Liardet* v. *Hammond Electric Light*, 31 W. R. 710; W. N. 1883, 96; allegations respecting matters compromised in a former suit, and which therefore could not be relitigated: *Knowles* v. *Roberts*, 38 Ch. D. 263.

A pleading not drawn according to the *Rules* respecting pleadings is embarrassing.

As a general rule a pleading should not be set aside on summary application unless plainly frivolous or indefensible. The party should be left to demur. Even if the pleading appears to be demurrable that is not a sufficient reason for not striking it out: *Glass* v. *Grant*, 12 P. R. 480.

The power to strike out is not so exercised as to enable one party to dictate to the other how he should plead: *Rolfe* v. *Maclaren*, 3 Ch. D. 106, 108; but portions of pleadings have been struck out which are not in accordance with *Rule* 399; *e.g.*, where they contained irrelevant allegations of fraud, to the effect that in transactions other than the one in question the defendants had been guilty of fraud: *Blake* v. *Albion, etc.*, 35 L. T. N. S. 269; statements in the nature of a demurrer: *Stokes* v. *Grant*, 4 C. P. D. 25; *Menhinick* v. *Turner*, W. N. 1876, 55; 2 Charl. Ch. Ca. 42; immaterial facts set out with prolixity: *Davy* v. *Garrett*, 7 Ch. D. 473; admissions; *Askew* v. *N. E. Ry. Co.*, W. N. 1875, 238; 1 Charl. Ch. Ca. 90, *Davy* v. *Garrett*, *supra*; evidence: *Jones* v. *Turner*, W. N. 1875, 239; 1 Charl. Ch. Ca. 91: scandalous statements which were immaterial: *Duncan* v. *Vereker*, W. N. 1876, 64; 2 Charl. Ch. Ca. 44; see *Cracknall* v. *Janson*, 11 Ch. D. 1; *Sadleir* v. *Smith*, 7 P. R. 409; *Christie* v. *Christie*, L. R. 8 Chy. 499; *Wood* v. *Earl Durham*, 21 Q. B. D. 501; and notes to *Rule* 421; but nothing is scandalous that is relevant to the merits: Dan. Prac. 5th ed. 290. General statements of title may be struck out: *Philipps* v. *Philipps*, 4 Q. B. D. 127; *Riddell* v. *Stathmore*, 31 Sol. Jour. 183; *Rule* 416; allegations so prolix as to be obscure: *Marsh* v. *Pontefract*, W. N. 1876; 1 Charl. Ch. Ca. 66; see also *Hill* v. *Hart-Davis*, 26 Ch. D. 470; and unnecessary details though not amounting to statements of evidence: *Aderis* v. *Thrigley*, W. N. 1876, 56; 2 Charl. Ch. Ca. 43. The whole of a pleading may be struck out; a statement of claim: *Cashin* v. *Cradock*, 3 Ch. D. 376; *Ker* v. *Williams*, W. N. 1886. 16; a defence: *Preston* v. *Lamont*, 1 Ex. D. 361; or a reply: *Williamson* v. *L. & N. W. Ry. Co.*, 12 Ch. D. 787. See also *Golding* v. *Wharton Saltworks Co.*, 1 Q. B. D. 374; W. N. 1876, 40; 2 Charl. Ch. Ca. 40, and *Harris* v. *Gamble*, 6 Ch. D. 748. **Rule 423.**

In an action for seduction a paragraph of the statement of claim alleged that the defendant administered noxious drugs to the plaintiff's daughter. It was held that the paragraph could not be struck out as disclosing a felony for which the defendant ought to have been prosecuted, inasmuch as the plaintiff was not the person upon whom the felonious act was committed, and had no duty to prosecute: *Appleby* v. *Franklin*, 17 Q. B. D. 93.

Allegations in the statement of claim may be struck out where they have been abandoned by the reply: *Brooking* v. *Maudsley*, 55 L. T. N. S. 343.

Where allegations are properly pleadable under *Rule* 399, the Court has no power to strike out the paragraph containing them, unless scandalous, or tending to prejudice, embarrass or delay, within the meaning of the present *Rule*: *Millington* v. *Loring*, 6 Q. B. D. 190.

Pleadings will not necessarily be struck out because they are inconsistent: *Re Morgan, Owen* v. *Morgan*, 35 Ch. D. 492; as a rule the only grounds for striking out pleadings are that they are (1) embarrassing, (2) scandalous, (3) tending to prejudice or delay: *Ryan* v. *Fish*, 10 P. R. 187, 192; but in *Chamberlain* v. *Chamberlin*, 11 P. R. 501, it was held that a defence which was wholly inapplicable, might be struck out, though neither scandalous nor tending to prejudice, embarrass, or delay. See *Glass* v. *Grant*, 12 P. R. 480.

A plaintiff by writ joined without leave other claims with a claim to recover land. By the statement of claim he omitted the claim to recover the land. A defence setting up that the writ was issued without leave was held not embarrassing: *Wilmott* v. *Freehold House Property Co.*, 51 L. T. N. S. 358.

Reasons pleaded to shew why an act, said to be *ultra vires*, was not *ultra vires*, were held not to be irrelevant or embarrassing, and a matter alleged as a reason should not be struck out because it is a bad reason: *Tomkinson* v. *S. E. Ry. Co.*, 57 L. T. N. S. 358.

A defence separating a libel, and justifying as to part, without leaving it clear what part was justified, was struck out as embarrassing: *Fleming* v. *Dollar*, 23 Q. B. D. 388.

An amendment, under leave to amend, granted when a new trial was ordered, adding claims for assault and false imprisonment, which would be barred by the Statute of Limitations if made by a new writ, was struck out. An amendment which will injuriously alter the rights which the parties would have if there were no amendment will not be allowed: *Weldon* v. *Neal*, 19 Q. B. D. 394.

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Rule 424.

Where the plaintiff asked for an injunction and damages, and recovery of possession, it was held that such claims were inconsistent and embarrassing, and the plaintiff, though granted an injunction, was refused costs: *Evans* v. *Davis*, 27 W. R. 285.

In *Restell* v. *Steward*, W. N. 1875, 249, paragraphs introduced into a statement of defence by amendment were struck out.

Where a pleading is defective in not containing all allegations necessary to show a case for relief, or a defence, the pleading may for that reason be embarrassing, and where the defects can be supplied it will in general not be proper to demur, but a motion to strike out the pleading or paragraph may be made. Thus, in *Scane* v. *Duckett*, 3 Ont. 370, the omission in a claim by a simple contract creditor to state that he sues on behalf of all creditors to set aside a conveyance as fraudulent against creditors, was held not matter of demurrer. So where a claim for ejectment alleged that prior to 1874 defendant was tenant and had paid rent, but since 1874 had not paid rent, it was held to be embarrassing as not showing any subsisting tenancy: *Molloy* v. *Lewers*, 12 L. R. Ir. 39; see also *Rowley* v. *Laffan*, 10 L. R. Ir. 9.

In *Finch* v. *The Guardians of York Union*, 35 L. T. N. S. 360, a motion to strike out the whole statement of defence was held to be misconceived, as the defence was not so frivolous as to justify its being set aside, and the plaintiff ought to have demurred. In *Weir* v. *Barnett*, W. N. 1875, 258; 1 Charl. Ch. Ca. 93, a defendant applied to compel the plaintiff to amend, in an action for false representations in regard to debentures, stated to have been made in a letter and prospectus, and Huddleston, B., refused to order an amendment of the claim, so as to show which of the false representations were in the letter, and which in the prospectus.

Where pleadings are such as should be struck out, they ought to be struck out by the Judge, and not be left to be dealt with as a question of costs: *Watson* v. *Rodwell*, 3 Ch. D. 380.

Ordinarily, instead of altogether striking out a pleading, or part of a pleading, the party whose pleading is defective will be given an opportunity to amend: *Moorhouse* v. *Colville*, W. N. 1876, 12; 1 Charl. Ch. Ca. 95; *Anon*, W. N. 1876, 24; 2 Charl. Ch. Ca. 39.

Applications under this *Rule* to strike out a pleading are under the practice in Ontario made to the Master in Chambers; for the practice in England in this respect, and as to the costs of such motions, see *Marriott* v. *Marriott*, 26 W. R. 416.

By Eng. R. 1883, O. 25, demurrers are abolished, and in lieu thereof, r. 4, provides for making of a motion to strike out pleadings as disclosing no reasonable cause of action. That practice has not been adopted in Ontario.

Appeals.

The striking out of pleadings is in the discretion of the Judge; and, as a general rule, an appeal from his order will not be entertained, unless a question of principle is involved: see *Golding* v. *Wharton Saltworks Co.*, 1 Q. B. D. 374; *Watson* v. *Rodwell*, 3 Ch. D. 380; *Ruston* v. *Tobin*, 10 Ch. D. 558, 565; *Re Martin*, *Hunt* v. *Chambers*, 20 Ch. D. 365. Such an appeal was entertained in *Davy* v. *Garrett*, 7 Ch. D. 473; *Knowles* v. *Roberts*, 38 Ch. D. 263; see also *Laird* v. *Briggs*, 19 Ch. D. 22; *Peterkin* v. *McFarlane*, 4 Ont. App. 25.

On this subject see also notes to sec. 65, *supra* pp. 74 and 75.

In view of the difference between the English and Ontario systems as to admissions (see *Rule* 403,) caution will be necessary in applying the English authorities on the subject of striking out embarrassing pleadings. The English Rules require a party to deal specifically with the allegations in the previous pleadings, and to deny such allegations as he is not prepared to admit; but where, as under the Ontario system, a party is not so bound to make denials, he might not, in framing his pleading, be embarrassed by an improper pleading, though he might be prejudiced by allowing irrevelant statements of fact to go before a jury.

Amendment by plaintiff

424. The plaintiff may, without any leave, amend his statement of claim once at any time before the expiration

of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who last appears. J. A. Rule 179. Rule 425. without leave.

This is the same as the Eng. R. 1875, O. 27, r. 2, (1883, R. 310), and introduced a practice new to the Common Law Courts.

A *precipe* order to amend was formerly obtained in Chancery but is unnecessary under this *Rule* as the amendment may be made "without any leave." *Rule* 432, by using the words "if any," seems also to point to an amendment without order.

The former Chancery practice warranted the addition, under an order of course to amend, of a plaintiff: *Dunn* v. *McLean*, 6 P. R. 97, or defendant; *Attorney-General* v. *Nethercoat*, 2 M. & Cr. 604, but not the striking out of a defendant or of a plaintiff, if any of defendants had answered: *Dunn* v. *McLean*, *supra*. As, however, this *Rule* relates to the amendment of a pleading only, and as an action is not now commenced by a pleading but by a writ, it would seem that no alteration in the frame of the action as to parties can be made by amendment under this *Rule*. It is to be observed also that *Rules* 326 and 327 point to the service of added defendants with a *writ*. *Rule* 324 *et seq.*, and perhaps 444, would seem to apply where an amendment in respect to the parties is desired.

It has been held under the similar provisions of the Irish Judicature Act, that a plaintiff amending without leave may not add a fresh cause of action not covered by the indorsement of the writ, and that such an amendment is liable to be moved against under *Rule* 426: *Moore* v. *Atwill*, 8 L. R. Ir. 245.

Such an amendment may affect the costs of prior pleadings, and on a motion under *Rule* 426 such costs may be provided for, but under the English practice it is not the rule that the statement of claim must be no wider than the claim indorsed on the writ: see *Johnson* v. *Palmer*, 4 C. P. D. 258; and *Bourke* v. *Alexandra Hotel Co.*, W. N. 1877, 30; (except when a defendant has not appeared, and a statement of claim has to be delivered, in order to found a motion for judgment: *Gee* v. *Bell*, 35 Ch. D. 160; 56 L. T. N. S., 305); and there seems to be no reason why the plaintiffs should not, except as to parties, make under this *Rule* as large amendments as by the former Chancery practice might have been made under an order of course: as to which see *McGillivray* v. *McConkey*, 6 P. R. 56. The provisions of *Rule* 426 will enable the defendant to obtain the imposition of any terms that may be just.

As to making amendments pending a demurrer, see *Rule* 390.

The plaintiff may not change the place of trial by amendment under this *Rule*: *Bull* v. *N. British*, 10 P. R. 622; and it has also been held in England that he may not by amendment under this *Rule* supply an omission to name the place of trial in his statement of claim: *Locke* v. *White*, 33 Ch. D. 308. But this may not be so in Ontario, for it would not be known where the place of trial was to be; while in England the effect of omitting to name any place is that the action is to be tried at the Middlesex Sittings. Such an amendment in England, therefore, would amount to changing the place of trial without order, but would not have that effect here. See also *Powell* v. *Cobb*, 52 L. T. N. S. 183.

Where the plaintiff amends after a statement of defence has been put in, the defendant may amend his statement of defence under *Rule* 427, or put in a new defence, or may proceed with his original defence: *Boddy* v. *Wall*, 7 Ch. D. 164, (not following *Durling* v. *Lawrence*, 46 L. J. Chy. 808; W. N. 1877, 182.) If he neither amends or puts in a new defence, it is presumed that the original defence will stand as a defence to the amended statement of claim.

425. A defendant who has set up any set-off or counter-claim, may, without any leave, amend such set-off or counter-claim at any time before the expiration of the time Amendment by defendant without leave.

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Rules 426, 427.

allowed him for pleading to the reply, and before pleading thereto, or in case there be no reply, then within twenty-eight days from the filing of his defence or counter-claim. J. A. Rule 180.

Substantially the same as the Eng. R. 1875, O. 27, r. 3, (1883, R. 311).

The time for pleading to a reply is four days : *Rule* 383. For the course to be pursued by plaintiff if the defendant amends, see *Rules* 426 and 427, and *Boddy* v. *Wall*, *supra*.

The last clause allowing an amendment to be made though there is no reply is similar to the provision in the case of a plaintiff made by *Rule* 424, and is doubtless to enable the defendant to amend if he has obtained any fresh light by examination for discovery.

Until the time allowed by this *Rule* for amending has expired the pleadings are not closed and notice of trial can therefore not be given : *Garner* v. *Tune*, 12 P. R. 280 ; and see notes to *Rules* 392 and 654.

Disallowance of amendment.

426. Where any party has amended his pleadings under either of the last two preceding Rules, the opposite party, may, within eight days after the delivery to him of the amended pleading, apply to the Court or a Judge, to disallow the amendment, or any part thereof, and the Court or Judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it, subject to such terms as to costs or otherwise as may seem just. J. A. Rule 181.

Same as Eng. R. 1875, O. 27, r. 4, (1883, R. 312). The giving of security for costs has been imposed as a term where a new case was raised by the amendment : *Northampton Coal, Iron & Waggon Co.* v. *Midland Waggon Co.*, 7 Ch. D. 500.

Where the plaintiff issued a writ indorsed for the recovery of land, claiming under an assignment and surrender of a lease ; and the defence was that the lease was in effect a mortgage, and the surrender was obtained by fraud : an amendment by the plaintiff asking, in the alternative, foreclosure [illegible] as mortgagee was disallowed on motion under this *Rule* : *McIlhargey* v. *Dennis*, 9 P. R. 157.

Where a plaintiff strikes out allegations so as to make the answer of defendant useless, the defendant may apply under this *Rule* for the costs unnecessarily incurred ; see *McGillivray* v. *McConkey*, 6 P. R. 56 ; *Clarkson* v. *White*, 4 Ont. 663 ; *Strickland* v. *Strickland*, 3 Beav. 242 ; *Mavor* v. *Dry*, 2 S. & S. 113 ; *Mounsey* v. *Burnham*, 1 Ha. 22 ; Dan. Pr. 5th ed., 351-2 ; *Bourne* v. *Coulter*, 50 L. T. N. S. 321 ; 53 L. J. Chy. 699. See also *Weldon* v. *Neal*, 19 Q. B. D. 394, in note to *Rule* 423.

Leave to plead or amend after amendment.

427. Where any party has amended his pleading under Rules 424 ~~or 425~~, the other party may [without leave amend his former pleading within four days after the delivery of the pleading so amended ; or he may] apply to the Court or a Judge for leave to (*a*) amend his former pleading within such further time and upon such terms as may seem just. J. A. Rule 182.

The Eng. R. 1875, O. 27, r. 5, has not the words in brackets, and inserts at (*a*) the words "plead or to." In other respects the Rules are the same. The Eng. R. of 1883, R. 313, is more like the present *Rule*. It allows eight days for pleading or amending without leave, and provides that if neither course is taken the party shall be deemed to rely on his original pleading. **Rules 428-430.**

428. Either party may amend his pleading at any time without order on filing the written consent of the opposite party or his solicitor. J. A. Rule 183. Amendment by consent.

429. In all cases not provided for by the preceding Rules [numbered from 424 to 428] application for leave to amend any pleading may be made by either party to the Court or a Judge in Chambers or to the Judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise, as may seem just. J. A. Rule 184. Application for leave to amend.

The Eng. R. 1875, O. 27, r. 6, (1883, R. 314), has the words "of this order" instead of the words in brackets; otherwise it is the same as this *Rule*.

The English Rule seems to be intended to provide the mode in which an application under *Rule* 423 is to be made. The object of the present *Rule* is probably the same and to authorize application for leave to amend when the time for doing so without leave under the preceding *Rules* has expired.

The expression "the Court or a Judge in Chambers" would seem to have no different force from "the Court or a Judge" used in *Rules* 423, 444 and other *Rules*, so that the motion may be made before the Master in Chambers or other officer having like jurisdiction. See notes to *Rules* 2 and 30.

Where an application is made at a late stage, doubtless the person applying will have to pay the costs: see *Chesterfield* v. *Black*, 25 W. R. 409; *Cargill* v. *Bower*, 4 Ch. D. 78; *King* v. *Corke*, 1 Ch. D. 57. The time to amend or deliver a new pleading will vary with each case. Fourteen days was allowed in *Planet Building Society* v. *Part*, W. N. 1878, 204; a week in *Chesterfield* v. *Black*, *supra*; a month in *Williamson* v. *L. & N. W. Railway Co.*, 12 Ch. D. 787. Where no time is limited by the order, *Rule* 430 applies.

Where an allegation was admitted on the pleadings (under the Eng. system by not being denied) and evidence was given contradicting it, leave to amend so as to deny the allegations was refused at the trial, the Judge considering that the balance of convenience was against giving the leave: *Lowther* v. *Heaver*, 37 W. R. 55; 59 L. T. N. S. 631.

Amendment was allowed at the trial in *Nobel's Explosives Co.* v. *Jones*, 17 Ch. D. 721; *King* v. *Corke*, and other cases mentioned in note to *Rule* 423. p. 447, and *Dullinger* v. *St. Albyn*, 41 L. T. N. S. 406. The application should be in Chambers, as a general thing: *Marriott* v. *Marriott*, 26 W. R. 416.

430. If a party who has obtained an order for leave to amend a pleading delivered by him does not amend the same within the time limited for that purpose by the order, or if no time is thereby limited, then within 14 days from the date of the order, such order to amend shall, on the expiration of the time limited as aforesaid, or of the 14 days, as the case may be, become *ipso facto* void, unless the time is extended by the Court or a Judge. J. A. Rule 185. Time limited for amendment.

Same as the Eng. R. 1875, O. 27, r. 7, (1883, R. 315), and as Chy. G. O. 83: see Morgan, Chy. Orders 4th ed., 415-17; Dan. Prac. 5th ed. 346.

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Rules 431-434.

How alterations to be made.

431. A pleading may be amended by written alterations in the copies filed and served and by additions on paper to be interleaved therewith if necessary; unless the amendments require the insertion of more than 200 words in any one place, or are so numerous or of such a nature that making them in the copies filed and served would render the same difficult or inconvenient to read; in either of which cases the amendment must be made by delivering a re-print or fresh copy of the pleading as amended. J. A. Rule 186.

Substantially the same as the Eng. R. 1875, O. 27, r. 8, (1883, R. 316), 144 words mentioned in the Eng. R. is two folios according to the English mode of computation by which a folio is 72 words.

In *John* v. *Lloyd*, L. R. 1 Chy. 64, it was held that, though amendments to a bill did not in any place exceed two folios, the Clerk of Records and Writs had discretion to refuse to file the bill without a reprint, if the amendments were numerous and complicated.

Marking of amended pleadings.

432. Where any pleading is amended, such pleading when amended shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in manner following, viz: "Amended day of under order dated day of ."

Same as Eng. R. 1875, O. 27, r. 9, (1883, R. 317).

(*a*) Where a pleading is amended, the amendment shall be written in ink of a different colour from that used in the original pleading. J. A. Rule 187.

Delivery of amended pleadings.

433. Where a pleading is amended, such amended pleading shall be delivered to the opposite party within the time allowed for amending the same. J. A. Rule 188.

Same as the Eng. R. 1875, O. 27, r. 10, (1883, R. 318).

8. Pleading Matters arising pending the action.

Before delivery of defence.

434. Any ground of defence [or counter-claim] which has arisen after action brought, but before the defendant has delivered his statement of defence (*a*) may be pleaded by the defendant in his statement of defence [or counter-claim] either alone or together with other grounds of defence. J. A. Rule 151.

Same as the first part of Eng. R. 1875, O. 20, r. 1, (1883, R. 282) except that in the latter at (*a*) the words "or before the time limited for his doing so has expired" are inserted, and the Eng. Rules have not the words in brackets, Reg. Gen. T. T., 1856, No. 22, was to the same effect: see also R. S. 1877, c. 50.

ss. 106 and 107, and Harr. C. L. P. Act, pp. 115 and 731. The result is, that under this *Rule* the defendant may in his defence set up any ground of defence which he has at the time of delivering the defence, whenever such ground arose; and not merely grounds of defence which arose before the time limited for delivering the defence. Whether a ground of counter-claim arising after action brought can be set up was the subject of conflicting decisions in England: see *Beddall* v. *Maitland*; *Toke* v. *Andrews*, and other cases cited in notes to *Rule* 373. The words "or counter-claim" have been inserted in this *Rule* to remove any doubt. See also *Chamberlain* v. *Chamberlin*, 11 P. R. 501, and notes to *Rule* 373 and 436. **Rules 435-436.**

435. If, after a counter-claim has been delivered, any ground of defence arises to anything alleged therein by the defendant, it may be pleaded by the plaintiff thereto, or be introduced by amendment into the statement of claim, within three weeks after the counter-claim or the last of the counter-claims has been delivered, unless the time is extended by the Court or a Judge. *See* J. A. Rule 152. Before delivery of defence to counter-claim.

See Eng. R. 1875, O. 20, r. 12; O. 24, r. 1, (1883, R. 282, *last part*).

The original *Rule* 152 was similar to the Eng. Rules referred to, except that the latter confined plaintiff to a reply, nothing being said about amending the statement of claim. The original *Rule* and the English Rules authorized the plaintiff to take the course provided for "after a *statement of defence* has been delivered." The present *Rule* is confined to cases where a *counter-claim* has been delivered so that if no counter-claim, but only a defence is delivered and facts exist, having arisen after action, which constitute a reply to the defence, the plaintiff may not be entitled to proceed under this *Rule*, but must have recourse to an application under *Rule* 439.

A plaintiff may, in his reply to a counter-claim of defendant, counter-claim in respect of a cause of action accruing after the issue of the writ, but arising at the same time and out of the same transaction as the counter-claim of defendant: *Toke* v. *Andrews*, 8 Q. B. D. 428. See also note to *Rule* 373.

436. Where any ground of defence [or counter-claim] arises after the defendant has delivered his statement of defence, (*a*) he may within eight days after such ground of defence [or counter-claim] has arisen, deliver a further defence or counter-claim setting forth the same, [or introduce the same by amendment into his statement of defence or counter-claim.] J. A. Rule 153. After delivery of defence.

Same as that part of the Eng. R. 1875, O. 20, r. 2, (1883, R. 283) which relates to a defendant; except that the English Rule has at (*a*) the words, "or after the time limited for his doing so has expired," and provides that the additional defence is to be raised only "by leave of the Court or a Judge." Leave will be unnecessary under this *Rule* if an affidavit is filed under *Rule* 438. The words in brackets are new.

A counter-claim and set-off were, under the Eng. Rules corresponding to the original Ont. *Rules*, held to constitute a ground of defence within this *Rule*: *Wood* v. *Goodwin*, W. N. 1884, 17, and this will no doubt be so now under this *Rule* and *Rule* 373; see *contra*, *Chamberlain* v. *Chamberlin*, 11 P. R. 501, under the original *Rules*.

In computing the eight days long vacation is not reckoned: *Rule* 404; and the time may be enlarged: *Rule* 485; and see *Re Jones*, *Eyre* v. *Cox*, 25 W. R. 303.

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Rules 437-440.

By pleading such a plea at law under the former practice, a defendant abandoned all his former pleas: *Barber* v. *Palmer*, 1 Salk. 178; but this is not so under the present Act, though *semble* other defences fall to the ground if the plaintiff confesses the new plea; see *Foster* v. *Gamgee*, 1 Q. B. D. 666.

After delivery of reply.

437. Where a ground of defence to any counter-claim arises after the expiration of three weeks from the time of delivering the counter-claim or the last of the counter-claims, the plaintiff, within 8 days after such ground of defence has arisen, may deliver a further pleading setting forth the same, [or may introduce such new ground of defence into his statement of claim by amendment.] J. A. Rule 154.

This *Rule* is substantially the same as the Eng. R. 1875, O. 20, r. 2, (see 1883, R. 283), in the case of a plaintiff, except that the words in brackets are new, and that the leave of the Court or a Judge is required under the English Rule. The same liberty is here given to a plaintiff after the time for delivering a reply has expired as is, by the preceding *Rule*, given to a defendant after the delivery of his defence.

Amendment on *præcipe*.

438. In any such case the amendment of the pleading filed may be made without an order, on filing a *præcipe* and an affidavit that the matter of the amendment arose within 8 days next before the day of the making of such amendment. J. A. Rule 155.

The affidavit here required is similar to that formerly required in obtaining leave to plead a plea *puis darrein continuance*, under R. S. O. 1877, c. 50, s. 107.

Amendment by leave.

439. In cases not provided for by the preceding Rules, the leave of the Court or a Judge to amend the statement of claim or defence or counter-claim, or to deliver a further defence or counter-claim or reply, is to be obtained on notice supported by affidavit. J. A. Rule 156.

See Eng. R. 1875, O. 27, r. 5, 6 and 1883, R. 313, 314.

This *Rule* will apply, for instance, where a further defence or reply has not been delivered under *Rules* 436, and 437, within the eight days mentioned. See also *Rule* 485, and *Re Jones, Eyre* v. *Cox*, 25 W. R. 303. The affidavit should set forth the new grounds of defence or reply, and explain any delay: Haynes' Ch. Pract. 88.

Plaintiff may deliver confession of defence.

440. Where any defendant, in his statement of defence or counter-claim, whether by way of amendment or otherwise, alleges any ground of defence or counter-claim which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence; which confession may be in the Form No. 17 in the Appendix with such variations as circumstances may require; and he may thereupon sign judgment for his costs up to the

time of the pleading of such defence unless the Court or a Judge shall, either before or after the delivery of such confession, otherwise order. J. A. Rule 257. Rule 440.

This is substantially the same as the Eng. R. 1875, O. 20, r. 3, (1883, R. 284). *Rules* 22 and 23 of Reg. Gen. T. T. 1856, were to the same effect, but were not applicable where a plea raising such a defence was pleaded by one, or more only, of several defendants.

Payment of money into Court is not a "defence" within the meaning of this *Rule*: *Callander* v. *Hawkins*, 2 C. P. D. 592.

Under the *Rules* of T. T. 1856, though a defendant pleaded with such a plea other defences arising before action, the plaintiff was nevertheless entitled to confess the plea and have his costs, the other pleas falling to the ground. And the present *Rules* seem to have the same effect: *Foster* v. *Gamgee*, 1 Q. B. D. 666. There is no difference in this respect between a plea of bankruptcy and any other plea: *Foster* v. *Gamgee*, *supra*. A plea that defendant was an adjudicated bankrupt, upon an act of bankruptcy which occurred after the service of the writ, was held to be "a ground of defence which has arisen after the commencement of the action;" and the plaintiff was held entitled to confess and sign judgment for his costs under this *Rule*: *Champion* v. *Formby*, 7 Ch. D. 373.

Such a confession is a determination of the matters in litigation, and precludes a second action for the same cause: *Newington* v. *Levy*, L. R. 5 C. P. 607; 6 C. P. 180.

For form of confession see App. Form No 17; and of judgment for costs, No. 179.

These *Rules* apply to a counter-claim in the nature of a pecuniary set-off arising after action brought: *Ellis* v. *Munson*, 36 L. T. N. S. 585, and to counter-claims generally: see notes to *Rules* 373 and 436, and *Beddall* v. *Maitland*, 17 Ch. D. 174.

Where a Judge refused to deprive the plaintiff of the costs, under the last clause of this *Rule* it was held that they were costs left within the discretion of the Judge within section 49 of the English Judicature Act (corresponding to s. 65 of the Ont. Act), and that therefore there could be no appeal from the decision except by leave: *Perkins* v. *Beresford*, 47 L. T. N. S. 515.

Defendants delivered a further defence of matter arising since former defence. Plaintiff delivered a confession of this defence and signed judgment for costs. The defendants asserting that the point was sufficiently raised by the former defence, which was not intended to be waived, and consenting to withdraw the further defence, the judgment for costs was set aside under this *Rule*: *Bridgdown, etc.* v. *Barbado, etc.*, 38 Ch. D. 378.

This *Rule* was held not to apply where the defence confessed did not amount to a waiver of pleas founded on matters which had occurred before the commencement of the action: *Harrison* v. *Marquis of Abergavenny*, 57 L. T. N. S. 360.

As to discontinuance of the action by the plaintiff in other cases, see *Rule* 641.

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CHAPTER VI.

MISCELLANEOUS PROCEEDINGS IN AN ACTION.

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1. Effect of Non-compliance and Errors.

Formal objections.

441. No proceeding shall be defeated by any formal objection. R. S. O. 1877, c. 49, s. 7.

Non-compliance with *Rules*.

442. Non-compliance with any of these Rules shall not render the writ or any other proceeding in any action or matter void unless the Court or a Judge so directs, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge thinks fit. J. A. Rule 473.

To the same effect as Eng. R. 1875, O. 59, (1883, R. 1037).

Where short notice of motion had been irregularly given but the opposite party had not been injured by the irregularity, the Court exercised its discretion under this *Rule*, disregarded the irregularity, and heard the motion: *Dawson* v. *Beeson*, 22 Ch. D. 504; see also *Williams* v. *De Boinville*, 17 Q. B. D. 180; *Re Coulton*, 34 Ch. D. 22. Rules 443, 444.

An irregularity may be condoned, in the discretion of the Court, even on a motion for attachment: *Pettie* v. *Daniel*, 34 Ch. D. 172; *Litchfield* v. *Jones*, 25 Ch. D. 64: see *Pilcher* v. *Hindes*, 11 Ch. D. 905.

As to moving against an irregularity, see *Rules* 443, and 534.

Affidavits not served with a notice of motion were allowed to be read: *Re Wyggeston Hospital & Stevenson*, 33 W. R. 550.

443. No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity. Rules T. T. 1856, 106. Irregularity, motion to set aside proceedings to be made promptly.

The same in effect as Eng. R. 1883, R. 1038.

If an objection can be waived, it amounts to an irregularity, if not, it is a nullity: *Bank of Upper Canada* v. *Van Voorish*, 4 U. C. L. J. 232. The tendency of the cases is to consider defects as irregularities, rather than nullities: *Herr* v. *Douglas*, 4 P. R. 102. A stranger cannot set aside proceedings for irregularity: *Perrin* v. *Bowes*, 5 U. C. L. J. 138; *Balfour* v. *Ellison*, 8 U. C. L. J. 330; *McKenzie* v. *Harris*, 10 U. C. L. J. 213; *Nicholls* v. *Nicholls*, 3 P. R. 201; see, however, *Bonistiel* v. *McMaster*, 6 O. S. 32; unless they are, in effect, fraudulent: *McDonald* v. *Boice*, 12 Gr. 48; and see *Martin* v. *Boulanger*, 8 App. Cas. 296.

The notice of motion must specify the irregularity: *Rule* 534.

A writ joining causes of action which should not be joined without leave is an irregularity, and appearance to such a writ is a "fresh step," within this *Rule*; and a defendant who appears instead, of applying to strike out the irregularity, cannot insist upon it: *Mulckern* v. *Doerks*, 51 L. T. N. S. 429; 53 L. J. Q. B. 526; *Re Derbon*, 36 W. R. 667, in note to *Rule* 341.

See also *Fry* v. *Moore*, 23 Q. B. D. 375, and *Boyle* v. *Sacker*, 39 Ch. D. 249, in notes to *Rule* 271, p. 302.

2. Amendments.

444. The Court or a Judge may at any time, and on such terms as to costs or otherwise as to the Court or Judge may seem just, amend any defect or error in any proceedings; and all such amendments may be made as may be necessary for [the advancement of justice], determining the real question or issue raised by or depending on the proceedings, [and best calculated to secure the giving of judgment according to the very right and justice of the case.] J. A. Rules. 10, 474. Amendment of defects or errors.

The words in brackets are not in the Eng. R. April 1880, R. 44 (see 1883, R. 309), and are taken substantially from R. S. O. 1877, c. 49, ss. 7, 8; *Ib.* c. 50, s. 270.

The first clause of this *Rule* differs from the Eng. R. of 1883.

This *Rule* is in regard to amendment of defects and errors generally, and is supplemental to *Rule* 423 respecting amendment of pleadings and *Rule* 780 respecting clerical errors and slips.

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Rule 444.

Where an order had been made for sale of property as described in a claim, but afterwards it was discovered to have been mis-described, the claim was amended and the order post-dated, so as to appear to have been made after the amendment: *Winkley* v. *Winkley*, 44 L. T. N. S. 572; 29 W. R. 628. In general, however, an order ought not to bear a fictitious date: *Ashley* v. *Taylor*, 10 Ch. D. 773.

On a motion for prohibition to a Division Court the affidavit and notice of motion were not styled in any Division of the High Court, but the defect was held to be amendable under this *Rule*: *Re Olmstead* v. *Errington*, 11 P. R. 366.

In *Re Smart*, 12 P. R. 312, 435, 635, proceedings by *habeas corpus* to obtain the custody of children were supplemented, by the applicant being directed to file a petition under R. S. O. 1877, c. 132: see *supra* p. 63.

If the Court comes to the conclusion that an amendment is "necessary for the advancement of justice, the prevention and redress of fraud, the determination of the rights and interests of the respective parties, and of the real questions in controversy between them, and best calculated to secure the giving of judgment according to the very right and justice of the case," the granting or refusing of the amendment ceases practically to be a matter of discretion: *Peterkin* v. *MacFarlane*, 4 Ont. App. 45; *Gilleland* v. *Wadsworth*, 1 Ont. App. 82.

An amendment made affecting a person not a party was at his instance rescinded: *Glass* v. *Cameron*, 9 Ont. 712.

Amendments of the writ of summons were specially provided for by original *Rule* 10, which has been omitted in the Consolidation, the present *Rule* covering the case.

Amendment of Writ.

The plaintiff will have to pay the costs of an amendment of the writ. An order to amend has been held to be necessary, even though the writ has not been served: *per* Lush, J., *Anon*, 60 L. T. Jour. 32; 1 Charl. Ch. Ca. 34; and this decision has been followed by Mr. Dalton in Chambers: see *Globe*, 6th Oct. 1881, and App. Form 91; see *contra* under the former practice, *Worthington* v. *Boulton*, 6 P. R. 68.

When a statement of claim has been delivered, an amendment of the indorsement on the writ seems to be unnecessary: *Large* v. *Large*, W. N. 1877, 98; *Johnson* v. *Palmer*, 4 C. P. D. 262; but see *Conybeare* v. *Lewis*, W. N. 1881, 31; 44 L. T. N. S. 242; 29 W. R. 391; see also *Re Jones*, *Eyre* v. *Cox*, 24 W. R. 317. An action may, by amendment of the writ and statement of claim, be turned into an information without prejudice to a pending motion in the action, the necessary sanction of the Attorney-General being obtained: *Caldwell* v. *Payham Harbour Reclamation Company*, 2 Ch. D. 221.

When a writ has been amended it must be served in the same way as the original: *The Cassiopeia*, 4 P. D. 188, where a new claim was introduced: *Guess* v. *Perry*, 12 P. R. 460, where a claim for damages was struck out by amendment; see also *Bryans* v. *Hughes*, 14 L. R. Ir. 62.

Irregularities in a writ of summons may be amended either on motion by the plaintiff, or leave to amend may be granted where the defendant moves to set aside the writ. The following irregularities have been allowed to be amended:—A writ signed by a Process Clerk issued after the appointment of his successor: *Stevenson* v. *Williams*, 7 P. R. 358; a writ issued without the signature of the Process Clerk: *Labadie* v. *Darling*, 7 P. R. 355; a writ tested in the name of a retired Chief Justice after the appointment of his successor had been gazetted, but before he had taken the oath: *Nelson* v. *Roy*, 3 P. R. 226; a writ tested in the name of a Lord Chancellor after his resignation and the appointment of his successor: *Pleasants* v. *East Dereham, etc.*, 47 L. T. N. S. 439; a mistake in the date in the *teste*, as "eighty——" for "eighty-two": *Wesson* v. *Stalker*, 48 L. T. N. S. 444. But the absence from the Province of the Judge in whose name writs are tested does not render it improper to *teste* a writ in his name: *Brett* v. *Smith*, 1 P. R. 309.

445. Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the Court or a Judge, if satisfied that it has been so commenced through a *bona fide* mistake and that it is necessary for the determination of the real matter in dispute so to do, may order any other persons or persons to be substituted or added as plaintiff or plaintiffs, upon such terms as may seem just. J. A. Rule 90.

Rule 445. Substitution and addition of plaintiffs.

Same as the Eng. R. 1875, O. 16, r. 2, (1883, R. 124).

Actions have been inadvertently brought by the wrong person, as by *cestui que trust*, instead of trustee; by mortgagor, instead of mortgagee. The same mistake has been made where it was matter of real difficulty to say which of the two persons ought to sue: as in the case of contracts made by agents, as to which it is sometimes a question of much nicety to determine who ought to sue. Previous to *The Administration of Justice Act*, 1873, in Ontario, and until the Judicature Acts in England, though the Common Law Courts had the largest powers of adding parties, or amending misdescriptions of parties, they had no power to substitute one plaintiff for another, such as this *Rule* confers: see *De Geadre* v. *Bogardus*, L. R. 7 C. P. 409.

An application under this *Rule* can only be made by a plaintiff: *Clowes* v. *Hilliard*, 4 Ch. D. 413, and is restricted to cases where a *bona fide* mistake has occurred, which has been discovered after action brought; as where a new partner was brought into a firm before the dealing in question; but it is not intended to confer upon the Judge unlimited discretion to re-model the proceedings: *per* Mellor, J., in *Turquand* v. *Fearon*, 4 Q. B. D. at p. 282. In *Smith* v. *Haseltine*, W. N. 1875, 250; 1 Charl. Ch. Ca. 56, Huddlestone, B., said: "You have to satisfy me of two things; 1st, that there has been a *bona fide* mistake in the issue of the w[illegible] and 2nd, that it is a necessary change." See also *Clowes* v. *Hilliard*, 4 Ch. D. 413.

In an action by assignees of insolvents, the Judge at the trial held that the claim sued for did not pass, under the circumstances, to the assignees. The defendants having been given time during the sittings to ascertain whether they had any defence to a suit by the insolvents, the latter were added under this *Rule* as plaintiffs, and judgment was given in their favour, but without costs: *Woodward* v. *Shields*, 32 C. P. 282. See *Emden* v. *Carte*, 17 Ch. D. 169.

In an action to restrain the violation of a covenant and for damages, the plaintiff was advised, after action commenced, that there was something in her title which might act as a personal bar to her obtaining relief. An amendment by making another person a co-plaintiff who was also entitled to the benefit of the same covenant was allowed, the real question being the effect of the covenant: *Ayscough* v. *Buller*, 4 Ch. D. 341. Where a new plaintiff is thus added, the action, as regards him, is to be deemed to have been commenced, only from the date of his being added: *Ib.* See also *Walcott* v. *Lyons*, in note to *Rule* 324.

For other cases in which the *Rule* has been acted upon, see *Val de Travers Asphalte Co., (Limited)*, v. *London Tramway Co., (Limited)*, 48 L. J. C. P. 312; 40 L. T. N. S. 133; W. N. 1879, 46, and *Mercantile River Plate Co.* v. *Isaac*, W. N. 1876, 104; 2 Charl. Ch. Ca. 23; *Blackburn Union* v. *Brooks*, 26 W. R. 57.

The *bona fide* mistake, which must be shewn, may be one of law: *Duckett* v. *Gover*, 6 Ch. D. 82; *Mason* v. *Harris*, 11 Ch. D. 97.

Rule 324 *(b)* is to be read into this *Rule*, so that a plaintiff will not be added or substituted unless he consents: *Turquand* v. *Fearon*, 4 Q. B. D. 280, though the terms may otherwise be "such as may seem just": *Tryon* v. *National Prov.*

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Rules 446-450.

Ins., 16 Q. B. D. 678; and see *Rule* 324; nor under this *Rule* unless the original plaintiff consents: *Emden* v. *Carte*, 17 Ch. D. 169.

An order will not be made on an *ex parte* application: *Tildesley* v. *Harper*, 3 Ch. D. 277.

Where the present *Rule* is not applicable, plaintiffs may nevertheless sometimes be added under *Rules* 324, and 325, *supra*: see notes to those *Rules*, and *Emden* v. *Carte*, and *Smith* v. *Haseltine*, *supra*.

Amendment at trial.

446. In case an amendment is directed or allowed to be made at the trial, it shall not be necessary to draw up or issue an order therefor. The amendment may be at once made on the record, or a minute of the amendment to be made may be entered in the book of the Registrar, Deputy or Local Registrar, Clerk or Marshall, and the amendment may be formally made at any time afterwards. *New.*

3. Paper, Notices and Written Proceedings Generally.

Notices to be written or printed.

447. All notices required by these Rules or the practice of the Court shall be in manuscript or print, or partly in [manuscript and partly in print], unless expressly authorized by the Court or a Judge or by these Rules to be given orally. J. A. Rule 451; Rules T. T. 1856, 131.

Instead of the words in brackets, the Eng. R. 1875, O. 56, r. 1 (1883, R. 1003) has "writing."

A verbal notice to produce is insufficient: *Provincial Ins. Co.* v. *Shaw*, 19 U. C. Q. B. 537.

Regulations as to printing proceedings.

448. Proceedings, if printed, shall be printed with pica type leaded, on good paper, of foolscap size. J. A. Rule 452.

The Eng. R. 1875, O. 56, r. 2 (1883, R. 1005), is more particular in its directions.

See Chy. G. O. 66, and *Cossey* v. *Ducklow*, 2 Chy. Ch. 227, where service of a bill not printed, etc., in conformity with the Gen. Orders was set aside.

Paragraphs

449. Every petition, issue, special case, affidavit and other proceedings of a like nature, shall be divided into numbered paragraphs, and shall state concisely such matters and facts as may be necessary to truly inform the Court. *See* J. A. Rule 128, *part.*

Clerks of Crown to prescribe width and length of paper, etc.

450. All rolls and records shall be upon parchment, or paper, of such width and length as the Registrars shall prescribe by written notice, to be put up in some conspicuous place in their respective offices and in the offices of the several Deputy Clerks of the Crown, and none of

these officers shall be bound to receive any roll or record not made up in conformity to such notice, and such rolls and records shall not exceed, when folded, 14 inches in length and 4 inches in breadth, written upon at least a sheet of paper and folded accordingly. Rules T. T. 1856, 147. Rules 451-453.

See as to pleadings, *Rule* 395; as to mode of printing to be adopted, *Rule* 448.

451. In all proceedings in a cause or matter, except pleadings, petitions in the nature of pleadings, judgments and decretal orders, the following short style of cause shall be sufficient: Short style of cause.

"*Between John Smith and others,—Plaintiffs,*
and
Richard Roe and others,—Defendants."

In case of proceedings which it has been the practice to entitle more shortly thus: "*Smith* v. *Roe*," such practice is to continue. Chy. O. 597.

In all pleadings, petitions in the nature of pleadings, judgments, and decretal orders, the full style of the action or matter is to be set out; in other proceedings, including affidavits, interlocutory orders, notices of trial, to produce, to admit, notices of motion, and of appeal, the shortened style first given in the *Rule* may be used.

The shorter title, *e.g.*, *Smith* v. *Roe*, is usually confined to appointments for settling minutes of judgments or orders, Master's warrants, notices of taxation or other notices and appointments not already mentioned, which are required to be taken out or served in the progress of a cause. There is, however, no authority for styling affidavits in this way.

452. The word folio shall mean one hundred words. Rules T. T. 1856, 167. A folio is 100 words.

4. Copies of Papers—Forms.

453. Office-copies of affidavits, and other proceedings for service are dispensed with; and where service is required, true copies, instead of office-copies, are to be served; but this order is not to apply to judgments or orders of which office-copies are by the practice of the Court required to be served. Chy. O. 402. Service of office copies of affidavits and other proceedings dispensed with in certain cases.

An "office copy" of a document is a copy authenticated by the proper officer, usually the one in whose custody the original record of the proceedings is deposited. But under *Rule* 454, Local Registrars, Deputy Registrars, and Deputy Clerks of the Crown, have power to make office copies. Office copies of decrees were expressly required to be served in certain cases: see *Rules* 46, 322; and where according to the former practice an office copy of a decree, or Office copies.

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Rules 454-456.

order, was required to be served, in like cases an office copy of the judgment, or order, would seem to be necessary under the present practice, except where a different practice is expressly provided.

Under the former Chancery practice, the first proceeding in the cause served upon a defendant was usually required to be an office copy; *e.g.*, bills, or decrees, or orders, served on parties added in the Master's office, and orders of revivor. But under the present practice, it would seem sufficient to serve a plain copy of an order adding parties upon a change of interest, instead of an office copy as formerly: see *Rule* 623.

As to what is "a true copy": see *Walker* v. *Niles*, 18 Gr. 213; *Sharp* v. *McHenry*, 38 Ch. D. 427.

Office copies may be certified by Deputy Clerks, etc.

454. Office copies of judgments to be served on persons made parties in the Master's office, may be certified by the Deputy Clerk of the Crown, Deputy or Local Registrar, as the case may require, at the place where the reference is being prosecuted. Chy. O. 547.

Office copies, how made.

Office copies are copies authenticated by the proper officer. In order to enable a local officer to authenticate a judgment which has not been entered in his own office, an authenticated copy must be produced to him, with which other copies may be compared. It has been usual to mark them "Examined," and stamp them with the seal of the officer who certifies them.

The right to certify office copies under this *Rule* has been in practice extended to cases where an office copy is required to be served on parties interested, but who are not made parties: see *Rule* 322.

Copies of documents to be demanded in writing.

455. A party requiring a copy of any pleading, affidavit, exhibit, or document not directed to be served is to make a written application for the same to the solicitor of the party by whom it has been filed, or on whose behalf it is to be used; and where the party has no solicitor, then to the party himself. Chy. O. 548.

Pleadings are required to be served on the opposite party without a demand: *Rule* 461.

An irregularity in the indorsement of an affidavit is waived by demanding a copy of it: *Bennett* v. *O'Meara*, 2 Chy. Ch. 167.

Where copy of document demanded, it is to be furnished within 48 hours.

456. Where an application is made for a copy of any pleading, affidavit, exhibit or document, it is to be delivered within 48 hours from the time of the demand; and any further time which may elapse before the delivery is not to be computed against the party demanding the same. Chy. O. 549.

Copies of affidavits, costs of furnishing.

This *Rule* is imperative, and the Court will enforce compliance with it: *Totten* v. *Macintyre*, 2 Chy. Ch. 80; *Burrows* v. *Hainey*, 2 Chy. Ch. 186. Formerly the costs of furnishing copies were part of the costs of the cause, or application, and payment of the costs of the copies could not be required as a condition of furnishing them. Whether the *Rules* are intended to make any change in this respect is not very clear: see *Rule* 457.

In practice, the costs of furnishing copies of affidavits on a motion have been regarded as part of the costs of the motion; and it has not been usual to demand payment for copies so demanded, as a condition of furnishing them.

457. As to taking copies of documents in possession of another party, or extracts therefrom, under Rules of Court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may, by writing, require, at the rate of 10 cents per folio; and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof. J. A. Rule 433. Rules 457-461. Copies of documents in possession of another party.

The Eng. R. of Aug. 12, 1875, "Costs," R. 16 (1883, R. 1002, r. 18), gives fourpence per folio; with that exception, the two *Rules* are the same.

458. The forms contained in the Appendices hereto are to be used with such variations or modifications as circumstances may require; but any variance therefrom, not being in matter of substance, shall not affect their regularity. Rules T. T. 1856, 169; J. A. Rule 485. Forms to be used.

See Eng. R. April, 1880, R. 52.

In *Turquand* v. *Fearon*, 40 L. T. N. S. at p. 545, Thesiger, L.J., said, "although the forms given in the Judicature Acts are not absolutely binding, they are still of assistance as illustrating the meaning of the Act." See also *Scott* v. *Creighton*, 9 P. R. 253.

5. Service of Papers.

459. Unless otherwise provided by Statute or Rule of Court, pleadings and notices required to be served in any action, whether in the Supreme Court of Judicature or County Courts, may be served in any County. R. S. O. 1877, c. 50, s. 59. Pleadings etc., may be served in any County.

460. Admissions and acceptances of the service of an order, notice of motion or other paper, upon the opposite solicitor, need not be verified by affidavit. Chy. O. 48. Solicitor's acceptance need not be verified.

See *Rules* 252, 704, as to acceptance of service of writs of summons.

Under *Rule* 704, acceptances of service of writs of summons, and undertakings to appear, are required to be verified by affidavit; but all other acceptances and admissions of service may under this *Rule* be received and acted on, without verification.

461. All writs, pleadings, notices, orders, appointments, warrants, and other documents, and written communications, which do not require personal service upon the party to be affected thereby, shall be served upon his solicitor Country agent, when to be served.

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Rule 462.

when residing in Toronto, or if his solicitor does not reside in Toronto then either upon his solicitor, or, if such solicitor does not reside in the county where such proceedings are conducted then upon the agent, if any, named in the "Solicitors and Agents' Book," provided for by Rule 204, or upon the Toronto agent of such solicitor named in the "Solicitors and Agent's Book," provided for by Rule 203, unless the Court, or a Judge, or a Master, before whom any such proceeding is had, shall give any direction as to the solicitor upon whom any such notice, appointment, warrant, or other document or written communication is to be served. Where any solicitor has not caused such entry to be made in either of the "Solicitors and Agents' Books," provided for by Rules 203 or 204, then the posting up of a copy of any such notice, appointment, warrant, or other document, or written communication, for such solicitor in the office in which the proceedings are being conducted, is to be deemed sufficient service, unless the Court, or Judge, or Master, as the case may be, directs otherwise. Chy. O. 42, 43; R. S. O. 1877, c. 50, s. 57; Rules T. T. 1856, 136, 137.

Service, where solicitor neglects to enter name of agent.

By *Rule* 203 it is imperative upon every solicitor to appoint an agent in Toronto and have his name entered as such agent in the books kept at Osgoode Hall; but under *Rule* 204 it is entirely at the solicitor's option to have, or not have, a booked agent in any county town. If a solicitor does enter an agent's name in the books kept in a county town, then service can be effected on such solicitor, but if he does not, then service can be effected only by serving the solicitor himself, or his Toronto agent. Service can only be effected by posting up copies, when there is no entry of an agent in the books at either place: *Essery* v. *G. T. Ry. Co.*, 9 C. L. T. 413; 25 C. L. J. 507.

Service of papers on a solicitor as agent for another solicitor is not good, unless the solicitor served is the booked agent of the other, even though he has acted as agent in the same suit: *Robinson* v. *Robinson*, 13 P. R. 51.

This *Rule* only applies to the service of documents, which do not require personal service.

A solicitor cannot, as agent for one principal, serve himself as agent for another principal: *Horseman* v. *Coulson*, 6 P. R. 263; *Ontario Bank* v. *Fisher*, 4 P. R. 22.

Service of solicitor on record, good, though he have ceased to act.

Until an order has been made and served, changing the solicitor of any party to an action, or authorizing such party to sue, or defend, in person, service on the solicitor originally named is sufficient, even though such solicitor have ceased to act for such party: *Wright* v. *King*, 9 Beav. 161; and see *Newton* v. *Thompson*, 16 Jur. 1008; *De la Pole* v. *Dick*, 29 Ch. D. 351; 52 L. T. N. S. 457. Where a solicitor has absconded, a notice of motion left at his unoccupied place of business was held properly served: *Newton* v. *Thompson*, 22 L. J. Chy. 10; and see *Re Templeman*, 20 Beav. 574; *Re Wisewold*, 16 Beav. 357; *Re Catlin*, 18 Beav. 508; *Re Dufaur*, 16 Beav. 1; *Re Thompson*, 20 Beav. 545; *Wilson* v. *Emmett*, 19 Beav. 232; *Ex parte Belton*, 25 Beav. 368; *Re Walton*, 4 K. & J. 78.

Consequence of omission of

462. Where a party sues or defends in person, and no address for service of such party is written or printed pur-

suant to the directions of Rules 238 to 240, or where a party has ceased to have a solicitor, all writs, notices, orders, appointments, warrants, and other documents, proceedings, and written communications, not requiring personal service upon the party to be affected thereby, shall, unless the Court otherwise directs, be deemed to be sufficiently served upon such party, by posting up a copy in the office in which the proceedings are being conducted. But if an address for service is written or printed as aforesaid, then all such writs, notices, orders, warrants and other documents, proceedings, and written communications, shall be deemed sufficiently served upon such party if left for him at such address for service. Chy. O. 45. Rule 463. indorsement.

The reference to *Rules* 238 to 240 is erroneous; the *Rules* intended are *Rules* 240 to 242.

The omission of a defendant's address, or address for service when necessary, in an appearance by a defendant in person, is expressly provided for by *Rule* 285.

Proceedings whereby the liberty of the person is intended to be affected; *e.g.* proceedings upon which to found an application for an attachment, are usually required to be personally served on the party, even though he have appeared, or sued, by a solicitor. Applications to commit for non-production of documents are, however, an exception to this rule: see *Rule* 521.

463. A party suing or defending by a solicitor shall not be at liberty to change his solicitor in any action or matter without an order of the Court for that purpose, which may be obtained on *præcipe;* and until such order is obtained and served, and notice thereof given to the officer with whom the pleadings are filed, the former solicitor shall be considered the solicitor of the party. Chy. O. 49. Rules T. T. 1856, 4. Change of solicitor.

Order to Change Solicitor.—An order to change the solicitor is necessary, not only where the client desires to discharge his solicitor in an action, but also where the solicitor discharges himself: see *Griffiths* v. *Griffiths*, 2 Hare 587; 7 Jur. 573. But no order is necessary to enable the client to appoint a new solicitor, in place of one deceased: *Whalley* v. *Whalley*, 22 L. J. Chy. 632; *Alchin* v. *Buffalo & L. H. Ry. Co.*, 2 Chy. Ch. 45. In the latter case, however, notice should be given of the appointment of the new solicitor to the officer with whom the pleadings are filed, and also to the opposite party: *Rule* 463, *Hunt* v. *Fineburg*, 22 Q. B. D. 259; Braith Pr. 564, 565; *Bank of Montreal* v. *Harrison*, 4 P. R. 331. Order to change solicitor when necessary.

Until an order to change the solicitor is obtained and served, service on the solicitor on the record is good, or his agent, even though the former has ceased to act, and though a new one has been appointed: *Davidson* v. *Leslie*, 9 Beav. 104; *Wright* v. *King*, *ib.*, 161; *Brown* v. *Burgar*, 2 Chy. Ch. 446; *De la Pole* v. *Dick*, 29 Ch. D. 351; 52 L. T. N. S. 357.

Under the former practice at law, the attorney could not be changed by the client, unless his costs were first paid: *Witt* v. *Ames*, 11 W. R. 751; but in Payment of costs not

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Rule 463. Chancery the rule was otherwise: *Meyers* v. *Robertson*, 1 Gr. 439. This is one of those matters in which the rules of Equity, and the rules of the Common Law differed, and therefore under the Jud. Act, s. 53, s-s. 12, the rule of Equity is now to prevail. Orders to change solicitor will now be granted in all the Divisions of the High Court of Justice, without any provision as to the payment of costs: *Grant* v. *Holland*, 3 C. P. D. 180.

a condition precedent.

Where there is a joint retainer, an order to change the solicitor on the application of some or one of the clients only, is irregular: *Re Norwich and Norfolk Building Society*, 22 W. R. 856; *Wedderburn* v. *Wedderburn*, 17 Beav. 158.

Material facts must be disclosed.

All material facts must be disclosed on the application for an order of course, otherwise it will be irregular and may be set aside; *e.g.*, the existence of a special retainer for a term of years unexpired: *Richards* v. *Scarborough Market Co.*, 17 Beav. 83; or the fact of the solicitor being mortgagee of the client's share in the fund in question: *Jenkins* v. *Bryant*, 3 Drew 70. Where, however, a solicitor in applying for an order to change a solicitor, relying on his client's statement that she was unmarried, so represented her, which statement turned out to be untrue, the Court, though setting aside the order, refused to direct the solicitor to pay the costs, emphatically declaring that the Court never had "made a man pay costs for believing the word of a woman": *Thomas* v. *Finlayson*, 19 W. R. 255.

Where special circumstances are disclosed in the *præcipe* for an order of course, the officer may refuse to issue the order, and may require a special application to be made.

Setting aside order.

After an order of course to change the solicitor has been issued, if the latter object to the order, he should not apply on *præcipe* for an order to re-appoint himself, but should move on petition to set aside the order: *Topping* v. *Searson*, 2 H. & M. 205.

Subpœna to appoint a new solicitor when necessary.

Where the solicitor dies and his client neglects to name a new solicitor he may be served with a *subpœna* to appoint a new solicitor. For form of *subpœna*: see Daul's Forms, 3rd ed., No. 2129; Braith Pr. 264. If after the service of the *subpœna* he still neglects to appoint a solicitor, he is liable to attachment, or leave may be given to proceed without further notice to such party: *Gibson* v. *Ingo*, 2 Phil. 402; Smith Pr., 7th ed., 126.

Application by one of several plaintiffs.

Where one of several plaintiffs desires to make an application in the action separately from his co-plaintiffs, he must obtain an order of course, giving him leave to appoint a solicitor for that express purpose: Danl Pr., 5th ed., 1724.

Party acting in person desiring to appoint a solicitor.

Where a party sues or defends by a solicitor, and afterwards desires to sue or defend in person, an order giving him leave to do so must be obtained: Danl Pr. 5th ed. 1724. But when a party sues or defends in person and afterwards appoints a solicitor, no order is necessary, *ib.* 1725, and see *Rule* 464; but notice should be given to the officer with whom the pleadings are filed, and also to the opposite party.

Proceedings taken by a new solicitor without an order, when one is necessary, or by a suitor in person when he has a solicitor on the record, are irregular and will be set aside: *Rathburn* v. *Hughes*, 3 Chy. Ch. 160; *Yeatman* v. *Snow*, 42 L. T. N. S. 502.

Order to change when a discharge of solicitor by client.

An order to change solicitor is *prima facie* a discharge of the former solicitor by the client: *Webster* v. *Le Hunt*, 9 W. R. 804. But it is not a discharge o the solicitor by the client, where it is taken out in consequence of the prior refusal of the solicitor to act: and a solicitor will be considered to have discharged himself, on the bankruptcy of himself, or the firm of which he is a partner: *Re Moss*, L. R. 2 Eq. 345; or by being arrested or detained in custody: *Re Williams*, 3 D. F. & J. 104; 28 Beav. 465; *Scott* v. *Fleming*, 9 Jur. 1085; but not merely by being in embarrassed circumstances: *Re Smith*, 9 W. R. 396. So also a firm of solicitors will be deemed to have discharged the client, where the firm is dissolved; and no arrangement can be made by the solicitors for the transfer of the client's business to one of their number without his

consent amounting to a new retainer: *Cholmondeley* v. *Clinton*, 19 Ves. 261; *Griffiths* v. *Griffiths*, 2 Hare 587; *Slater* v. *Stoddard*, 6 P. R. 299; *Alchin* v. *Buffalo & L. H. Ry. Co.*, 2 Chy. Ch. 45. **Rule 463.**

Where any new party is brought into an action by order to continue proceedings, by reason of the death of, or transfer of interest by, any of the parties; such new party is not obliged to employ the solicitor by whom the deceased person, or transferror was represented, but he may, without order, employ a new solicitor, but notice of such new solicitor being so employed must be given to the officer with whom the pleadings are filed, and also to the opposite party: Daul. Pr., 5th ed., 1725; *Simmonds* v. *Great Eastern Ry. Co.*, L. R. 3 Chy. 797; but the assignee of the plaintiff in a creditor's suit cannot appoint a new solicitor except on special application: *Topping* v. *Searson*, 2 H. & M. 265. **When order unnecessary.**

Although a solicitor may for sufficient cause, by notice to his client, terminate the connection between them, the Court will not make an order for that purpose on the *ex parte* application of the solicitor: *Bricker* v. *Ansell*, 1 Ch. Ch. 367.

Where the solicitor is changed by the client, the original solicitor is still entitled to a lien on any fund recovered in the cause, and is entitled to be paid his costs, next after the costs of the solicitor by whom the suit is concluded: *Clark* v. *Eccles*, 3 Chy. Ch. 324. **Lien of solicitor.**

Where a solicitor is discharged by the dissolution of a firm of which he is a member, he is not at liberty to act for the opposite party: *Cholmondeley* v. *Clinton*, 19 Ves. 261; but when he is discharged by his client he cannot be restrained from acting for the opposite party, nor the latter from employing him: *Little* v. *Kingswood & Parkfield Colliery Co.*, 20 Ch. D. 733; 47 L. T. N. S. 323; 52 L. J. Chy. 66; but the solicitor may be restrained by injunction from divulging the secrets of his former client to the opposite party, either in the same transaction, or any other flowing thereout, or connected therewith: *Ib.*, and see *Davies* v. *Clough*, 8 Sim. 262, 267; *Grissell* v. *Peto*, 9 Bing. 1; *Johnson* v. *Marriott*, 2 Cr. & M. 183. **Solicitor restrained from acting for opposite party when.**

How far the solicitor's retainer continues after judgment is recovered in the action in which he is retained to sue or defend, seems doubtful: see 79 L. T. Jour. 208. Service of notice of appeal from the judgment made on the respondent's solicitor on the record, was held good: *De la Pole* v. *Dick*, 29 Ch. D. 351; 52 L. T. N. S. 457; but a retainer of a solicitor to collect a debt was held not to authorize him, after judgment recovered, to enter upon interpleader proceedings without further instructions: *James* v. *Richnell*, 20 Q. B. D. 164; 58 L. T. N. S. 278.

Lien of Solicitor on Books and Papers.—A solicitor has a lien on the books and papers of his client, which have come to him in the course of business in his professional capacity. This lien, however, is a mere right to retain the documents until his costs are paid, and cannot be actively enforced: *Bozon* v. *Bolland*, 4 My. & Cr. 354. In the absence of any agreement to the contrary, the lien is general, and attaches for all costs due from the client, and is not confined to the costs incurred in the particular business in which the documents came into the solicitor's hands: *Re Faithful*, L. R. 6 Eq. 325; *Bozon* v. *Bolland*, *supra*; *Richards* v. *Platel*, Cr. & Ph. 82; *Worrall* v. *Johnson*, 2 Jac. & W. 214; *Ex parte Sterling*, 16 Ves. 257; *Friswell* v. *King*, 15 Sim. 191; *Colmer* v. *Ede*, 19 W. R. 313; *Re Messenger*, 3 Ch. D. 317. **Lien on books and papers.**

The solicitor cannot acquire any greater right of detainer, than the client had himself, and the lien is therefore subject to the rights and equities of those claiming by title paramount to that of the client: *Francis* v. *Francis*, 5 D. M. & G. 108; *Stedman* v. *Webb*, 4 My. & Cr. 346; *Clutton* v. *Pardon*, T. & R. 304; *Molesworth* v. *Robbins*, 2 J. & Lat. 358; *Petty* v. *Wathen*, 1 D. M. G. 16; 7 Hare 351; *Blunden* v. *Desart*, 2 Dr. & W. 405; *Bell* v. *Taylor*, 8 Sim. 216; *Baker* v. *Henderson*, 4 Sim. 27; *Warburton* v. *Edge*, 9 Sim. 508; *Re Mosely*, 15 W. R. 975; *Young* v. *English*, 7 Beav. 10; *Stennett* v. *Aruyn*, 2 Chy. Ch. 218; *Re Union Cement and Brick Co., Ex parte, Pulbrook*, L. R. 4 Chy. 627; and where the client would be bound to produce the documents in evidence on the demand of third parties, the solicitor cannot refuse to produce them on the ground of his lien: *Hope* v. *Liddell*, 7 D. M. & G. 331; 20 Beav. 438; *Fowler* v. *Fowler*, 44 L. T. N. S. 790; 50 L. J. Ch. 686.

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But third parties whose rights are acquired under the client subsequent to the creation of the lien, have no greater rights than the client himself had at the time they acquired title: *Gill* v. *Gamble*, 13 Gr. 169; 2 Chy. Ch. 135. The solicitor, however, cannot claim a lien, against such third parties, for costs incurred by him subsequently to their acquiring their rights: *Blunden* v. *Desart*, 2 Dr. & W. 405.

A solicitor cannot acquire a lien on the documents of a joint stock company which by statute, or the articles of association, are required to be kept in the office of the company: *Re the Anglo-Maltese Co.*, 52 L. T. N. S. 841; but he may acquire a lien on the books and documents of a company which are not so required to be kept in the office of the company, *Ib.*, but not for business which was *ultra vires* of the company: *Re Howard & Dollman*, 1 H. & M. 433. A lien may be maintained notwithstanding that the debt in respect of which it is claimed may be barred by the Statute of Limitations: *Re Carter, Carter* v. *Carter*, 53 L. T. N. S. 630.

A solicitor who is employed by a mortgagor and mortgagee to prepare a mortgage, after completion of the mortgage holds the title deeds for the mortgagee, and cannot as against him claim any lien thereon for a debt due by the mortgagor: *Ex parte Quinn*, 49 L. T. N. S. 811.

Taking security, effect on lien.

The lien is superseded by the solicitor taking security for his costs: *Cowell* v. *Simpson*, 16 Ves. 275, but only to the extent of the security: *Watson* v. *Lyon*, 7 D. M. & G. 288, and ceases altogether on payment, and the solicitor cannot then retain documents on the ground that a third party claims an interest in them: *Re Emma Mine, Ex parte Turner*, 24 W. R. 54. The lien may also be lost by the solicitor assigning his bill of costs to a third party: *Reesor* v. *Ella*, 7 P. R. 371; and also by parting with possession of the documents; but where on the dissolution of a firm of solicitors, one of the partners took possession of documents on which the firm had a lien, without the permission or consent of his late partners, it was held that the lien of the firm was not thereby lost: *Re Carter, Carter* v. *Carter*, 53 L. T. N. S. 630.

Although ordinarily the documents cannot be taken out of the solicitor's hands until the lien is satisfied, the client is nevertheless entitled to inspect them: *Lockett* v. *Cary*, 10 Jur. N. S. 144; and where the circumstances are pressing, an order may be made for delivery of documents in a discharged solicitor's hands before payment of his bill, provided money is brought into Court sufficient to satisfy his demand: *Re South Essex Eq. Investment and Advance Co.*, 46 L. T. N. S. 280.

When a firm is changed by the introduction of a new partner, there is no lien on papers delivered to the new firm for costs due the old firm: *Re Forshaw*, 16 Sim. 121.

Toronto agents, as against their principals, have a general lien for their agency bills on papers placed in their hands by their principals; and the lien is not lost even though the relationship of principal and agent is dissolved by the agent: *Re Attorney*, 7 P. R. 311; *Re A. B. & C.*, 14 C. L. J. 142; *Re Cross*, 4 Chy. Ch. 11.

Difference between right of lien of solicitor who is discharged, and one who discharges himself.

There is an important difference in the right of lien, of a solicitor in an action who discharges himself, and one who is discharged by his client.

When the solicitor discharges himself, he is bound to deliver up the papers in the action to the new solicitor, upon the latter undertaking to hold them subject to his lien for what, if anything, shall be found due on taxation of his bill; and to proceed with the cause with due diligence, and to redeliver the papers within ten days after he shall cease to have occasion for them, if the lien be not sooner satisfied: *Colegrave* v. *Manley*, T. & R. 400; *Heslop* v. *Metcalf*, 3 My. & Cr. 183; *Wilson* v. *Emmett*, 19 Beav. 233; *Cane* v. *Martin*, 2 Beav. 584; *Robins* v. *Goldingham*, L. R. 13 Eq. 440; *Ley* v. *Brown*, 1 Chy. Ch. 179; *Merrewether* v. *Mellish*, 13 Ves. 161; *Mayne* v. *Hawkey*, 3 Sw. 93; *Webster* v. *Le Hunt*, 9 W. R. 804: *Commerell* v. *Poynton*, 1 Sw. 1. The solicitor cannot in such a case require the client to undertake to proceed to a taxation of his bills: *Moir* v. *Mudie*, 1 S. & S. 282. And if he refuse to deliver up the papers to the new solicitor, on his undertaking as above mentioned, he

may be ordered to pay the costs of an application to compel him to do so: *Robins* v. *Goldingham*, *supra*. A solicitor who declines to proceed with an action until his costs are paid, in effect discharges himself: *Ib.*, and see *Re Lewis*, 72 L. T. Jour. 387. And so the dissolution of the firm of solicitors engaged by the client, or the arrest or detention in custody, or bankruptcy of the solicitor, works a discharge of the client by the solicitor: *vide supra*. But where the client dies, or his interest is transferred by assignment or otherwise, and an order is made to continue the proceedings in the name of some new party who names a new solicitor, in such cases the solicitor is deemed to be discharged by the client: see *Re Moss*, L. R. 2 Eq. 345. **Rule 463.**

When the solicitor is discharged by the client he cannot generally be ordered to deliver up the papers, until his lien has been satisfied: *Re Faithful*, L. R. 6 Eq. 325; *Griffiths* v. *Griffiths*, 2 Hare, 587; *Bozon* v. *Bolland*, 4 My. & Cr. 354, unless it appear that there is strong ground for believing that there is nothing due the solicitor: *Re Bevan & Whitting*, 33 Beav. 439. Nor is the solicitor in such a case bound even to produce the papers for the purpose of the cause, until his bill is paid: *Lord* v. *Wormleighton*, Jac. 580; *Redfearn* v. *Sowerby*, 1 Sw. 84; *Robins* v. *Goldingham*, L. R. 13 Eq. 440; but see *Simmonds* v. *G. E. Ry. Co.*, L. R. 3 Chy. 797; *Clifford* v. *Turrill*, 2 D. & S. 1; *Webster* v. *Le Hunt*, 9 W. R. 804; *Re Leah*, 6 Jur. N. S. 387. But where the discharged solicitor neglects to deliver his bill of costs within the proper time, he may be ordered to deliver up the papers subject to his lien thereon: *Cooper* v. *Hewson*, 2 Y. & C. C. C. 515; and when the papers are urgently needed he may be ordered to deliver them up on the amount claimed for costs being paid into Court together with a sum to meet the costs of taxation: *Re Galland*, 31 Ch. D. 296; 53 L. T. N. S. 921. **Discharge by client.**

And where the action is one for administration in which the rights of third parties are concerned, the solicitor, though discharged by his client, may be compelled to deliver up the papers necessary for the prosecution of the action, on the usual terms: *Re Boughton*, *Boughton* v. *Boughton*, 48 L. T. N. S. 413; *Bevaney* v. *Ffrench*, L. R. 8 Chy. 918; 20 L. T. N. S. 706; and see *Re Capital Fire Insurance Assn.*, 24 Ch. D. 408; 49 L. T. N. S. 697; *Hutchinson* v. *Norwood*, 54 L. T. N. S. 842. But costs incurred by an administrator in administration proceedings are a charge upon the estate, and upon his death, the administrator *de bonis non* takes the estate subject to the charge, and cannot compel the delivery up of the papers in the hands of the solicitor until his costs are paid: *Re Watson*, 50 L. T. N. S. 205.

Lien on Fund.—A solicitor has not only a general lien on his client's papers for all costs due to him, but he has also a particular lien for the costs of proceedings to recover a fund, upon the fund recovered, or ordered to be paid: *Lann* v. *Church*, 4 Mad. 391, and if the fund actually reaches the solicitor's hand he is entitled then to retain it until his costs, not only of the action in which the fund is recovered, but all other costs are paid, that is so far as his client's interest in the fund extends: *Davidson* v. *Douglas*, 15 Gr. 354; *Hall* v. *Laver*, 1 Hare, 571; but his lien only extends to what is due to him in his character of a solicitor: *Re Galland*, 31 Ch. D. 296; 53 L. T. N. S. 921. **Lien on fund.**

The solicitor may give notice to the opposite party not to pay the money until his costs are satisfied: *Cowell* v. *Simpson*, 16 Ves. 275; and see *Sympson* v. *Prothero*, 5 W. R. 814. And this lien is not lost by the discharge of the solicitor by the client, or by the act of God, pending the suit; thus where the plaintiff assigned his interest in the suit, and the assignee named a new solicitor, the first solicitor was held entitled to a lien on the fund ultimately recovered and to payment of his costs thereout, next after those of the solicitor by whom the suit was concluded: *Clark* v. *Eccles*, 3 Chy. Ch. 324; and see *Kellett* v. *Kelly*, 5 Ir. Eq. R. 34; *Bozon* v. *Bolland*, 4 My. & Cr. 354; *Cormack* v. *Beisly*, 3 D. & J. 157; *Re Wadsworth*, *Rhodes* v. *Sugden*, 34 Ch. D. 155; 55 L. T. N. S. 596. But after the fund has been paid to the client, with the solicitor's acquiescence, or without notice by the payer of his claim, the solicitor's lien is gone, and he must look to his client alone for payment of his costs: see 86 L. T. Jour. 446.

Where the solicitor declines to act he has no lien upon a fund in Court: *Cresswell* v. *Byron*, 14 Ves. 271. **Solicitor refusing to act.**

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Lien may be actively enforced.

The lien on a fund may be actively enforced: *Bozon* v. *Bolland*, 4 My. & Cr. 354. The solicitor may obtain a stop order: *Hobson* v. *Shearwood*, 8 Beav. 486; or an order for payment of his costs out of any money in Court payable to his client, or applicable to the payment of the costs: *Wardell* v. *Trenouth*, 8 P. R. 142. But a solicitor can have no higher claim against a fund by virtue of his lien than that of his client; and if the client would not be entitled to payment of his costs out of the fund neither will his solicitor; although it may have been recovered by means of proceedings taken by him: *Francis* v. *Francis*, 5 D. M. & G. 108; *Re Harrald, Wilde* v. *Walford*, 51 L. T. N. S. 441.

Client cannot defeat lien.

The client cannot assign the fund in Court so as to defeat the solicitor's lien, even to a purchaser for value, without express notice: *Haymes* v. *Cooper*, 33 L. J., N. S. Chy. 488; *Yemen* v. *Johnston*, 11 P. R. 231. Neither can the client release the adverse party from the payment of costs ordered to be paid, so as to defeat his solicitor's lien: *Ex parte Bryant*, 1 Mad. 49. But the lien may be defeated by a *bonâ fide* compromise by the parties to the action: *The Hope*, 8 P. D. 144; 49 L. T. N. S. 158; but a collusive compromise will not have that effect: *Beames Costs*, 312, 313; *Langle* v. *Fetterly*, 5 U. C. R. 628; *Griggs* v. *Meyers*, 6, U. C. R. 532; *Connors* v. *Squires*, 2 P. R. 149; and see *Plant* v. *Stone*, 9 U. C. R. 458; *Ex parte Morrison*, L. R. 4 Q. B. 153; *Ex parte Games*, 3 H. & C. 294; *Brown* v. *Conant*, 2 P. R. 208; *Smith* v. *Thompson*, 5 P. R. 166; *Morgan* v. *Holland*, 7 P. R. 74; *Barrett* v. *Barrett*, 18 C. L. J. 56; *Hall* v. *Griffith*, 5 Ont. 478; *Friedrich* v. *Friedrich*, 10 P. R. 308, 546; *Ross* v. *Buxton*, 60 L. T. N. S. 630. Where a compromise is effected for the purpose of depriving a plaintiff's solicitor of his costs, he may be authorized to carry on the action for the purpose of realizing them out of the defendant: *Dunthorne* v. *Bunbury*, 24 L. R. Ir. 6. But where in a suit for foreclosure the plaintiff and defendant compromised the suit, the plaintiff paying the defendant $200 in consideration of his releasing his equity of redemption, the defendant's solicitor was held to have no lien on the $200: *Brownscomb* v. *Tully, re Fairbairn*, 3 Chy. Ch. 71. An agent of a solicitor has a lien on a fund recovered: *Re Ryan*, 11 P. R. 127, and payment by the client to the agent in order to obtain his papers, is a good payment as against the principal solicitor: *Re Cross*, 4 Chy. Ch. 11; but the lien of the agent is no greater than that of the principal solicitor, and if the latter have no claim upon the fund as against his client, the agent may be compelled to pay it over upon a summary application on behalf of the client: *Re Edwards*, 45 L. T. N. S. 578. When the fund was in Court an order was made for payment to the agent of the amount of his lien thereout: *Re Ryan*, 11 P. R. 127.

Where money is standing to the separate account of the party to a cause, he may apply for payment out by a new solicitor, without an order changing the solicitor: *Waddilove* v. *Taylor*, 17 L. J. Chy. 384. But where the new solicitor delivered the cheque to the client before the lien of the former solicitor was satisfied, he was ordered to pay him the amount of his lien: *McPhatter* v. *Blue*, 15 C. L. J. 162.

Effect of lien on right of set-off.

Effect of Lien on right of set-off between parties.—No set-off of damages or costs between the parties is to be allowed to the prejudice of the solicitor's lien for costs in the particular action against which the set-off is sought; but costs of interlocutory proceedings may be set-off: see *Rule* 1205 note. But this *Rule* is held to apply only to the set-off of damages and costs in separate actions: see notes to *Rule* 1205; where that is sought, the set-off is not to be allowed to the prejudice of the solicitor's lien: *Webb* v. *McArthur*, 4 Chy. Ch. 63; *Edwards* v. *Hope*, 14 Q. B. D. 922; 53 L. T. N. S. 69; *Cuthbert* v. *Commercial Travellers Assoc.*, 7 P. R. 255; and see *Ross* v. *McLay*, 7 P. R. 97; *Wardell* v. *Trenouth*, 8 P. R. 142; *Barker* v. *Hemming*, 5 Q. B. D. 609; *Re Harrald, Wilde* v. *Walford*, 48 L. T. N. S. 352; 51 L. T. N. S. 441; but see *Wilson* v. *Switzer*, 1 Chy. Ch. 75, 160. But a set-off of damages and costs payable in the same action, will ordinarily be allowed without regard to the solicitor's lien: *Pringle* v. *Gloag*, 10 Ch. D. 676; 40 L. T. N. S. 512; *Cameron* v. *Campbell*, 12 U. C. Q. B. 159; *Young* v. *Hobson*, 8 P. R. 253; *Brigham* v. *Smith*, 17 Gr. 512.

Where a special lien was given by one of the parties to his solicitor, the right of set-off to the extent of the special lien thus created was held to be defeated:

Ross v. *McLay*, 7 P. R. 97. As to the right of the taxing officer to set-off costs : see *Rule* 1204 ; *Baker* v. *Hemming*, 5 Q. B. D. 609. **Rules 464, 465.**

No Lien on Estate recovered.—In Ontario a solicitor is not entitled to any lien on an estate recovered through his instrumentality : *Shaw* v. *Neale*, 6 H. L. C. 581 ; but see *Morgan* v. *Holland*, 7 P. R. 74. In England since 23 & 24 Vict. cap. 127, sec. 28 (Imp.), he has a lien on all property recovered by him for his client. No lien on estate recovered.

464. In all cases where a plaintiff has sued out a writ in person, or a defendant has appeared in person, and either party by a solicitor gives notice in writing to the opposite party, or the solicitor or agent of such party, of the solicitor being authorized to act as solicitor for the party on whose behalf the notice is given, all pleadings, notices, orders, and other proceedings, which according to the practice of the Court are to be delivered to, or served upon, the party on whose behalf such notice is given, shall thereafter be delivered to, or served upon such solicitor. Rules T. T. 1856, 139. Where party has acted in person, and notice given by solicitor that he is authorized to act, subsequent proceedings to be served on solicitor.

In the Court of Chancery it was formerly customary where a party, who had been previously acting in person, desired to act by solicitor, to obtain an order of course authorizing him to do so.

Notwithstanding this *Rule*, notice of motion to attach a defendant must usually be served personally, unless some sufficient reason is shown for dispensing with personal service : *Mann* v. *Perry*, 50 L. J. Chy. 251 ; followed by Proudfoot, J., in *Smith* v. *Marrin*, Sept. 29th, 1884. But notice of motion to commit for non-production, or not bringing in accounts, in the office of the Master, or Clerk of Records and Writs, Registrar or Deputy or Local Registrars, may be served on the solicitor : see *Rules* 521, 522.

465. In any action instituted by a mortgagee or other person having a charge on real property, for the foreclosure or sale of property, and to which action any judgment creditor of the mortgagor, or of the person liable to the charge, is a defendant, personal service on such defendant shall not be necessary, and it shall be sufficient to serve his solicitor in the action in which the judgment has been recovered, with the process of the Court, whether the same be an office copy of the judgment or decretal order, or any other order or notice which by order of Court may be directed, and whether the same be issued by the Court or by any officer thereof; but the plaintiff in any such action may elect to serve the judgment creditor personally instead of serving the solicitor. R. S. O. 1877, c. 40, s. 92. Service of proceedings for foreclosure or sale may be on solicitor in certain cases.

It is a matter of some doubt how far a solicitor's retainer continues after judgment has been recovered : see 79 L. T. Jour. 208 ; *De la Pole* v. *Dick*, 29 Ch. D. 351 ; 52 L. T. N. S. 457 ; *James* v. *Richnell*, 20 Q. B. D. 164 ; 58 L. T. N. S. 278 ; but whether the retainer continues or not, this *Rule* makes the service of the solicitor, sufficient service on the client for whom he acted.

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Rules 466-468.

Original or need not be shown except in cases of attachment.

466. It shall not be necessary to the regular service of an order, that the original shall be shown, except in cases of arrest or attachment. Rules T. T. 1856, 134.

Unless it is demanded, it is not necessary that the original order to examine a judgment debtor should be shown to him when serving him with a copy of it, in order to found an application for a *ca. sa.*, in the event of his disobeying it: *Imperial Bank* v. *Dickey*, 8 P. R. 246.

Service of notice of motion in Chambers may be dispensed with. Or substituted service ordered.

467. Where it appears, upon the hearing of any matter, that by reason of absence, or for any other sufficient cause, the service of notice of the application, or of the appointment, cannot be made, or ought to be dispensed with, such service may be dispensed with, or any substituted service or notice, by advertisement, or otherwise, may be ordered. Chy. O. 199.

Formerly in actions, after service of the writ, and the time for appearance had elapsed and no appearance entered, a notice of motion or appointment might be served on any non-appearing defendant by posting up a copy in the office whence the writ issued, under original *Rule* 131: *Dymond* v. *Croft*, 3 Ch. D. 512; but that *Rule* has not been embodied in this Consolidation; see *Rules* 461, 462, which appear only to apply to cases where the defendant has appeared.

But where the notice of motion required to be served is the first proceeding, or personal service is necessary on a party who has appeared but cannot be found, then this *Rule* would seem to apply and to authorize the allowance of substitutional service, or dispensing with service altogether. For cases in which applications of this kind have been made, see *supra* pp. 289, 302.

Where it was not shewn that defendant could not be served, the Court refused under this *Rule* to dispense with service of notice of motion for judgment for default of defence: *Dominion Bank* v. *Doddridge*, 12 P. R. 655. The fact that defendant had been personally served with the writ and had not appeared was held not to be "sufficient cause" within this *Rule*: *Ib.*

See *Re Backhouse* v. *Bright*, 13 P. R. 117.

6. Transmission of Papers.

On receiving notice, Deputy Clerks to transmit record to Toronto, sealed up, etc. Failure to be a contempt.

468. Every Deputy Clerk of the Crown, Deputy or Local Registrar, shall, within 24 hours after notice in writing delivered to him in his office, for that purpose, and payment of the necessary postage enclose, seal up, and transmit by post to the office of the proper Division at Toronto, addressed to the Registrar thereof, any record in his custody mentioned in the notice, together with all exhibits filed at the trial, and in default thereof he may be adjudged guilty of a contempt of Court, and be dealt with in the discretion of the Court accordingly; and if, after such notice, the record is not in Court at the time of making any motion requiring a reference thereto, the party moving may, on filing an affidavit of the service of notice, and that the record, on search,

has not been found in the said Registrar's office, be allowed by the Court to make the motion without the production of such record. R. S. O. 1877, c. 50, s. 279. Rules 469-472.

469. Where pleadings or other documents, filed with an officer of the Court, are required by any other officer, the officer with whom the pleadings or other documents are filed, is, upon production of a request signed by the officer requiring the pleadings or other documents, that the same are required for some proceeding before him, to transmit the pleadings or other documents upon payment of postage or express charges and return. *See* Chy. O. 542, 544. Transmission of documents from one officer of the Court to another.

This *Rule* is general in its terms, and appears to apply to all documents, whether filed with an officer in the action, in which their production is required, or in some other action.

Formerly where the documents in some other cause were required to be produced, an order was considered necessary. When a party in his affidavit on production referred to documents produced by him, and in the custody of a Deputy Registrar in another suit, an order was made *ex parte* for their production: *Gainer* v. *Doyle*, 2 Chy. Ch. 279; but see *Hamelyn* v. *White*, 6 P. R. 143. On a motion to produce documents in another cause at the trial, it was necessary to show that the original documents were required, and that the production of office copies would not be sufficient: *Chadwick* v. *Thompson*, 2 Chy. Ch. 389; *Jarvis* v. *White*, 8 Ves. 313; *Attorney-General* v. *Ray*, 6 Beav. 335; *Anon*, 13 Beav. 420; and ordinarily, an application for the order was required to be on notice: *Lamb* v. *Danby*, 9 W. R. 765. But under this *Rule* it does not appear to be necessary to obtain any order. Production of documents in other causes may be ordered. Proof required that production of originals is necessary.

470. Documents shall be transmitted by post or express, and not otherwise, and with the documents shall be transmitted the necessary postage or express charges for the return of the same, unless they are to be delivered by one officer to another in the same town, when they shall be transmitted by delivering the same to the officer requiring them, or his clerk. *See* Chy. O. 543, 544. Rules T. T. 1856, 148. Documents, how transmitted.

471. As soon as the purpose for which any such documents are required is completed, the officer to whom they have been sent is to re-transmit them to the office from which they were sent. Chy. O. 545. Documents to be returned.

7. Time.

472. Where by these Rules, or by any judgment or order, time for doing any act or taking any proceeding is limited by months, not expressed to be lunar months, such time shall be computed by calendar months. J. A. Rule 454. Months shall mean calendar months.

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Rules 473-476.

Identical with the Eng. R. 1875, O. 57, r. 1. That of 1883, R. 961, is a little more full.

Where a month's notice of passing a by-law was required, notice given on 28th March for 28th April was held insufficient: *Re Laplante* v. *Peterborough*, 4 C. L. T. 339.

Period of less than six days.

473. Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, holidays, as defined by *The Interpretation Act*, shall not be reckoned in the computation of such limited time. J. A. Rule 455.

The words in brackets do not correspond with the Eng. R. 1875, O. 57, r. 2 (1883, R. 962). Holidays are defined by the *Interpretation Act* (R. S. O. c. 1, s. 8, s-s. 16) as follows:

"Holiday."

"16. The word "holiday" shall include Sundays, New Year's Day, Good Friday, Easter Monday, and Christmas Day, Dominion Day, the days appointed for the celebration of the birthday of Her Majesty and of Her Royal Successors, and any day appointed by proclamation of the Governor-General or Lieutenant-Governor as a public holiday or for a General Fast or Thanksgiving."

This *Rule* applies to the period for entering cases under *Rule* 665: *Parr* v. *Lough*, 3 C. L. T. 312, to short notice of trial under *Rule* 661: *O'Donnell* v. *O'Donnell*, 10 P. R. 264, and to the computation of the 48 hours' notice of the examination of a party required to be given under *Rule* 491: *Lovelace* v. *Harrington*, 10 P. R. 157.

Where the limited period is *not less* than six days, holidays are counted: *Ex parte Viney*, 4 Ch. D. 794; *Cornish* v. *Manning*, 18 C. L. J. 143, except when the last day is a holiday when, by *Rule* 476, it is not to be reckoned: *Taylor* v. *Jones*, 45 L. J. C. P. 110.

As to how far the Court regards a fraction of a day: see *Broderick* v. *Broach*, 12 P. R. 561.

Days, how computed.

474. In all cases in which any particular number of days not expressed to be clear days, is prescribed by the Rules or practice of the Court, the same shall be reckoned exclusively of the first day, and inclusively of the last day. J. A. Rule 456.

Same as English Rule No. 174, of Hilary Term, 1853.

When the expression "clear days" is not used, days are "clear" when expressed to be "at least" a certain number of days: see *Rule* 475 and *Reg.* v. *Shropshire Justices*, 3 A. & E. 173; Fisher Digest, p. 8323; *Webster* v. *Leys*, 3 C. L. T. 504; *Rumohr* v. *Marx*, in note to *Rule* 800.

Clear days.

475. In all cases expressed to be clear days, or where the term "at least" is added, both days shall be excluded. App. O. 60.

See *Lovelace* v. *Harrington*, in note to *Rule* 473.

Where last day is Sunday.

476. Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or

proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken on the next day on which the offices are open. J. A. Rule 457. Rules 477-479.

Identical with the Eng. R. 1875, O. 57, r. 3 (1883, R. 963).

This *Rule* does not apply to extend the time for registration of a chattel mortgage under the statute, R. S. O. 1887, c. 125: *McLean* v. *Pinkerton*, 7 Ont. App. 490; nor to extend the time fixed by a Statute of Limitations, and therefore, in an action on a promissory note, where the limit of time under such a statute expired on Sunday, and the writ was not issued till Monday, the bar of the statute was held to apply: *Morris* v. *Richards*, 45 L. T. N. S. 210.

But it is considered by the officers of the various Divisions at Toronto that where the year within which a writ of execution is to be renewed under *Rule* 894 expires on a Sunday, the writ may be renewed on the following day, as the limit of a year is one imposed by the *Rules*, and not by a statute.

Where the time for appealing from Chambers expires on a holiday, the motion may be made the next day: *Taylor* v. *Jones*, 45 L. J. C. P. 110.

Notice of motion for a *dies non* is not bad: *Re Coulton, Hamling* v. *Elliott*, 34 Ch. D. 22, over-ruling *Daubney* v. *Shuttleworth*, 1 Ex. D. 53: see *Deykin* v. *Coleman*, 36 L. T. N. S. 195; 25 W. R. 294; and *Rules* 442 and 479.

477. The day on which an order that the plaintiff do give security for costs is served, and the time thenceforward until and including the day on which the security is given, is not to be reckoned in the computation of time allowed to a defendant to appear or deliver a defence. Chy. O. 409. Computation of period of stay of proceedings.

478. The time for delivering or amending any pleading may be enlarged by consent in writing, without application to the Court or a Judge. J. A. Rule 458. Enlargement of time by consent.

Identical with the Eng. R. April, 1880, R. 42.

479. Unless the Court or Judge gives special leave to the contrary, there must be at least two clear days between the service of a notice of motion or petition and the day for hearing the motion or petition; and in the computation of such two clear days, Sundays, and days on which the offices are closed are not to be reckoned. Chy. O. 264. J. A. Rule 407. Two clear days' notice.

See Eng. R. 1876, O. 53, r. 4 (1883, R. 700).

For the days on which the offices are closed: see *Rule* 7.

Motions for judgment are held to be within this *Rule*: *Parsons* v. *Harris*, 6 Chy. D. 694; *Pearce* v. *Spickett*, W. N. 1876, 109; *Martins* v. *Birney*, 10 P. R. 368, and note to *Rule* 748.

Where a motion is made by leave of the Court or a Judge the notice should so state, otherwise it is irregular: *Hill* v. *Rimell*, 8 Sim. 632. The Court should also be informed of the fact on the return of the motion; but the Court has a discretion to disregard the irregularity: *Dawson* v. *Beeson*, 22 Ch. D. 504. Under *Rule* 442 affidavits were allowed to be read, though not served until after the notice of motion: *Re Wyggleston Hospital*, 78 L. T. Jour. 282. So, where, without leave, a motion is made returnable on a day on which the Court does not sit: *Armstrong* v. *Cayley*, 13 Gr. 558; or in vacation: *Maullin* v. *Rogers*, 34 W. R. 592; 55 L. T. N. S. 121; 55 L. J. Q. B. 377; or the notice is

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Rule 479. too short, it is irregular: *Daubney* v. *Shuttleworth*, 1 Ex. D. 53; *Deykin* v. *Coleman*, 25 W. R. 294; but the Court may disregard the irregularity: see *Williams* v. *De Boinville*, 17 Q. B. D. 180; *Forrest* v. *Davies*, 26 W. R. 534, and *Re Coulton*, 34 Ch. D. 22.

Objection to a notice as being short was considered waived by appearing on the motion in *Re McRae, Forster* v. *Davies*, 25 Ch. D. 19; and by obtaining an enlargement and demanding affidavits in *Re Farlinger & Morrisburg*, 9 C. L. T. 109.

Where notice of motion has not been given in sufficient time owing to a *bona fide* mistake, the Court may, in its discretion, allow the party in default to show the reason of the mistake by affidavit, and allow the motion to be made on a later day: *Smith* v. *Smacksmen, Ins. Co.*, 32 W. R. 184.

Where a defendant has not appeared to the writ the posting up of a notice of motion under the original *Rule* 131 was formerly good service within this *Rule*: *Dymond* v. *Croft*, 3 Ch. D. 512: *Morton* v. *Miller, ibid.* 516; *Parsons* v. *Harris*, 6 Ch. D. 694; but that *Rule* has not been embodied in the Consolidated *Rules*, and service of a notice of motion for judgment must therefore be effected personally when defendant has not appeared: see *Burritt* v. *Murdock*, 9 P. R. 191, and note to *Rule* 467.

Where the party who has given notice of motion fails to appear, the party served and appearing is entitled to an order for his costs: *Berry* v. *Exchange Trading Co.*, 1 Q. B. D. 77; *Denison* v. *Devlin*, 11 Gr. 84. But if the notice of motion is invalid, the party served not being bound to appear, is not entitled to costs if he does appear: *Daubney* v. *Shuttleworth*, 1 Ex. D. 53. In *Re Coulton, Hamling* v. *Elliott*, 34 Ch. D. 22, it was held that notice for a day not in the sittings is not bad, perhaps because the parties appeared on the motion; and see *Fisken* v. *Smith*, 3 Chy. Ch. 74.

In *Williams* v. *De Bonville*, 17 Q. B. D. 180, notice for a day not in the sittings was amended to insert the proper day, the case apparently having been entered by the Clerk in the list of opposed motions for the first day of the sittings. The notice was held bad, but the amendment was allowed, the amount in question being large. In *Maullin* v. *Rogers, supra*, the Court thought it best for the parties not to permit an amendment, the amount being small: see 34 W. R. 702.

As to when costs will be given, where the Court decides that it has no jurisdiction: see *Brown* v. *Shaw*, 1 Ex. D. 425; *Great Northern Co.* v. *Inett*, 2 Q. B. D. 284; *Powley* v. *Whitehead*, 16 U. C. Q. B. 589.

As to the costs of a person who appears, though unnecessarily served and merely to ask costs, and of one who appears *quia timet* an order would be made against him: see *Lucas* v. *Fraser*, 9 P. R. 319.

Under *The Judicature Act*, where an order is made in default of appearance, the former practice is still in force that it is still necessary to produce an affidavit of service to the Registrar before the rising of the Court; it is not sufficient if it be produced in time to draw up the order: *Secar* v. *Webb*, 25 Ch. D. 84; *Jones* v. *Bartholomew*, W. N. 1883, 205; *Re Rosier*, 49 L. T. N. S. 442.

A notice of motion need not state under what *Rule* the party proposes to move: *Re Barker's Estate*, 10 Ch. D. 165-6.

A petition presented by a person, not a party to the action should set out his residence and occupation: *Hunter* v. *Mountjoy*, 2 Chy. Ch. 90; *Glazbrook* v. *Gillatt*, 9 Beav. 492.

The petition need not be filed before the day of hearing, and a petition filed before it had been served, and in the prosecution of which delay had arisen, was ordered to be taken off the files for want of prosecution: *Re Western Insurance Co.*, 6 P. R. 86. But a petition must be filed before any order made thereon can be issued; but where the original is lost, or the petitioner refuses to deliver it to the respondent to file, a copy may be filed instead: *Smith* v. *Harwood*, 1 Sm. & G. 137; *Sanderson* v. *Walker*, 1 M. & Cr. 359; *Re Hobler*, 9 Jur. 419; *Andrews* v. *Walton*, 1 M. & Cr. 360.

Formal parties, may, with the petition, be tendered $5 for costs, and if they appear unnecessarily they will get no more costs : *Rule* 1193 ; *Re Sutton*, 46 L. T. N. S. 740 ; where several respondents appear by the same solicitor, the tender of one sum of $5 is sufficient : *Re Mitchell*, 17 Ch. D. 515 ; 45 L. T. N. S. 60.

Rules 480-483. Tender of $5 costs to formal respondents.

480. Unless otherwise specially ordered in the particular case, service of pleadings, notices, orders, and other proceedings, shall be effected before the hour of four o'clock in the afternoon ; except on Saturday, when it shall be effected before the hour of two o'clock in the afternoon. Service effected after four o'clock in the afternoon on any week day except Saturday, shall be deemed to have been effected on the following day. Service effected after two o'clock on Saturday shall be deemed to have been effected on the following Monday. J. A. Rule 540.

Time for service of pleadings.

The original *Rule* 459 was identical with the English Rule and named six o'clock as the last hour for service, instead of four o'clock.

Where service was admitted by a solicitor a few minutes after the hour *per incuriam*, and was repudiated by him as soon as he discovered the nature of the paper served upon him it was held not to bind : *McTavish* v. *Sympson*, 7 P. R. 145 ; *Wright* v. *Way*, 8 P. R. 328.

Service of a paper effected within proper hours but by leaving the paper in the office of the solicitor, after he and his clerks had left for the day, is good service only from the time when the paper came to the knowledge of the solicitor : *Davies* v. *Hubbard*, 20 C. L. J. 32 ; following *McCallum* v. *Prov. Ins. Co.*, 6 P. R. 101.

A specially indorsed writ is not a pleading within this *Rule*, and may be served at any hour of the day : *Murray* v. *Stephenson*, 9 Q. B. D. 60 ; see also *Veale* v. *Automatic Boiler, etc., Co.*, 18 Q. B. D. 631.

See *Lloyd* v. *Ward* in note to *Rule* 393.

481. An attendance on a motion in Chambers, or on an appointment before a Master Registrar, or other officer, for half an hour next immediately following the return thereof, shall be deemed a sufficient attendance. Rules T. T. 1856, 124.

Half an hour's attendance on a summons, or appointment, is sufficient.

482. On every appointment the party on whom the same is served shall attend such appointment without waiting for a second, or in default thereof the officer before whom the appointment is may proceed *ex parte* on the first appointment. Rules T. T. 1856, 144.

One appointment sufficient.

483. No pleadings shall be amended or delivered in the long vacation, except [by consent or unless] directed by the Court or a Judge. J. A. Rule 460.

Pleading in vacation.

The words in brackets are not in Eng. R. 1875, O. 57, r. 4, (1883, R. 964).

In the former Common Law Courts no pleadings could be delivered during the long vacation : R. S. O. 1877, c. 50, s. 95. Under this *Rule* it can be done by order, or by consent.

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Rules 484, 485.

Long vacation when not computed.

484. The time of the long vacation shall not be reckoned in the computation of the times appointed or allowed by these Rules for filing, amending, or delivering any pleading, or in the times allowed for the following purposes, unless otherwise directed by the Court or a Judge:

1. ~~Setting down demurrers~~;
2. Master's reports becoming absolute;
3. Moving to discharge an order under Rule 622;
4. Moving to add to, vary, or set aside a judgment by any party served therewith. J. A. Rule 461; Chy. O. 408.
5. Doing any act or taking any proceeding in appealing to the Court of Appeal, except in County Court appeals. App. O. 57.

Formerly the Christmas vacation was excluded from the time allowed for setting down demurrers: Chy. Ord. 408; and see *Blake* v. *Building & Loan Assoc.*, 10 P. R. 153; but under this *Rule* it is not.

Masters' reports, when confirmed.

Masters' Reports.—In order to confirm a Master's report, it must be filed as directed in *Rule* 84, fourteen days: see *Rule* 848. No part of this period must fall in the long vacation. Where it is desired to appeal from a report, the notice of appeal must be served before the report is filed, or within fourteen days from its filing, including the day of filing: *Rule* 848. The notice of appeal must be a seven days' notice and must be returnable within a calendar month from the date of the report: *Rule* 849; but if the month elapse before the filing, then fourteen days must still elapse from the filing, before the report can be confirmed. The word "report" includes certificates of Masters. The appeal is to be heard in Court: *Rule* 850. Formerly the Christmas vacation was excluded in the computation of the time allowed for appealing from a report: *Blake* v. *Building & Loan Association*, 10 P. R. 153; but this is no longer the case.

What reports require confirmation.

As a general rule, any report, or certificate, of the Master, which may be the subject of appeal, requires confirmation before it can be acted on, or become absolute.

A certificate of a Master as to the insufficiency of accounts filed before him requires confirmation: *Foster* v. *Morden*, 9 P. R. 70; but not a certificate that no accounts at all have been filed. See further as to reports requiring confirmation: *Rule* 848 note.

Motions to discharge orders to continue proceedings. Time for.

Moving to Discharge Order Under Rule 622.—Where an order of revivor was formerly issued, the practice is now to issue an order to continue the proceedings. The Christmas vacation is not excluded from the time allowed for moving against an order to continue proceedings. Fourteen days from service are allowed for moving against an order to continue proceedings: *Rule* 624.

Motions to add to, or vary, judgments.

Moving to add to, or vary, or set aside a Judgment.—This *Rule* applies to motions to add to, or vary, judgments, by parties served therewith, by direction of the Master, whether on being added as parties to an action under *Rules* 46, 126, or merely for the purpose of binding them by, and enabling them to attend the proceedings in the action under *Rule* 322. The time allowed for moving against a judgment by any party as served is fourteen days from the day of service: see *Rules* 48, 127, 322. The Christmas vacation is not excluded from the time allowed for making such motions.

Enlargement or abridg-

485. A Court or a Judge shall have power to enlarge or abridge the time appointed by these Rules, or any Rules

relating to time, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed. J. A. Rules 462, 514.

Rule 485. Enlargement of time.

Identical with the Eng. R. 1875, O. 57, r. 6, (1883, R. 967).

See *Crom* v. *Samuel*, 2 C. P. D. 21. In *Wilkins* v. *Belford*, 35 L. T. N. S. 622, Bacon, V.C., refused to extend time for delivering a counter-claim. It had not been delivered, through the gross neglect of the defendant's solicitor, and the application was made six months after a decree had been obtained, but immediately after the defendant discovered his solicitor's neglect.

In *Norris* v. *Beasley*, 35 L. T. N. S. 845, the Court said, "Parties must not exercise the jurisdiction of the Court and extend time by mutual consent. We do not accept such consent, but regard orders as to time as compulsory." The time was then extended by the Court.

In *Hastings* v. *Hurley*, 16 Ch. D. 734, the time for indorsement of the date of service under *Rule* 256 was extended.

In *Dager* v. *Robertson*, 9 P.R. 78, time for appealing from an Official Referee in Chambers under *Rule* 846, was extended where the time had expired through a misapprehension of the practice.

This *Rule* does not empower the Court to allow an application as to costs, which by *Rule* 1170, if made to a Judge, must be made at the trial, to be made at any later period: *Baker* v. *Oakes*, 2 Q. B. D. 171.

Where an order was made under *Rule* 646, dismissing an action for want of prosecution, unless a statement of claim should be delivered within a week, and no statement was delivered in the week so limited, it was held that the action was at an end, and that there was no jurisdiction to make an order subsequently extending the time for delivery of the statement of claim: *Whistler* v. *Hancock*, 3 Q. B. D. 83; and see *Dunn* v. *McLean*, 6 P. R. 156.

An order was made on the 6th of May dismissing an action for want of prosecution if the statement of claim was not delivered within fourteen days, and on the 19th of May the plaintiff took out a summons returnable the next day, the last of the fourteen days, for further time to deliver the statement of claim. The summons was, on the 20th, adjourned, by the consent of the parties in writing indorsed thereon, till the 21st, and on the 21st a Master made an order giving seven days more for delivery of the statement of claim. The Court rescinded the order on the ground that there was no jurisdiction to make it, the action being at an end on the 20th of May: *King* v. *Davenport*, 4 Q. B. D. 402.

On the 25th of March a Master made an order dismissing an action for want of prosecution, unless an affidavit in answer to interrogatories was filed on the 31st. The affidavit was not filed on that day; but on the day following a summons was taken out for further time to answer the interrogatories; it was held that it was still competent to the Court or a Judge to enlarge the time for moving to set aside or vary the order of the 26th of March: *Burke* v. *Rooney*, 4 C. P. D. 226.

The Court of Appeal has decided that a Judge has jurisdiction under this *Rule* to enlarge the time for appealing against an order dismissing the action for want of prosecution, even after the order has taken effect, and the action has therefore become dismissed; and that he has also jurisdiction, when he has so enlarged the time for appealing, to vary or amend the order dismissing the action, and in the exercise of such jurisdiction his discretion is not limited by fixed or arbitrary rules: *Carter* v. *Stubbs*, 6 Q. B. D. 116; see also *Welpy* v. *Buhl*, 3 Q. B. D. 80, 253, and note to *Rule* 646.

In the above cases, *Whistler* v. *Hancock* is recognized as correctly decided. In that case there was no jurisdiction to make the order asked, because the

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motion was to take some step in the cause, and was not directed to modifying the order for dismissal. There had been no order or application within the week to set aside or vary the order of dismissal, or to enlarge the time for appealing against the order of dismissal, and, that order existing and having taken effect, the cause was dead.

The last five above-mentioned English cases were considered in *Newcombe* v. *McLuhan*, 11 P. R. 461, and were not considered to stand in the way of a motion to vacate a judgment (signed on default of delivery of a statement of claim on a day previously fixed by order for its delivery), and to extend the time for delivering statement of claim.

By a Master's order an action was ordered to be dismissed, unless notice of trial should be given by a certain day. Through mistake of a solicitor's clerk notice of trial was not so delivered. A Judge in his discretion refused to extend the time, and the Court of Appeal refused to interfere: *Gilder* v. *Morrison*, 30 W. R. 815.

Where, within four days from a decision of a Master in Chambers, an appeal summons was taken out, and made returnable at a date after the expiration of the four days, but on the first day when any Judge would sit at Chambers, it was held that the time might be enlarged under this *Rule*: *Gibbons* v. *London Financial Association*, 4 C. P. D. 263.

The *Rule* only applies where a limited time is fixed for something to be done, and not where the *Rules* direct some act to be done before another: *Pilcher* v. *Hinds*, 11 Ch. D. 905.

The Court cannot, under this *Rule*, extend the time for renewing a writ where in the absence of such renewal the claim would be barred by the Statute of Limitations: *Doyle* v. *Kaufman*, 3 Q. B. D. 7, 340; but the time for issuing a concurrent writ may be extended, the original having been kept renewed so that it could be acted upon within the jurisdiction: *Smallpage* v. *Yonge*, 55 L. T. N. S. 44, distinguishing *Doyle* v. *Kaufman*. See also note to *Rule* 238.

See also notes to sec. 71 of the Act, *supra* p. 81.

Time for vacations in the High Court of Justice, and Court of Appeal.

486. The Vacations to be observed by the High Court of Justice and the Court of Appeal, shall be as follows:

The Long Vacation to consist of the months of July and August.

The Christmas Vacation to consist of the period from the 24th day of December to the 6th day of the following January, both days inclusive. J. A. Rule 582.

Unless under any *Rule* (such as 7, 483, 484), proceedings are prohibited during vacation they may lawfully be taken, *e.g.*, taxation: see *Cousineau* v. *City of London F. Ins. Co.*, 13 P. R. 36.

8. Examination for Discovery.

Discovery. General rules.

In general discovery is obtained by interlocutory proceedings as ancillary to the main object of an action, but an action for discovery may, in a proper case, still be brought: *Orr* v. *Diaper*, 4 Ch. D. 92; *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644. For the grounds of objection to such an action: see Maddock's Chy. Pr., 3rd ed., 268. An action for discovery in aid of proceedings in a foreign Court cannot be maintained: *Dreyfus* v. *The Peruvian Guano Co.*, 41 Ch. D. 151.

The Judicature Act has made no alteration in the right of the parties to discovery by examination: see *Atty.-Gen.* v. *Gaskill*, 20 Ch. D. 519; also

Hannings v. *Williamson*, 10 Q. B. D. 459, where it was held that in an action for penalties the plaintiff could not administer interrogatories as he had not the right before the Act: also *Jones* v. *Jones*, 22 Q. B. D. 425; *Martin* v. *Treacher*, 34 W. R. 315; 54 L. T. N. S. 7; *Whiteley* v. *Barley*, 56 L. J. Q. B. 312; but the amount payable under the Copyright Act, 1842, for each representation of a musical publication copyright, was held not to be an action for penalties, and therefore discovery was allowable: *Adams* v. *Batley*, 18 Q. B. D. 625. **Rule 487.**

The general rules as to privilege in evidence apply in examinations for discovery, and in the production and inspection of documents.

The plaintiff is entitled to examine in order to ascertain what title the defendant is setting up against him. This does not come within the ground of privilege: *Cayley* v. *Sandycraft*, 33 W. R. 577.

A party has the right to examine for discovery, not only for the purpose of obtaining information from the opposite party as to material facts which are not within his own knowledge, and are within the knowledge of the opposite party, but also for the purpose of obtaining from the opposite party, admissions which will make it unnecessary for him to enter into evidence of the facts admitted: *Atty.-Gen.* v. *Gaskill*, 20 Ch. D. 519; *Hellier* v. *Ellis*, W. N. 1884, 9; see *Colter* v. *McPherson*, 12 P. R. 630; *Humphries* v. *Taylor Drug Co.*, 39 Ch. D. 693.

An executor pleading *plene administravit* was held bound to disclose particulars of the real and personal estate: *St. George* v. *St. George*, 19 L. R. Ir. 225.

There is no distinction as regards the right to discovery between actions of ejectment and other actions: *Lyell* v. *Kennedy*, 8 App. Cas. 217; *Daniel* v. *Ford*, W. N. 1883, 27, 52.

The old practice in Chancery was for the bill to contain interrogatories, to which the defendant was bound to give full answers upon oath; and, on the other hand, the defendant could only avail himself of the plaintiff's oath by filing a cross-bill containing like interrogatories. This practice was changed in this Province by the General Orders of the 3rd of June, 1853, which substituted an oral examination of each party at the instance of his opponent. The Orders for this purpose were afterwards embodied in the Consolidated Chy. Orders 138-148. By *The Administration of Justice Act*, a similar practice was provided for the Courts of Common Law: see R. S. O. 1877, c. 50, sec. 156, *et seq.*, as amended by 41 Vict. c. 8, ss. 8, 9. In some particulars the Chy. Orders differed from the statute; and the original J. A. *Rules* left the old practice under both on this subject in force. **Former practice.**

The Con. *Rules* formulate a practice in part adopted from the Chy. Orders and in part from the Common Law Procedure Act, so that the difficulties which formerly were created by the double provision on the subject (as to which see Maclennan's, Jud. Act, 2nd ed., 353), no longer exist.

487. Any party to an action or issue whether plaintiff or defendant, or in the case of a body corporate, any one who is or has been one of the officers of such body corporate, may without any special order for the purpose be orally examined before the trial touching the matters in question in the action by any party adverse in point of interest; and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination, as any witness except as hereinafter provided. *See* Chy. O. 138; R. S. O. c. 50, s. 156. **Examination of parties for discovery.**

Parties adverse in point of interest.—Under the English Ord, 31, r. 1, providing for the examination of the "opposite party or parties," it has been held that a party added by the defendant in a counter-claim, is not an opposite **Who may be examined.**

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party as regards the plaintiff: *Molloy* v. *Kilby*, 15 Ch. D. 162; but see *Bradley* v. *Clark*, 9 P. R. 410; 19 C. L. J. 193. But a third party, who has been notified by the defendant under *Rules* 328, 329, and has appeared and obtained leave to defend, is entitled to examine the plaintiff in the same manner as an original defendant: *McAllister* v. *Bishop of Rochester*, 5 C. P. D. 194: *Eden* v. *Weardale Iron Co.* 34 Ch. D. 223; and the plaintiff is entitled to examine him; *Bradley* v. *Clark*, 9 P. R. 410; 19 C. L. J. 193.

If the issues between co-defendants are material to the case of the plaintiff, or to the character of the relief he seeks, he may examine a defendant upon them, though there is no issue between that defendant and himself: *Alexander* v. *Diamond*, 9 P. R. 274. A defendant whose interest is identical with that of the plaintiff is a party adverse in point of interest to his co-defendant, and may be examined by such co-defendant; and where the plaintiff's solicitor is present at such examination the depositions may be read against the plaintiff: *Moore* v. *Boyd*, 8 P. R. 413. A disclaiming defendant charged with complicity in a fraud was held to be properly questioned as to the fraud: *McFarland* v. *McFarland*, 9 P. R. 73.

Officers of corporations.

Officers of Corporations.—The examination of an officer or past officer, or member of a corporation in England is obtained under a Rule (Ord. 31, r. 5) not adopted here, and sometimes by making him a defendant: see *Manchester Val de Travers Paving Co.* v. *Slagg*, W. N. 1882, 127; *Berkeley* v. *Discount Co.*, 13 Ch. D. 99.

Under the practice in Ontario, under the above *Rule*, a member of a Co., not being an officer or ex-officer, cannot be examined unless a party and it is improper to make an officer of a Co. a party merely for the purpose of discovery: *Rule* 307.

R. S. O. 1877, c. 50, s. 156, in regard to the right to examine officers was the same as the present *Rule*, and under these provisions, the sub-editor or assistant editor of a newspaper has been held to be an officer examinable for discovery in action of libel: *Maitland* v. *Globe Printing Co.*, 9 P. R. 370; so also the chief engineer of a Ry. Co.: *Oakley* v. *Toronto G. & B. Ry.*, 6 P. R. 253; a station master of a Railway Co. in an action for not delivering goods shipped: *Ramsay* v. *Midland Ry. Co.*, 10 P. R. 48; the locomotive superintendent, and locomotive foreman of a Ry. Co. in an action for damage caused by sparks from a locomotive: *Moxley* v. *Canada Atlantic Ry. Co.*, 15 S. C. R. 145; and in an action for price of goods which a defendant refused to accept as being worthless on their arrival: *Milner* v. *Clark and G. T. Ry. Co.*, 3 C. L. T. 215; but not an engine driver or paymaster: *McLean* v. *G. W. Ry. Co.*, 7 P. R. 358; or a tie inspector: *Dalziel* v. *G. T. Ry. Co.*, 6 P. R. 307; or surveyors usually employed by a municipality, but not formally appointed officers thereof: *Meek* v. *Yarmouth*, 9 C. L. T. 373.

An order was made to examine the agent of a bank, where the contract in question was alleged to have been made by him on the bank's behalf: *Consolidated Bank* v. *Neilon*, 7 P. R. 251; an architect of defendants in an action for price of work and materials in erecting a building, where defendants themselves could give no information: *Smith* v. *Clarke*, 12 P. R. 217; a local agent of an Insurance Co. who procured the application for the insurance in question in the action: *Hartnell* v. *Canada Mutual Aid Co.*, 12 P. R. 401.

It would seem that several officers of a corporation may be examined where different matters are peculiarly within the knowledge of different officers: see *Compagnie Financière, etc.* v. *Peruvian Guano Co.*, 28 Sol. Jour. 410.

In *Goring* v. *London Mutual Fire Ins. Co.*, 10 P. R. 642, it was held that a local agent who received applications for premiums, and issued interim receipts, and his successor who had charge of the agency when the fire occurred were properly examinable for discovery as officers; and in an action upon a life policy the local agent of an insurance company who procured the application for insurance was held to be examinable for discovery: *Hartnell* v. *Canada Mutual Aid Assocn.*, 12 P. R. 401; and in an action against a corporation for negligence, the servant of the defendants who was guilty of the alleged negligence was also held to be examinable: *Odell* v. *City of Ottawa*, 12 P. R. 446; so also the

conductor on a train on which an accident occurred which was the subject of the action: *Leitch* v. *Grand Trunk R. W. Co.*, 12 P. R. 541, 671; and an officer of a company called as a witness as the first trial of an action may, pending a second trial, be examined under this *Rule*: see *Leitch* v. *Grand Trunk R. W. Co.*, 12 P. R. 671. **Rule 487.**

Quære, whether a person may be an officer examinable for discovery, but not one whose evidence taken upon such examination will bind the company: *Goring* v. *London Mutual, etc., supra*; *Hartnett* v *Canada Mutual Aid Assocn.*, 12 P. R. 401.

As to the time for making the examination: see *post Rule* 489.

How attendance procured.—Where a party resided in Quebec, a subpœna requiring his attendance for examination in Ontario was ordered to issue under *C. S. C.*, c. 79, s. 4; *Moffat* v. *Prentice*, 6 P. R. 33; *Bank of British North America* v. *Eddy*, 19 C. L. J. 192; and see *Morell* v. *Morrison*, 6 P. R. 210. But such an order will not be granted *ex parte*: *Moffatt* v. *Prentice, supra*; and see *Dewalt* v. *Hughitt*, 7 P. R. 323. Under the subpœna he may be compelled to attend at such place as in the opinion of the Court is most convenient, and not necessarily the nearest to his place of abode: *Smith* v. *Babcock*, 9 P. R. 97; *Bank of B. N. A.* v. *Eddy*, 9 P. R. 396. The party desiring the examination is also entitled to a commission: *Stratford* v. *G. W. Ry. Co.*, 6 P. R. 91. How attendance procured.

Where the party is out of the jurisdiction elsewhere than in Quebec, a Special Examiner may, by order, be appointed, to take the examination: see *Rule* 524; or a commission may be issued: *Banque Franco-Egyptienne* v. *Lutscher*, W. N. 1879, 183; 41 L. T. N. S. 468; 28 W. R. 133; see also *Nadin* v. *Bassett*, 25 Ch. D. 21; but there is no authority to proceed without an order, and by subpœna only: see *Bank of B. N. A.* v. *Eddy*, 9 P. R. p. 399.

See also *Rule* 524.

The party to be examined must be served with a subpœna, and paid proper witness fees: *McMurray* v. *G. T. Ry.*, 3 Chy. Ch. 130; *Vardon* v. *Vardon*, 7 P. R. 436. A subpœna dated prior to the time when the party issuing it was entitled to examine the party served therewith, is irregular: *McMurray* v. *G. T. Ry., supra*. The solicitor of the party to be examined should also be served with a copy of the examiner's appointment: *Fowler* v. *Boulton*, 12 Gr. 437.

The solicitor of the party to be examined is entitled to forty-eight hours' notice of the examination: *Rule* 491, but the party himself, where he has a solicitor, is only entitled to reasonable notice according to circumstances: *Wilson* v. *Cowen*, 19 C. L. J. 140; 3 C. L. T. 216; *Bolkow* v. *Foster*, 7 P. R. 388; see *Re N. Wheal Exmouth Mining Co.*, 31 Beav. 628; and *Lynskey* v. *Can. Pacific Ry. Co.*, 4 C. L. T. 93; but where a party who has no solicitor is required to attend, he should have forty-eight hours' notice: *Watson* v. *Ham*, 1 Chy. Ch. 293.

Where the party to be examined is a resident out of the jurisdiction but temporarily present within the jurisdiction, and about to return to his home, $1 is an insufficient witness fee on which to detain him five days in order to attend the examination: *Bolkow* v. *Foster*, 7 P. R. 388; but it may be sufficient if the party served make no objection to its sufficiency: see *Smith* v. *Greey*, 10 P. R. 345; *Comstock* v. *Harris*, 12 P. R. 17; *Parker* v. *Meriden*, 7 C. L. T. 112.

A party taking out an order to examine and failing to appear on an appointment thereunder, loses the benefit of the order and must obtain a new one: *Ferguson* v. *Eliott*, 7 P. R. 7. When an examination is adjourned *sine die* re-service of an appointment and payment of conduct money is necessary in order to compel attendance: *Whitehead* v. *Harte*, (Mr. Dalton, 22 June, 1882,) Globe. The party is compellable to re-attend although he has signed the depositions and does not consent to the adjournment: *Re Metropolitan Brush Co.*, 51 L. T. N. S. 816; 54 L. J. Chy. 253.

The Examination.—The Examiner's office is not a public Court, and he has no discretion to admit the public, if objected to by any of the parties: *Re Western of Canada O. L. & W. Co.*, 6 Ch. D. 109; see also *Re Cambrian Co.*, Examiner's office not a public Court.

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Rule 488. 51 L. J. Chy. 221; *Re Grey's Brewery Co.*, 25 Ch. D. 400. The examining counsel has no right to have a clerk to assist him if the opposite party objects: *Hands* v. *U. C. Furniture Co.*, 12 P. R. 292.

Exclusion of parties. Where several parties attend for examination, the Examiner may exclude those in the same interest, while the others are under examination: *Culverwell* v. *Birney*, 10 P. R. 575; *Sirewright* v. *Sirewright*, 8 P. R. 81; *Sadlier* v. *Smith*, 14 C. L. J. 30; but one of them should remain for the purpose of instructing counsel, subject to his being first examined: *Sirewright* v. *Sirewright*, 8 P. R. 81; and the Examiner has a discretion as to the order of their examination, where several are in attendance for examination: *Stuart* v. *Balkis*, 32 W. R. 676; 53 L. J. Chy. 791; and his discretion extends even to the exclusion of the examinant's solicitor if his presence interferes, in the Examiner's opinion, with the execution of his duty as Examiner: *Hands* v. *U. C. Furniture Co.*, 12 P. R. 292. The refusal to comply with the Examiner's ruling is a contempt of Court: *Sadlier* v. *Smith*, 14 C. L. J. 30. A foundation must be laid in the pleadings for questions asked on the examination: *Dickson* v. *Corrie*, 2 Chy. Ch. 242; *Nicholl* v. *Elliott*, 3 Gr. 536; *Proctor* v. *Grant*, 9 Gr. 31.

The party examined may be required to produce books and papers: *Rol* [illegible]93, 497, but books in constant use need not be produced until it is decided [illegible]re necessary; when the Examiner may adjourn the examination until [illegible] produced: *Comstock* v. *Harris*, 12 P. R. 17.

If documents are produced the examining party is entitled to have them marked as exhibits: *Hands* v. *U. C. Furniture Co.*, 12 P. R. 292.

The party may be examined under this *Rule*, and may be subsequently cross-examined on his affidavit on production, as of course. Usually it is advisable to postpone the examination until after the affidavit on production has been filed. The issuing of a *subpœna duces tecum* as a substitute for an order for production is not to be encouraged: *per* Boyd, C., *Lavery* v. *Wolfe*, 10 P. R. 488; 20 C. L. J. 410. If the examination is unnecessary, or vexatious, the party taking it may have to pay, or at all events be disallowed the costs of it: *Dobson* v. *Dobson*, 7 P. R. 256.

Where the examination is taken before a Local Registrar, or other officer paid by salary, the fees are payable in stamps: *Denmark* v. *McConaghy*, 8 P. R. 136; Jud. Act, s. 125, (11); but Deputy Clerks are entitled to fees in money for their own use, for such examinations: *Ib.* s. 125, (6).

Place of examination. **Place of Examination.**—The Examination must usually be had before a Master, Local Registrar, or Deputy Clerk of the Crown, or Special Examiner, in the county where the party to be examined resides: *Rule* 49, but for special reasons, to be shown on an application in Chambers, he may be ordered to attend elsewhere: *Rule* 492; *Gallagher* v. *Gairdner*, 2 Chy. Ch. 480; *McDermid* v. *McDermid*, *Ib.*, 371; *Campbell* v. *Tucker*, 7 P. R. 135; *Kahn* v. *Redford*, 3 Chy. Ch. 55; and note as to this case Cooper's Digest, 1873, p. 111.

Party benefitted. **488.** A person for whose immediate benefit an action is prosecuted or defended is to be regarded as a party for the purpose of examination. J. A. Rule 224.

Same as Eng. Ord. 139; it is not among the English Rules.

A person to be examined, etc., must be directly interested: *Menzies* v. *Toronto & Ottawa*, Globe, 1st Oct., 1881. An order was made, where it appeared, on affidavit, that the plaintiff was agent for his wife as to part of the subject matter of the suit: *Bowman* v. *Sutherland*, Globe, 10th Sept., 1881.

In *Johnson* v. *McIntosh*, 3 C. L. T. 313, J. L., was trustee for the E. estate for twenty years when the plaintiff was appointed in his place. The action involved the consideration of matters during the trusteeship of J. L., and as to which the plaintiff was ignorant, and the E. estate was indebted to J. L., so that if the plaintiffs succeeded J. L. would be benefitted. An order was made under this *Rule* for examination of J. L.

See also *Bradley* v. *Clarke*, in note to *Rule* 509.

488(a) Where any action is brought by an assignee of any chose in action, the assignor of such chose in action may be examined for discovery—Rule 1338.

Rule 489.

An order under this *Rule* for the examination of the plaintiff's daughter, in an action of seduction was refused, but under special circumstances was granted under *Rule* 566: *Turner* v. *Kyle*, 18 C. L. J. 402; 2 C. L. T. 598. See notes to that *Rule*.

The examination of a debtor, who had effected insurance and assigned the policy for the benefit of his creditors, was ordered in actions by one creditor and the trustee for the benefit of other creditors: *MacDonald* v. *Norwich Union*; *Clarkson* v. *F. Ins. Assn.*, 10 P. R. 462.

See *Minkler* v. *M. McMillan*, 10 P. R. 506, where proof of the interest of the party sought to be examined was unsatisfactory, but the order was made with the qualification that it was only to be used for the purpose of discovery.

Time when examination may be held.

489. The examination on the part of a plaintiff may take place at any time after the statement of defence of the party to be examined has been delivered or after the time for delivering the same has expired; and the examination on the part of a defendant may take place at any time after such defendant has delivered his statement of defence; and the examination of a party to an issue, at any time after the issue has been filed. *See* Chy. O. 140.

Party may be examined as a witness.

A party may be examined as a witness in support of a motion, although the time for examining him under this *Rule* may not have arrived: *McClennaghan* v. *Buchanan*, 7 Gr. 92.

Time for examination by plaintiff.

Under this *Rule* it will be noted that the right of the plaintiff to examine only arises *after* the statement of defence, or after the time for delivering the same has expired: see *Davis* v. *Wickson*, 9 P. R. 219. He is not obliged to wait until all of several defendants have filed their statements of defence. Formerly, if instead of answering the defendant demurred, the right of examination did not arise until after the demurrer had been disallowed, or if allowed with leave to amend, then not until after amendment and the time for answering the amended bill had expired: see *Chance* v. *Henderson*, 1 Chy. Ch. 30; and it would seem, under this *Rule*, that if the defendant demurs to the whole statement of claim, instead of filing a statement of defence, the right of examination is similarly postponed.

Time for examination by defendant.

The right of a defendant to examine the plaintiff under this *Rule* only arises after he has filed his statement of defence: a defendant who suffers the time for delivering a defence to elapse without delivering one, has no right to examine the plaintiff for discovery: *Ashley* v. *Brenton*, 13 P. R. 98.

Co-defendants need not be notified of examination of plaintiff.

A defendant is entitled to examine the plaintiff as soon as his own statement of defence is filed, he is not obliged to wait until those of his co-defendants, if any, are filed: *Fowler* v. *Boulton*, 12 Gr. 437. He need not notify his co-defendants of the examination: *Ib.*

The examination may be had, though the cause has been entered for trial: *Clarke* v. *Hawke*, 1 Chy. Ch. 346.

The examination under this *Rule* may be had as of course within the time prescribed by it, but under *Rule* 566 both the plaintiff and defendant may, upon a special application, for good cause shown, obtain leave to examine not only the opposite party before the period mentioned in this *Rule*, has arrived: *Fiskin* v. *Chambertain*, 9 P. R. 283; 18 C. L. J. 403; but also a witness, for the purpose of discovery: *Turner* v. *Kyle*, 18 C. L. J. 402; *Hendrie* v. *Neelon*, 2 C. L. T. 499; *Smith* v. *Clarke*, 12 P. R. 217; *McMaster* v. *Mason*, 12 P. R. 278; *Megaw* v. *McDiarmid*, 10 L. R. Ir. 376; but see *Carnegie* v. *Federal Bank*, 10 P. R. 69; *Hovey* v. *Gilbert*, 12 P. R. 114; and see *Central News Co.* v. *Eastern Telegraph Co.*, 76 L. T. Jour. 242, where it was held that the attendance of a witness or the production of a document could only be ordered for the purpose of a particular motion, and not merely for discovery; and see *Rosenheim* v.

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Rules 490-492.

Silliman, 11 P. R. 7. An order obtained by plaintiff *ex parte* for the examination of the defendant before the time mentioned in this *Rule* had elapsed was set aside: *Hovey* v. *Gilbert*, 12 P. R. 114.

The defendant in an action to recover land is liable to be examined by the plaintiff for discovery: *Ryell* v. *Kennedy*, 8 App. Cas. 217; 48 L. T. N. S. 585; reversing *S. C.* 20 Ch. D. 484; 46 L. T. N. S. 752; and the fact that a defendant pleads that he is a "purchaser for value without notice" affords no ground for resisting discovery: *Ind* v. *Emmerson*, 56 L. T. N. S. 778. An examination for discovery may be had in an action for breach of promise of marriage: *McLaughlin* v. *Carroll*, 4 C. L. T. 498; and see R. S. O. 1887, c. 61, s. 6; and in an interpleader issue: *Canada Perm. B. S.* v. *Forest*, 6 P. R. 254; and see *White* v. *Watts*, 31 L. J. C. P. 381, and *Rule* 507 note.

Subpœna and appointment.

490. Whenever a party is entitled to examine another party he may procure an appointment therefor from the Local Registrar, Local Master, Deputy Clerk of the Crown, or a special examiner, in the County where the party to be examined resides, and the party to be examined, upon being served with a copy of the appointment and a subpœna, and upon payment of the proper fees, shall attend thereon and submit to examination. *See* J. A. Rule 598.

The fact that a witness could only speak Welsh, was held not to be a reason for having the examination before some person other than the Court Examiner, as he can have an interpreter: *Marquess of Bute* v. *James*, 33 Ch. D. 157.

For special reasons the examination may be specially ordered to be taken before some other person, and elsewhere than provided by this *Rule*: *Rule* 492; *Gallagher* v. *Gairdner*, 2 Chy. Ch. 480; *McDermid* v. *McDermid*, *Ib.*, 372; *Campbell* v. *Tucker*, 7 P. R. 135; *Kuhn* v. *Radford*, 3 Chy. Ch. 55; Coop. Dig. 1873, p. 111.

Where a motion is made to compel attendance of a party who has not attended, or has attended and refused to be sworn, it must be proved that he was duly served with a copy of appointment and *subpœna* and was paid proper fees: *McLean* v. *Bruce*, 12 P. R. 602. *Semble* that the Examiner's certificate on these points would not be sufficient: *Ib.*

Service of appointment.

491. The party examining shall serve a copy of the appointment upon the solicitor of the party to be examined, if he has a solicitor in the cause, at least forty-eight hours before the examination. *See* J. A. Rule 598.

Sundays and other holidays are excluded in the computation of the 48 hours: see *Rules* 473, and 475, and *Lovelace* v. *Harrington*, 10 P. R. 157. Service on Saturday at 9:30 p.m. for Tuesday at 2 p.m. is insufficient: *Senn* v. *Hewitt*, 8 P. R. 70.

Order to examine.

492. Upon application to the Court or a Judge, an order may be made for the examination of any party liable to be examined as aforesaid before any other person or in any other county than those before mentioned, and upon service of a copy of the appointment of the person before whom the examination is to take place and a copy

of the order upon the party to be examined, and upon payment of the proper fees he is to attend and submit to examination. A copy of the appointment shall be served upon the solicitor of the party at least forty-eight hours before the examination. Rules 493-496.

See note to *Rule* 487.

493. The party or person to be examined shall, if so required by notice, produce on the examination all books, papers and documents which he would be bound to produce at the trial under a *subpœna duces tecum*. R. S. O. 1877, c. 50, s. 161 part. Production of papers.

The proper mode of compelling production on an examination for discovery, where the witness neglects or refuses to produce, is for the Examiner to direct what documents are to be produced and to adjourn the examination. Process by *subpœna duces tecum* to get production of particular documents is not to be encouraged by treating non-production as contempt: *Lavery* v. *Wolfe*, 10 P. R. 488.

See *Russell* v. *Macdonald*, 12 P. R. 458.

494. Any party or officer so examined, may be further examined on his own behalf, or on behalf of the body corporate of which he is or has been an officer, in relation to any matter respecting which he has been examined in chief; and when one of several plaintiffs or defendants has been examined, any other plaintiff or defendant united in interest may be examined on his own behalf or on behalf of those united with him in interest, to the same extent as the party examined. R. S. O. 1877, c. 50, s. 156, (1). Chy. O. 141, 142. Parties and others may be examined on their own behalf.

495. Such explanatory examination shall be proceeded with immediately after the examination in chief, and not at any future period, except by leave of the Court or a Judge; and for the purposes of this and the preceding Rule, when the officer of a body corporate has been so examined as aforesaid on behalf of the body corporate, the body corporate shall be deemed to be fully represented by such officer. R. S. O. 1877, c. 50, s. 156 (2). When explanatory examination to take place.

496. Any party or person examined orally under the preceding Rules shall be subject to cross-examination and re-examination; and the examination, cross-examination and re-examination shall be conducted as nearly as may be in the mode in use on a trial. R. S. O. 1877, c. 50, s. 161. Mode of conducting examination.

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Rules 497-499.

A party admitting the possession of documents may be ordered to produce them.

497. A party to the action who admits, upon his examination, that he has in his custody or power any deed, paper, writing, or document relating to the matters in question in the cause, is to produce the same for the inspection of the party examining him upon the order of the Court or a Judge, or of the Deputy Clerk, Local Registrar, Special Examiner, or Local Master, before whom he is examined, and for that purpose a reasonable time is to be allowed. But no party shall be obliged to produce any deed, paper, writing, or document, which is privileged or protected from production. Chy. O. 147.

Where Master may order production.

The power of the Master, or Special Examiner, to order production of documents under *Rule* 497, is confined to cases where *parties to the action* admit the possession of such documents. Where the admission is made by an officer of a corporation, it would seem that the Master, and Examiner, have no power to make the order, and that an application in Chambers is necessary; see *Rule* 507. Production may be obtained under an order of course, as provided by *Rule* 508. The provisions of *Rule* 497 are intended to meet the case of a party who, having filed an affidavit in answer to an order to produce, on his subsequent cross-examination admits that he has other material documents which he has not produced. The examination may be adjourned for the purpose of enabling the party to comply with the Master's, or Examiner's order for production: *Comstock* v. *Harris*, 12 P. R. 17.

A party to the action examined under *Rule* 566 may also be ordered by the Examiner to produce documents by virtue of this *Rule*: *Orpen* v. *Kerr*, 11 P. R. 128.

Master's and Examiner's order for production appealable.

498. Either party may appeal from the order of the Deputy Clerk, Local Registrar, Master, or Examiner; and thereupon the Deputy Clerk, Local Registrar, Master, or Examiner, is to certify under his hand the question raised and the order made thereon. Chy. O. 148.

Appeal from order directing production.

An appeal from a Master is to be brought by notice of motion to be given within four days after the decision complained of, or such further time as may be allowed by a Judge: *Rule* 846; *Dayer* v. *Robertson*, 9 P. R. 78; but see *McNeill* v. *McGregor*, 3 C. L. T. 309. The appeal must be to a Judge in Chambers, and must be brought on to be heard, within nine days after the decision, or such further time as may be allowed by a Judge: *Rule* 846. In the Chancery Division such appeals are at present heard on Mondays, and in the other Divisions on Tuesdays and Fridays, except in vacation; *Rule* 211, the operation of which was suspended, has not yet been brought into force.

There is no *Rule* specially regulating appeals from Special Examiners, but it is presumed they should be brought and prosecuted in the same manner as appeals from Masters, under *Rule* 846.

As to documents privileged from production, see notes to *Rule* 513.

Penalty on witness refusing to attend or answer, etc.

499. Any party or person refusing or neglecting to attend at the time and place appointed for his examination, or refusing to be sworn or to answer any lawful question put to him by the examiner or by any party entitled so to do, or his counsel, solicitor or agent, shall be deemed

guilty of a contempt of Court and proceedings may be forthwith had by attachment. If a defendant, he shall be liable to have his defence, if any, struck out, and to be placed in the same position as if he had not defended; and the party examining may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly. R. S. O. 1877, c. 50, s. 162; J. A. Rule 236; Chy. O. 144; 41 V. c. 8, s. 9. Rule 499.

This *Rule* is confined to three classes of cases (1) refusal or neglect to attend for examination, (2) refusal to be sworn, (3) refusal to answer lawful questions. This *Rule* renders a wilfully disobedient defendant liable to have his defence struck out: *Haigh* v. *Haigh*, 31 Ch. D. 478. And by *Rule* 648 a plaintiff refusing or neglecting to attend for examination, or to comply with any order for production or inspection of documents is liable to have his action dismissed: *Republic of Liberia* v. *Imperial Bank*, L. R. 9 Chy. 569; *S. C.*, as *Republic of Liberia* v. *Roye*, 1 App. Cas. 139; *Dunn* v. *McLean*, 6 P.R. 156; *Daneillier* v. *Myers*, W. N. 1883, 58. *Rule* 648, however, does not cover the case of the plaintiff's refusal to be sworn, or his refusal to answer lawful questions.

By *Rule* 520 a party failing to comply with an order for production, or inspection of documents, is liable to attachment, and, if a defendant, to have his defence struck out.

Upon failure of a plaintiff to attend for examination, the action may be stayed for a definite time and not indefinitely, to enable him to attend: *Comstock* v. *Harris*, 12 P. R. 17.

A party who has been ordered to attend for further examination, after a refusal to answer questions, is in contempt if he does not so attend, but that is not a bar to his appealing from the order: *McGregor* v. *McDonald*, 11 P. R. 518.

The defaulting party is entitled to notice of a motion to commit: *Rule* 879, or to strike out defence; and it would seem that a notice to commit should be personally served: *Mann* v. *Perry*, 44 L. T. N. S. 248; 50 L. J. Chy. 251; *Weir* v. *Matheson*, 1 Chy. Ch. 244; see, however, *Rule* 521. Two days' notice would seem to be sufficient in all cases: *Rule* 479. Proceedings in default of production.

The party must have been regularly subpœnaed: *McMurray* v. *G. T. Ry. Co.*, 3 Chy. Ch. 130, and paid his witness fees: *Bolkow* v. *Foster*, 7 P. R. 388, or no order can be made against him; *McLean* v. *Bruce*, 12 P. R. 602.

A motion to strike out defence is not the proper course, where default has been made by an officer of a Co. in attending for examination. The remedy is to commit the defaulting officer: *Badgerow* v. *G. T. Ry. Co.*, 13 P. R. 132.

A motion may be made under the above *Rule* to commit either a plaintiff or defendant for (1) refusing or neglecting to attend, (2) refusing to be sworn, (3) refusing to answer any lawful question.

For any of the above causes a defendant is liable to have his defence struck out. Either of the above motions may be made without a preliminary motion to compel him to attend at his own expense. But in the case of a plaintiff he would appear to be liable to have his action dismissed only for refusal or neglect to attend: see *Rule* 648. In the case therefore of a plaintiff attending, but refusing to be sworn, or to answer any lawful questions, the proper course would seem to be to move for an order to compel him to attend again at his own expense and submit to examination, or in default that his action be dismissed. When such an order has been obtained and disobeyed, the motion to dismiss the action may be made *ex parte*: *Dunn* v. *McLean*, 6 P. R. 156.

It has been held that proceedings to attach must be taken before the Court and not before a Judge in Chambers: *Merchants Bank* v. *Pierson*, 8 P. R. 123; but this decision does not seem in practice to have been adhered to. The motion is

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Rule 499.

made to a Judge in Chambers in a case of non-compliance with a præcipe order, or order in Chambers; and an application to the Court is only necessary in case of breach of an order of the Court: see *Klein* v. *Union Ins. Co.*, 3 C. L. T. 601, and note to *Rule* 542.

The Master in Chambers cannot entertain applications to commit for non-production: *Rule* 30: *Keefe* v. *Ward*, 9 P. R. 220; 18 C. L. J. 166; 2 C. L. T. 260; neither can a Local Judge: see *Rule* 41; or Local Master: *Rule* 138.

Restoring action dismissed for non-production.

Where an action has been dismissed it will not be restored unless perhaps when the claim would otherwise be barred by the dismissal, *e.g.*, by the Statute of Limitations: *Dunn* v. *McLean*, 6 P. R. 156; and see *Hodgson* v. *Paxton*, 2 Chy. Ch. 398; *Bank of Montreal* v. *Wilson*, 2 Chy. Ch. 117; *Davy* v. *Davy*, 2 Chy. Ch. 26; nor where the defence has been struck out, and judgment signed, will the judgment be set aside: *Haigh* v. *Haigh*, 31 Ch. D. 478.

As to motions to commit for unsatisfactory answers: see *Smith* v. *Greey*, 4 C. L. T. 589. An objection to answer incriminating questions should be taken by the witness, but the privilege may be claimed on a motion to commit, though not claimed before the examiner: *Hall* v. *Gowanlock*, 12 P. R. 604. The penal provisions of 13 Eliz., c. 5, do not afford any ground for refusing to answer questions put regarding a fraudulent transaction: *Dunsford* v. *Carlisle*, 10 P. R. 449.

On a motion to commit for non-production of books, etc., pursuant to a subpœna *duces tecum* on an examination for discovery, it was held that the proper course was to get the examiner to direct what should be produced, and adjourn the examination for procuring the documents: *Lavery* v. *Wolfe* 10 P. R. 488; *Comstock* v. *Harris*, 12 P. R. 17.

Where the defendant did not appear nor deliver any statement of defence after being served with a statement of claim, and a summons for him to attend to be examined touching the matters in question (delivering up to plaintiff of books and documents in his possession) was likewise disregarded; it was held, that, notwithstanding that he was a party to the action, he must be considered as being summoned as a witness, and must be dealt with accordingly, and that his disobedience was not disobedience of an order of Court. An order was therefore made under Eng. Rule of 1883, No. 495, (not adopted in Ontario) for his attendance for examination at his own expense, for disobedience of which an attachment might issue: *Powell* v. *Nivett*, 55 L. T. N. S. 728.

This *Rule* does not apply to cases of disobedience of a notice to produce for inspection under *Rule* 574: see *Merchants' Bank* v. *Pierson*, 8 P. R. 123; an order under *Rule* 517 must first be obtained.

An order for production need not now be indorsed with the warning to the party, sometimes employed under the former Chancery Practice: *Thomas* v. *Palin*, 21 Ch. D. 360; *Wallace* v. *Graham*, 11 L. R. Ir. 369.

It is otherwise in England under the Rules of 1883, O., 41, r. 5, even in case of an order for production which may be served on the solicitor: see *Hampden* v. *Wallis*, 26 Ch. D. 746.

For the proceedings on a motion to attach, see further notes to *Rules* 878, 879.

It is not imperative on the Court to act under this *Rule*: *Kennedy* v. *Lyell*, W. N. 1882, 137. It was said in one case that the *Rule* is a penal one, and only to be acted on in last resort: Lush, J., in *Twycross* v. *Grant*, W. N. 1875, 201, 229; 1 Charl. Ch. Ca. 115; see *Fisher* v. *Hughes*, 25 W. R. 528; *Pike* v. *Keene*, 24 W. R. 322; 35 L. T. N. S. 341.

Where the plaintiffs were husband and wife, and the wife complied with an order for production, but the husband absconded without complying, Hall, V.C., refused to dismiss the action under this *Rule*: *Hartley* v. *Owen*, W. N. 1876, 193; 34 L. T. N. S. 752.

For other cases in which the power has been exercised: see *Eyre* v. *Hughes*, 25 W. R. 528; and *Rep. of Liberia* v. *Roye*, 1 App. Cas. 139. In the last case it was held that where any step ought to be taken in a cause, which in the judgment of the Court was necessary to facilitate the decision of the cause, and

default had been made, the former Court of Chancery had power, if the party in default was the plaintiff, to dismiss the bill: see also *Fraser* v. *Burrows*, 2 Q. B. D. 624. Rules 500, 501.

Compliance was held excused by illness: *Lord Cardwell* v. *Tomlinson*, 33 W. R. 814; 52 L. T. N. S. 746.

Demurrer to questions.

500. If the party or person under examination demurs or objects to any question or questions put to him, the question or questions so put, and the demurrer or objection of the witness thereto, shall be taken down by the examiner and transmitted by him to the office of the Court where the pleadings are filed to be there filed; and the validity of such demurrer or objection shall be decided by the Court or a Judge; and the costs of and occasioned by such demurrer or objection shall be in the discretion of the Court or Judge. R. S. O. 1877, c. 50, s 163.

A party may object to answer questions, tending to criminate the party under examination or the husband or wife of such party: *Fisher* v. *Owen*, 8 Ch. D. 645; *Allhusen* v. *Labouchere*, 3 Q. B. D. 654; *Mitchell* v. *Little*, 10 P. R. 265. The objection must be made on oath: *Webb* v. *East*, 5 Ex. D. 23; *Power* v. *Ellis*, 6 S. C. R., but if not taken before the Examiner the privilege, it seems, may still be claimed on a motion to commit: *Hall* v. *Gowanlock*, 12 P. R. 204; it is sufficient if the person swear that the answer to the question 'might' tend to criminate him: *Lamb* v. *Munster*, 10 Q. B. D. 110. That another person may be exposed to an action, is not a ground for refusing to answer: *Tetley* v. *Easton*, 25 L. J. C. P. 293.

Where interrogatories under the English practice were administered to the guardian *ad litem* of a lunatic defendant, it was held that he need not answer them, as he was not a party and not called upon to make admissions against defendant's interest: *Ingram* v. *Little*, W. N. 1883, 124.

There is no distinction as regards the right to discovery between actions of ejectment and other actions; and a plaintiff is therefore entitled to discovery as to all matters relevant to his own and not exclusively to the defendant's case: *Lyell* v. *Kennedy*, 8 App. Cas. 217; *Daniel* v. *Ford*, W. N. 1883, 27, 52. This is not a new right, however; the right to discovery is unaffected by *The Judicature Act*, *Ib.*, and *Hunning* v. *Williamson*, 10 Q. B. D. 459, 462.

Depositions how to be taken down.

501. Subject to the two next following Rules the depositions taken upon any such oral examination as aforesaid shall be taken down in writing by the examiner, not ordinarily by question and answer, but in the form of a narrative, expressed in the first person; and when completed shall be read over to the party examined, and shall be signed by him in the presence of the parties, or of such of them as may think fit to attend.

Signing depositions.

(*a*) In case the party or person examined refuses or is unable to sign the depositions, then the examiner shall sign the same; and the examiner may upon every examination state any special matter to the Court if he thinks fit.

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Rules 502-504.

Taking down questions.

(*b*) It shall be in the discretion of the examiner to put down any particular question or answer, if there appears to be any special reason for so doing, and any question or questions objected to shall at the request of either party be noticed or referred to by the examiner in or upon the depositions; and he shall state his opinion thereon to the counsel, solicitors, agents or parties, and if requested by either party, he shall on the face of the depositions refer to such statement. R. S. O. 1877, c. 50, s. 164.

Shorthand.

502. In case of an examination before the trial, or otherwise than at the trial of an action, if the examining party desires to have such examination taken in shorthand, he shall be entitled to have it so taken at the place of examination, except where the Court or a Judge sees fit to order otherwise. J. A. Rule 219.

Question and answer.

503. Where an examination in a cause or proceeding in any Court is taken by the examiner, or any other duly authorized person, in shorthand, the examination may be taken down by question and answer; and in such case it shall not be necessary for the depositions to be read over to, or signed by, the person examined, unless the Judge so directs where the examination is taken before a Judge, or in other cases unless any of the parties so desires.

Certified copy to have effect of original depositions.

(*a*) A copy of the depositions so taken, certified by the person taking the same as correct, shall for all purposes have the same effect as the original depositions in ordinary cases. 41 V. c. 8, s. 8.

Depositions to be returned to Court.

504. Wherever, by virtue of these Rules, an examination of any party or witness has been taken before a Judge of the High Court or of any County Court, or before any officer or other person authorized or appointed to take the same, the depositions taken down by the examiner shall, at the request of any party interested and upon payment of his fees, be returned to and kept in the office of the Court in which the proceedings are carried on; and office copies of such depositions may be given out, and the examinations and depositions certified under the hand of the Judge or other officer or person taking the same, or a copy thereof certified under the hand of the proper officer, shall, without proof of the signature, be received and read in evidence, saving all just exceptions. R. S. O. 1877, c. 50, s. 165.

Office copies.

Where a defendant, before delivery of defence, obtained an order for examination of an officer of the plaintiff for discovery, it was held that the depositions taken under the order might be read by the defendant as evidence at the trial: *Union Bank* v. *Starrs*, 13 P. R. 108. **Rules 505-507.**

505. Every Judge, officer or other person taking examinations under these Rules, may, and if need be shall, make a special report to the Court in which such proceedings are pending, touching such examination and the conduct or absence of any witness or other person thereon or relating thereto; and the Court shall institute such proceedings and make such order upon such report as justice may require, and as may be instituted and made in any case of contempt of the Court. R. S. O. 1877, c. 50, s. 166. Examiners may make a special report to the Court.

506. Any person may, at the trial of an action or issue, use in evidence any part of the examination of the opposite parties; provided always, that in such case the Judge may look at the whole of the examination, and if he is of opinion that any other part is so connected with the part to be so used that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence. J. A. Rule 239. Part of examination to be evidence.

This *Rule* is the same in substance as the Eng. R. 1875, O. 31, r. 23 (1883, R. 366), and is an adaptation of that Rule (which provides for an examination on interrogatories) to the case of an examination *viva voce*. In the Court of Chancery of this Province, and in the Common Law Courts of both England and Ontario, a party could use no part of the examination of his opponent without using the whole. The consequence was that one of the great uses of an examination of a party, viz., the saving of expense by proving by admission the facts *not really in dispute*, was prevented; as such admissions in the examination often stood side by side with other statements which the examining party could not safely make part of his case.

See *Lyell* v. *Kennedy*, 50 L. T. N. S. 34, in which under the corresponding English Rule it was said that when an admission is read everything ought to be read which is fairly connected with that admission.

Where the plaintiff, without objection, put in the defendant's depositions and referred to certain parts, and the Judge in charging the jury referred to other parts, it was held that he could properly do so, as the whole depositions were used in evidence; *Dougall* v. *Stapleton*, 12 Ont. 206.

It may be observed that this *Rule* speaks "of the examination of the opposite *parties*;" an officer of a company who is not himself a party, does not strictly come within the terms of the *Rule*. See notes to *Rules* 504 and 487.

9. Production and Inspection of Documents.

507. It shall be lawful for the Court or a Judge at any time pending any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power relating to any matter in question in such action or proceeding, as the Discovery before and after close of pleadings.

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Rule 508. Court or Judge thinks right; and the Court may deal with such documents, when produced, in such manner as appears just. J. A. Rule 221.

The same as the Eng. R. 1875, O. 31, r. 11 (1883, R. 356). It enables the Court or Judge to order production at any time during the pendency of the action or proceeding. The next *Rule*, 508, enables either party, after the defence is delivered, or, when the application is on behalf of a plaintiff, after the time for delivering the defence has expired, to obtain an order of course for this purpose upon *præcipe*.

In England, where there is no such Rule restricting the time for the order to produce, and the order is on special application, the current of decision is in favour of not allowing a plaintiff discovery before statement of claim, nor in general before defence, nor a defendant before defence delivered: see *Cashin* v. *Craddock*, 2 Ch. D. 140; *Hancock* v. *Guerin*, 4 Ex. D. 3; *Webster* v. *Whewall*, 15 Ch. D. 120; *Mellor* v. *Thompson*, 49 L. T. N. S. 222; but the Court has a discretion to direct earlier discovery with any due restrictions: *Edelston* v. *Russell*, 57 L. T. N. S. 927.

Evidence will not be entered into on a motion under this *Rule*, but the Court will form its conclusions upon the pleadings and any proceedings already taken: *Downing* v. *Falmouth*, 37 Ch. D. 234.

Under the present *Rule* production by defendant was ordered, before defence, where the plaintiff had been awarded an injunction restraining the sale of chattels and had been put on terms to go down to trial, at such a time that it was probable that the case would be tried before production could be obtained in the ordinary way: *Coots* v. *Coots*, 3 C. L. T. 314. So, under a similar Irish Rule, where it was required by defendants to ascertain what damage the plaintiff had sustained, with a view to payment of money into Court: *McGaw* v. *McDiarmid*, 10 L. R. Ir. 376. See also *Jourdain* v. *Palmer*, L. R. 1 Ex. 102; *Re Sutcliffe*, 50 L. J. Chy. 574; 29 W. R. 732; 17 C. L. J. 367; *Whyte* v. *Ahrens*, 26 Ch. D. 717.

Interpleader. In interpleader proceedings and the like, where there were no pleadings, the provisions of original *Rule* 222 (now 508) did not in terms apply, and production of documents was sometimes obtained under original *Rule* 221 (LOW 507): see *Philipps* v. *Philipps*, 27 W. R. 939: 40 L. T. N. S. 815; and *White* v. *Walls*, 31 L. J. C. P. 381; but in *Dominion S. & I. Co.* v. *Kilroy*, 12 P. R. 19, it was held that after the delivery of an interpleader issue, an order for production might issue on *præcipe*, and such order should be issued, and the record passed, in the principal office at Toronto, as no locality is pointed out by the usual proceedings in interpleader. *Rule* 508 now in terms applies to the parties to an issue.

Order for production of documents. **508.** Any party may, after the defence is delivered, or a plaintiff may, after the time for delivering the defence has expired, (*a*) [and any party to an issue] may, after the issue has been filed, obtain an order of course upon *præcipe* directing the adverse party within 10 days after the service thereof, to make discovery on oath of the documents which are or have been in his possession or power, relating to any matters in question in the action; and to produce and deposit the same with the proper officer for the usual purposes, and such party shall make discovery and produce and deposit the documents accordingly, without further notice. J. A. Rule 222 and 513. See *Dale* v. *Hall*, 9 P. R. 106.

(*a*) These words mean that as each defendant puts in his defence or the time for doing so expires, that defendant becomes liable to give and entitled to obtain production. **Rule 508.**

The words in brackets are new.

See notes to *Rules* 507 and 511.

In an interpleader proceeding the order will be issued from the proper principal office in Toronto: see *Dominion S. & I. Co.* v. *Kilroy*, 13 P. R. 19.

Rule 508 varies from the Eng. R. 1875, O. 31, r. 12 (1883, R. 354), and from the practice under the Common Law Procedure Act, but agrees substantially with the practice in Chancery under Chy. O. 134. The English Rule is not limited as this *Rule* is, with respect to the time of obtaining the order; and the English decisions thereon, such as *Union Bank of London* v. *Manby*, 13 Ch. D. 239, etc., will therefore not apply here. Nor does the English Rule permit the order to be obtained on *præcipe*, but requires an application, though not necessarily on affidavit, which, however, the Judge may require, if he sees fit: *Johnson* v. *Smith*, 36 L. T. N. S. 741. "Adverse party" to produce.

The Eng. R. 1875, O. 31, r. 1 (1883, R. 343), not adopted by the Ontario Act, provides for the examination of the "opposite party or parties" by interrogatories; and it has been held, that a person whom defendant, by his counterclaim, had made a defendant, was not "an opposite party" as between him and the plaintiff, so as to entitle him to examine the plaintiff under that Rule: *Molloy* v. *Kilby*, 15 Ch. D. 162; and there is no jurisdiction under the English Rules to make an order for discovery, except as between opposite parties: *Brown* v. *Watkins*, 16 Q. B. D. 125; see *Shaw* v. *Smith*, 18 Q. B. D. 193; third parties may become in the position of defendants and thus be under the Rule: *Eden* v. *Weardale*, 35 Ch. D. 287. The Ontario *Rule* 508 entitles any party to production from "the adverse party:" and *Rule* 487 enables a party to examine for discovery "any party adverse in point of interest," and it is probable that production may be obtained under this *Rule* from any party who might so be examined: see notes to *Rule* 487, *supra;* and *Hamilton* v. *Nott*, L. R. 16 Eq. 112; *Kennedy* v. *Wakefield*, 39 L. J. Chy. 827; 22 L. T. N. S. 645; 18 W. R. 884; and *Brigham* v. *Bronson*, 3 C. L. T. 311, where a defendant obtained production from a co-defendant adverse in interest.

On a special application, production may be obtained under *Rule* 507 from "any party" and at any stage, *e.g.* before defence: *Mellor* v. *Thompson* 49 L. T. N. S. 222.

In a petition of right the Crown is entitled to discovery of documents from the suppliant: *Tomline* v. *The Queen*, 4 Ex. D. 252.

Under an order obtained by one defendant, other defendants cannot compel production: *Seymour* v. *Longworth*, 3 Chy. Ch. 112.

Rule 509 provides that a third party, who has been served by the defendant, under *Rule* 329, and has appeared, shall for all purposes of and incident to the production of documents, and examination, be, as between him and such defendant, in the same situation as a defendant. A third party so served and appearing, is not on that ground entitled to an order for production as against the plaintiff under this *Rule*. But if directions are obtained under *Rule* 332, allowing him to defend as against the plaintiff, he is then in the same situation, with respect to the plaintiff, as any other defendant, and may obtain from, and be compelled to give discovery to the plaintiff: *McAllister* v. *The Bishop of Rochester*, 5 C. P. D. 194; *Eden* v. *Weardale*, 34 Ch. D. 223. Third parties.

Under an order for production by the plaintiff, the plaintiff on the record is the person to make the affidavit, and an affidavit from some beneficial plaintiff is not a compliance with the order: *Wilson* v. *Ruffalovich*, 7 Q. B. D. 553. By whom affidavit to be made.

Where a plaintiff of unsound mind sues by a next friend, the defendant is entitled to an affidavit of documents made by the next friend, or by some one acquainted with the facts: *Travis* v. *Bell*, 8 P. R. 550. In England, *Higginson* v. *Hall*, 10 Ch. D. 235, to the same effect was disapproved of in *Dyke* v. *Stephens*, 30 Ch. D. 189. A motion by the defendant was granted, that the next friend of an infant plaintiff might be ordered to make an affidavit in reference Infant, and lunatic, plaintiffs.

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Rule 502.

to documents in his possession in *Crowe* v. *Bank of Ireland*, 5 Ir. R., Eq. 578; but see *Ingram* v. *Little*, 11 Q. B. D. 251; and *Re Corsellis, Lawton* v. *Elwes*, 48 L. T. N. S. 425; W. N. 1883, 60; 52 L. J. Chy. 399; and *Dyke* v. *Stephens*, 30 Ch. D. 189, decided under the English Rules 1875, O. 31, r. 12 (1883 R. 354), not adopted here, but which provides that any 'party' may apply to a Judge for an order directing any other 'party' to the action to make discovery on oath of the documents which are, or have been, in his possession, etc., relating to any matter in question in the action.

Where it is sought to remove a next friend of an infant, he cannot be compelled to give discovery under this *Rule* for this purpose: *Re Corsellis, Lawton* v. *Elwes*, 31 W. R. 414. (For the conclusion of that matter see 50 L. T. N. S. 703.)

The next friend of a married woman is not bound to make the affidavit: *Brown* v. *Capron*, 6 P. R. 203; Dan. Pr. 5th ed. 1682.

In an action by a husband and wife, the wife suing in respect of her separate property and without a next friend, they must make affidavits as to what documents they, and each of them, have, an affidavit as to what they have jointly not being sufficient: *Fendall* v. *O'Connell*, 29 Ch. D. 899.

In other cases, where a plaintiff cannot make an affidavit, some proper person must do so for the plaintiff, and proceedings will be stayed meanwhile: *Republic of Liberia* v. *Roye*, 1 App. Cas. 139; see *Prioleau* v. *U. S. America*, L. R. 2 Eq. 659; *U. S. America* v. *Wagner*, L. R. 2 Chy. 582; *Princess of Wales* v. *Earl of Liverpool*, 1 Sw. 114; see also notes to *Rules* 507, 511. But it has been held that proceedings could not be stayed by a defendant in an action on a marine policy until the plaintiff had obtained an affidavit of documents from his assignor, who was not a party to the suit, nor under the plaintiff's control, within the jurisdiction: *Fraser* v. *Burrows*, 2 Q. B. D. 624.

Official liquidator. As to production of documents by an official liquidator: see *Re Mutual Society*, 22 Ch. D. 714.

Affidavit. See *Rule* 513 as to the form of the affidavit to be made in pursuance of the order to produce.

As to what documents a party is bound to produce, see notes to *Rule* 513.

Affidavit where no documents produced. An affidavit must be made, though the party has no documents to produce. It should not be made before the order to produce is issued: *Kennedy* v. *Royal Ins. Co.*, 3 Chy. Ch. 489; see *Dobson* v. *Dobson*, 7 P. R. 258; and it should not in such case refer to schedules containing no documents: see *Rogers* v. *Crookshank*, 4 C. L. J. 45.

Production before Referees, or Masters. Where a claim has been ordered to be tried before a Referee, under the Act, the Court or Judge has still jurisdiction over discovery: *Re Leigh, Rowcliffe* v. *Leigh*, 4 Ch. D. 661; *Dauvillier* v. *Myers*, 17 Ch. D. 346, *Quære* whether the Referee has any such power. See notes to *Rule* 552, and *Cochrane* v. *Morrison*, 10 P. R. 606.

Probably orders on *præcipe* to produce under this *Rule*, as under Chy. G. O. 134, are for the purposes of a trial only, and will not be enforced for the purposes of a reference. In the latter case the Master to whom the reference is directed may be applied to for a direction for production: *Hilderbroom* v. *McDonald*, 8 P. R. 389.

Where an action and all matters in difference had been referred by consent, and the plaintiff afterwards applied for production, it was held under Eng. R. 1875, O. 31, R. 12, that the Court had no jurisdiction to make the order, there being no longer before it any matter "in question in the action" within the meaning of the *Rule*: *Penrice* v. *Williams*, 23 Ch. D. 353.

In an action on a marine policy, an order that the plaintiffs and all other persons interested, produce the ship's papers in accordance with the practice in that behalf before *The Judicature Act* was held not superseded by it, and therefore proper: *China Trans-Pacific S. S. Co.* v. *Commercial Union*, 8 Q. B. D. 142.

The right to discovery of documents is not enlarged by *The Judicature Act*, and where a bill of discovery would not formerly lie, discovery of documents cannot now be had, *e.g.*, in an action to recover statutory penalties: *Hun-*

ings v. *Williamson*, 10 Q. B. D. 459; *Martin* v. *Treacher*, 34 W. R. 315; *Whiteley* v. *Barley*, 56 L. J. Q. B. 312; see also *Adams* v. *Batley*, 18 Q. B. D. 425; *Jones* v. *Jones*, 22 Q. B. D. 425.

Deposit of documents.

Documents produced, may be ordered to be deposited, ordinarily in the office in which the proceedings are being taken, (and the form of order issued directs them to be deposited with the affidavit on production), but not in the case of books in daily use: *Macdonnell* v. *McKay*, 2 Chy. Ch. 141; though inspection of these must be allowed at reasonable times: *Hamelyn* v. *Whyte*, 6 P. R. 143. In practice it is not the custom to deposit the documents, unless specially required by the opposite party, and upon an undertaking being given to allow inspection when required of books in constant use, the deposit of them may be dispensed with: *Re Ross*, 5 Ont. App. 82. Where necessary any convenient place for inspection may be named by special order: see *Hamelyn* v. *White*, *supra*; *Gabbett* v. *Cavendish*, 3 Sw. 267 (*n*), in the case of books in daily use; *Prestney* v. *Colchester*, 24 Ch. D. 376, old records and books; *Wagner* v. *Mason*, 6 P. R. 188, documents in which other persons were interested.

As to restoring to parties documents left for inspection in the office of a Master, see *Darling* v. *Darling*, 10 P. R. 1.

Position of a third party served by a defendant.

509. A third party who has been served by a defendant under Rule 329, and has entered an appearance, shall, for all purposes of and incident to the production of documents, and examination, be as between him and such defendant in the same situation as a defendant, and the defendant serving him shall, for the same purposes, be in the same situation as a plaintiff; the time for taking out an order for production or for examining shall be after the party so served has delivered a defence, or where the application is on behalf of the defendant so serving such third party, the time shall be after the time for delivering the defence has expired. J. A. Rule 223.

The object of this *Rule* is to place a third party who has been served by a defendant, in the same situation as a defendant, for the purpose of *Rule* 508. There is no corresponding *Rule* in England. As to the position of the plaintiff in regard to third parties: see *McAllister* v. *Bishop of Rochester*, 5 C. P. D. 194; *Eden* v. *Weardale*, 34 Ch. D. 223, and note to *Rule* 508; see also *Bradley* v. *Clarke*, 9 P. R. 410, where though there was no direct issue between the plaintiff and a third party, yet as the latter had all the rights of a defendant, and virtually took his place, the plaintiff was allowed to examine him under *Rule* 510.

Person benefitted, a party for certain purposes.

510. A person for whose immediate benefit an action is prosecuted or defended is to be regarded as a party for the purpose of production of documents. J. A. Rule 224.

See notes to *Rule* 488 and *Bradley* v. *Clarke*, *supra*.

Affidavit on production by a corporation.

511. Where the party required to produce documents is a corporation aggregate, the affidavit shall be made by one of the officers of the corporation, and his affidavit shall have the same effect (as nearly as may be) as the affidavit of a party, unless where the Court or a Judge sees reason for holding otherwise. J. A. Rules 225, 226.

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Rules 512, 513.

This *Rule* is not among the English Rules, but is in conformity with what was the practice in Chancery: see Dan. Prac. 5th ed., p. 1677, and cases there cited.

A form of the affidavit by the officer is given in the Appendix, No. 49. This affidavit must be made by the proper officer of the Co., in compliance with an order in the usual form. That specially applicable to a Co. under the former Chancery practice (see *Lindsay Petroleum, etc.* v. *Pardee*, 6 P. R. 140), is not necessary: *Harrison* v. *G. T. Ry. Co.*, 2 C. L. T. 104; see also *Cooke* v. *Oceanic Steamship Co.*, W. N. 1875, 220.

Where a bill was filed by a Republican government, the defendant, having put in a sufficient answer, was held entitled to the usual affidavit of documents, to be made by one or more of the Ministers or officers of the Government: *Republic of Liberia* v. *Imperial Bank*, L. R. 16 Eq., 179.

As to what persons have been held to be officers within similar words in R. S. O. c. 50, s. 156 (now *Rule* 487), see notes to *Rule* 487.

It was held unreasonable to require a defendant Co. to answer interrogatories through a former director who was interested in the plaintiff's Co., the Court intimating at the same time, that such person might be made a defendant, and discovery thus obtained: *Manchester Val de Travers Paving Co.* v. *Slagg*, W. N. 1882, 127.

Cross-examination of deponent.

512. The deponent in every affidavit on production shall be subject to cross-examination. *New.*

This, though not allowed in England (see *Manby* v. *Bewicke*, 8 DeG. M. & G., 470; *Hall* v. *Truman*, 29 Ch. D. 313; *Nicholls* v. *Wheeler*, 17 Q. B. D. 101), was formerly the Chy. practice in Ont.: see *Dobson* v. *Dobson*, 7 P. R. 256; but in *Frith* v. *Ryan*, 10 P. R. 235; it was held that this Chy. practice was not continued under the Jud. Act. The present *Rule* was therefore passed. It is nevertheless desirable to postpone examination for discovery till after production, as the costs of two examinations will not be allowed without good reason: see *Lavery* v. *Wolfe*, 10 P. R. 488.

Affidavit on production, form of.

513. The affidavit to be made by a party against whom an order for production has been made, shall specify which, if any, of the documents therein mentioned he objects to produce, and said affidavit may be in the Form No. 48, in the Appendix with such variations as circumstances may require. J. A. Rule 228.

Corresponds with the Eng. R. 1875, O. 31, r. 13, (1883, r. 355).

See notes to *Rule* 50.

The form given in the Schedule should be followed. "The statutory form is the right form and is intended to be the common form. The affidavit of documents is intended now to be exhaustive, and the form given in the Act is so": *per* Lindley, J., W. N. 1876, 39.

For form of affidavit where two plaintiffs have different interests, see *Fendall* v. *O'Connell*, 52 L. T. N. S. 553, in note to *Rule* 508.

What must be produced.

Discovery and Production of Documents Generally.—Courts of Equity have always compelled the production of documents. The Common Law Courts did so to a very limited extent, but the practice was extended by statute: R. S. O., c. 50, ss. 169, 170; 41 Vict. c. 8, s. 9. And now, under *The Judicature Act*, the right is regulated by the rules previously existing in the Court of Chancery: *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644, 658; and the Common Law rules are entirely at an end: Cotton, L.J., in *Eade* v. *Jacobs*, 3 Ex. D. 337; explained in *Bidder* v. *Bridges*, 29 Ch. D. 29, in which it was decided that the defendant has no larger right to discovery than the plaintiff.

Production is a matter of right (subject to any right of privilege or protection) and is not a matter in the discretion of the Court: *Bustros* v. *White*, 1 Q. B. D. 423; *Atherley* v. *Harvey*, 36 L. T. N. S. 551. **Rule 513.**

A plea of purchase for value without notice was formerly available in Chancery, in a suit for discovery in aid of proceedings at law but, was not available against either discovery or relief, in cases in which the Court of Chancery had concurrent jurisdiction. Sec. 52 (6) of the Act therefore does not protect defendants who set up such a defence from giving discovery, as the High Court does not now exercise the former auxiliary jurisdiction of the Court of Chancery, but has complete jurisdiction over the whole action: *Emmerson* v. *Ind*, 12 App. Cas. 300.

Every material document (see *Bewicke* v. *Graham*, 7 Q. B. D. at p. 411) must be produced, unless it is shown to be privileged; though, where the materiality depends upon the determination of a question in dispute, and the discovery sought is calculated to cause considerable trouble, or to prove oppressive and vexatious to the party from whom it is sought, the Court may act upon *Rule* 519, and postpone the discovery until the question has been determined: *Wood* v. *Anglo-Italian Bank*, 34 L. T. N. S. 255. See also notes to *Rule* 519. All material documents unless some ground of privilege made out.

It is the duty of a party, who, after filing an affidavit, discovers a document of which his opponent has a right to have inspection, but which is not disclosed in the Schedule to inform his opponent of the discovery, either by a supplementary affidavit (the proper course), or at least by notice: *Mitchell* v. *Darley Main Colliery Co.*, 1 Cab. & Ell. 215.

The general law applicable to discovery governs in patent cases. The defendant must disclose the particular lines of attack on the plaintiff's patent which are contemplated, but need not so individualize persons alleged to be prior users as to enable the plaintiff to know the defendant's witnesses: *Smith* v. *Greey*, 10 P. R. 482.

Every thing which will throw light upon the case: *Hutchinson* v. *Glover*, 1 Q. B. D. 138; or which *may* help the case: *Dinn* v. *Brandon*, 79 L. T. Jour. 196; *Cameron* v. *Cameron*, 10 P. R. 522; *Compagnie Financiere, etc.* v. *Peruvian Guano Co.*, 11 Q. B. D. at p. 63, is *prima facie* subject to production and inspection.

Letters written, though not mailed, must be produced; the mere fact that they were not forwarded is no ground of exemption: *Cameron* v. *Cameron*, 10 P. R. 522.

Discovery of documents clearly immaterial to the question at the trial will not be compelled before trial: see note p. 503. Materiality

The Court, however, does not in general distinguish nicely between the materiality of the discovery to the matter to be tried at the hearing, and by way of consequental relief; still if the discovery is such as might be used to the prejudice of the party, irrespectively of the suit, the Court will look narrowly to the question, whether there is reasonable prospect of it being of material service at the hearing: *Carver* v. *PintoLeite*, L. R. 7 Chy. 90; *Heugh* v. *Garrett*, 44 L. J. Chy. 305; 32 L. T. N. S. 45; *Republic of Costa Rica* v. *Erlanger*, L. R. 19 Eq. 33.

A defendant is entitled to inspect documents evidencing the contract sued on, though he does not admit their genuineness: *Benjamin* v. *Saulez*, 6 Ir. R. C. L. 16; and documents bearing upon the amount of damage though there is no question of liability to be tried but assessment of damages only: *Pape* v. *Lister*, L. R. 6 Q. B. 242.

Discovery was ordered before decree as to matters which would be referred to a Master in *McDonald* v. *McArthur*, 7 C. L. T. 28, following *Elmer* v. *Creasy*, L. R. 9 Chy. 69.

After judgment for the plaintiff in an action for the infringement of a patent, he is entitled to inspection of defendant's books, and to an account, although an appeal may be pending from the judgment: *Saxby* v. *Easterbrook*, L. R. 7 Ex. 207. Inspection.

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Rule 513. Discovery of the documents must be given, though the party may not be bound to produce them for inspection: *Rumbold* v. *Forteath*, 3 K. & J. 44; *Lazarus* v. *Mozley*, 5 Jur. N. S. 1119; *Manby* v. *Bewicke*, 8 D. M. & G. 476; *Kain* v. *Farrar*, W. N. 1887, 266; *New British Investment Co.* v. *Peed*, 3 C. P. D. 196; and see *Owen* v. *Wynn*, 9 Ch. D. 29 *Re Pickering*, 25 Ch. D. 247.

Information to be sought by party producing. The party making an affidavit on production must, if necessary, seek the necessary information from his present or former agents: *Earl of Glengall* v. *Frazer*, 2 Hare 99; *McIntosh* v. *G. W. Railway*, 4 DeG. & S. 544; *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644; see *Rushotham* v. *Shropshire, etc.*, 24 Ch. D. 110; *Southwark* v. *Quick*, 2 Q. B. D. 321; *Bolcklow* v. *Fisher*, 10 Q. B. D. 161; see also *Foakes* v. *Webb*, 28 Ch. D. 287. In an action on a policy of marine insurance, the defendants obtained an order that the action should be stayed until the plaintiffs satisfied the Court that they had done all in their power to obtain production of the ship's papers: *West of England Bank* v. *Canton Co.*, 2 Ex. D. 472; but when the person in whose control the documents were, was not within the jurisdiction and it was difficult if not impossible to obtain the discovery, the Court refused to stay proceedings: *Fraser* v. *Burrows*, 2 Q. B. D. 624.

See *London, Tilbury & Southend Ry. Co.* v. *Kirk*, 51 L. T. N. S. 599, where knowledge which might have been obtained by inquiry was contained in reports which had been held privileged.

Difficulty in obtaining production. Mere difficulty or inconvenience in giving discovery, is no reason for not giving it. Thus a railway company was required to give discovery of the contents of books in the possession of themselves or their agents extending over a series of years, to shew the receipt of goods specifically delivered to them for carriage: *Hall* v. *L. & N. W. Ry. Co.*, 35 L. T. N. S. 848. See also *Mertens* v. *Haigh*, 11 W. R. 792.

Documents not in party's possession. If documents not in the possession of a party are required to be produced or information respecting them given, the party is entitled to be indemnified against the cost of obtaining the documents, or the information: *Hamelyn* v. *Whyte*, 6 P. R. 143; *Bethell* v. *Casson*, 12 W. R. 200.

Copies. A party who has a right to have documents produced for his inspection has also a right to take copies of them: *Pratt* v. *Pratt*, 30 W. R. 837; 51 L. J. Chy. 838; 47 L. T. N. S. 249; W. N. 1882, 117.

Privileged documents. The general rules as to privilege in evidence, are applicable in regard to protection from discovery: *Wadeer* v. *E. Indian Co.*, 2 Jur. N. S. 407; *Clegg* v. *Edmonson*, 22 Beav. 125.

See *Greenough* v. *Gaskell*, 1 M. & K. 100.

Privilege and Protection from Production:

The following are some of the principal classes of cases in which documents need not be produced:

On ground of public policy. 1. State documents and the like, the production of which is not in the public interest, and is against public policy, are privileged: *Kain* v. *Farrer*, W. N. 1877, 266; 37 L. T. N. S. 469; *H. M. S. Belleropho*n, 31 L. T. N. S. 756; 23 W. R. 248; 44 L. J. Adm. 5; *Hennessey* v. *Wright*, 21 Q. B. D. 509. But it must be stated in the affidavit how these are privileged: *Kain* v. *Farrer*, *supra*; and in such case it is for the head of the department from which such documents are brought, not for the Judge, to determine whether the production will be injurious to the public service: *Bradley* v. *McIntosh*, 5 Ont. 227; *Hennessy* v. *Wright*, 21 Q. B. D. 509.

Involving party in criminal charge. 2. Documents the production of which would tend to involve the party in a criminal charge, or to subject him to a penalty or forfeiture: *Webb* v. *East*, 5 Ex. D. 23; *Fisher* v. *Owen*, 8 Ch. D. 645; *Allhusen* v. *Labouchere*, 3 Q. B. D. 654; *Hill* v. *Campbell*, L. R. 10 C. P. 222; *Boyle* v. *Wiseman*, 10 Ex. 647; see *Waters* v. *Earl of Shaftesbury*, 14 W. R. 259; but the objection must be made upon oath; *Webb* v. *East*, *supra*, *Bromley* v. *Graham*, 11 P. R. 451; *Power* v. *Ellis*, 6 S. C. R. 1; and the penalty and forfeiture clauses of the 13 Eliz. c. 5, and 27 Eliz. c. 4, cannot be used to prevent production by parties to deeds which it is sought to impeach under those statutes: *Bunn* v. *Bunn*, 4 DeG., J. & S. 316; see *Society of Apothecaries* v. *Nottingham*, W. N. 1875, 259.

Generally when fraud is charged, no privilege can be claimed for documents relating to the alleged fraud: *Ferner* v. *Williams*, 11 Jur. N. S. 902; *Philips* v. *Holmer*, 25 W. R. 578; *Charlton* v. *Coombes*, 4 Giff. 372; *Mornington* v. *Mornington*, 2 J. & H. 697. **Rule 513.**

3. Documents relating exclusively to the party's own title or case, or to the evidence by which it is to be established: *Owen* v. *Wynn*, 9 Ch. D. 29; *Daw* v. *Eley*, 2 H. & M. 725; *Ingilby* v. *Shafto*, 33 Beav. 31; *Commissioner of Sewers* v. *Glasse*, L. R. 15 Eq. 302; *Stovel* v. *Coles*, 4 Chy. Ch. 9; *Green* v. *Amen*, 2 Chy. Ch. 138. In such case his opponent is not entitled to his deeds, etc., in order to "pick holes" in them: *Owen* v. *Wynn*, 9 Ch. D. 29; but it must appear that they do not relate also to the title of the opposite party: *Clegg* v. *Edmonson*, 22 Beav. 125; *Lind* v. *Isle of Wight Ferry Company*, 8 W. R. 540; *Bishop of Winchester* v. *Bowker*, 29 Beav. 479; *Felkin* v. *Lord Herbert*, 9 W. R. 756; *Bolton* v. *Corporation of Liverpool*, 1 Myl. & K. 88; *Jenkyn* v. *Bushby*, 14 W. R. 531; *Southwark & Vauxhall Water Company* v. *Quick*, 3 Q. B. D. 315. Relating to party's own case.

Letters between co-defendants were held not capable of being put in evidence, and therefore, as not supporting the defendant's case, are not privileged: *Hey* v. *De la Hey*, W. N. 1886, 101.

Interrogatories seeking discovery in support of a substantive case set up by the defendant were required to be answered by the plaintiff: *Bidder* v. *Bridges*, 29 Ch. D. 29; but a party is not entitled to discovery of the manner in which, and the evidence by which, his opponent intends to establish exclusively his case: *Ib.*

Production cannot be refused merely on the ground that if the plaintiff's claim is unfounded, he has no interest in the documents: *Gresley* v. *Mousley*, 2 K. & J. 288.

Production was ordered when, from the circumstances of the case as stated, the Court thought that the cases of the plaintiff and defendant were so interwoven that nothing could relate to the one without relating to the other: *Hamilton* v. *Street*, 1 Gr. 327.

For what was held a sufficient description of the documents, and entitling them to protection on this ground: see *Bywicke* v. *Graham*, 7 Q. B. D. 400; *Roberts* v. *Oppenheim*, 26 Ch. D. 724; and Sichel & Chance on Discovery, 269.

4. Documents having no bearing on the question to be tried. These need not be produced before trial: *Merchants Bank* v. *Tisdale*, 6 P. R. 51; *Bryce* v. *McIntyre*, 7 P. R. 134; *Parker* v. *Wells*, 18 Ch. D. 477; such as papers relating to details of trust account until the right to account has been established: *Fennessy* v. *Clark*, 37 Ch. D. 184: *McGregor* v. *McDonald*, 11 P. R. 386; *Hurst* v. *Barber*, 12 P. R. 467, or relating to sales in an action for infringement of trade-mark until the right to damages established: *Waters* v. *Earl of Shaftesbury*, 1 W. R. 259, and see *Rule* 519. The Court does not distinguish too nicely, however, between documents relating to the question at the hearing and consequential relief. See note p. 501, especially in cases where further inquiries consequent on the establishment of the plaintiff's right may not be directed at the trial, but judgment at the trial may be given as to the matters depending upon the right: *Re Morgan, Owen* v. *Morgan*, 39 Ch. D. 316. Irrelevant to the question at the trial.

The plaintiff sued the defendant who had acted as his stock-broker for account and damages, making general allegations of fraud and then interrogated with a view to establish the fraud. The defendant refused to answer on the ground that the plaintiff was not entitled to the information till after decree. It was held that the plaintiff was entitled to the discovery to establish his alleged cases of fraud at the trial: *Leitch* v. *Abbott*, 31 Ch. D. 374.

A party's case for the purposes of discovery consists of everything which it is reasonable to suppose will directly, or indirectly, enable him either to advance his own case, or damage, or repel, his adversary's: *Compagnie Financiere du Pacifique* v. *Peruvian Guano Co.*, 11 Q. B. D. 55; *English* v. *Tottie*, 1 Q. B. D. 141; *Hutchinson* v. *Glover*, 1 Q. B. D. 138; *Western of Can. Oil Co.* v. *Walker*, 6 P. R. 191; *Lawlor* v. *Murchison*, 3 Gr. 553; and the test of materiality is to assume the party's pleading to be true: *Gresley* v. *Mousley*, 2

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K. & J. 288; *White* v. *Ahrens*, 32 W. R. 311, affirmed in appeal, 26 Ch. D. 717, where it was held that the party was entitled to discovery before giving particulars of fraud under Eng. R. 1883, 202; (see also *Leitch* v. *Abbott*, 31 Ch. D. 374; *Miller* v. *Harper*. 38 Ch. D. 110; *Harbord* v. *Monk*, 6 Ch. D. 616); but a document relating exclusively to the case of the party making discovery is not material: see Wigram on Discovery, 15, 261; Bray on Discovery; *Minet* v. *Morgan*, L. R. 8 Chy. 361; *Atty.-Gen.* v. *Emerson*, 10 Q. B. D. 191; 52 L. J. Q. B. 67: and *per* Brett, L.J., 74; Peile on Discovery, 42.

Irrelevant documents, if disclosed, need not be produced for inspection: *Wilson* v. *Thornbury*, L. R. 12 Eq. 517; *Central News (Limited)* v. *Eastern Tel. Co.*, 28 Sol. Jour., 390; 33 L. J. Q. B. 236.

In *Star Kidney Pad Co.* v. *Greenwood*, 3 Ont. 280, an action on a promissory note given for kidney pads, one defence was that the pads were useless and possessed no healing properties. Discovery of the recipe or ingredients was refused, the plaintiff resisting the discovery, on the grounds that no representation was made as to the ingredients, which constituted a trade secret, and the disclosure of the same would damage the plaintiff's business. See also *Badische Anilin, etc.* v. *Levinstein*, 24 Ch. D. 156; *Howe* v. *McKernan*, 30 Beav. 574.

Muniments of party's title.

5. (Properly speaking only a branch of the third head). A party's muniments of title, which he swears do not contain anything impeaching his case, or supporting, or material to, the case of the defendant: *Minet* v. *Morgan*, L. R. 8 Chy. 361: *Morris* v. *Edwards*, 23 Q. B. D. 287; *Horton* v. *Bott*, 26 L. J. Ex. 267; *New British Invest. Co.* v. *Peed*, 3 C. P. D. 196; but not documents which tend to support the title of the opposite party: *Lyell* v. *Kennedy*, 8 App. Cas. 217, 223, 224; see *Small* v. *Eccles*, 3 P. R. 189; *Egremont Burial Board* v. *Egremont Iron Ore Co.*, 14 Ch. D. 158; *Webster* v. *Whewall*, 15 Ch. D. 120. It was held in the last case, that it was sufficient to swear to the best of the deponent's knowledge, information and belief. The contrary has been held in *Manby* v. *Bewicke*, 8 D. M. & G. 476. It is insufficient to swear generally that the documents are privileged. The affidavit must state the facts upon which the objection is grounded: *Gardner* v. *Irvin*, 4 Ex. D. 49; see also *Webb* v. *East*, 5 Ex. D. 23.

An affidavit to protect maps is more readily accepted than in the case of deeds: *March* v. *Bailey*, 78 L. T. Jour. 263: see also article on production of documents of title in 78 L. T. Jour. 278.

In an action for the recovery of land, and delivery of deeds relating thereto in the defendant's possession, the defence of purchaser for valuable consideration without notice enables the defendant to resist discovery of such deeds and documents: *Emmerson* v. *Ind*, 134 W. R. 636; but only if he sets that defence up simply (in which case the discovery would not be material to the issue to be tried), not if he also disputes, or does not admit the plaintiff's title: *Ib.*; 33 Ch. D. 323; 12 App. Cas. 300.

For a form of statement of objection on this ground, in the affidavit on production, see Sichel & Chance on Discovery, 209.

The defendants, before putting in their statement of defence, moved for the production by the plaintiffs of the conveyance under which they held their land, in order to ascertain whether it contained a reservation of minerals, the defendants alleging that, if it did not, they would submit to a decree at once. It was held that, the land having been conveyed to the plaintiffs in fee simple, they were *prima facie* entitled to the land down to the centre of the earth, and unless the defendants could show that the plaintiffs were not so entitled, they could not be compelled to produce their title deeds: *Egremont Burial Co.* v. *Egremont Iron Ore Co.*, 14 Ch. D. 158; see *Webster* v. *Whewall*, 15 Ch. D. 120.

Title deeds of defendant in possession.

6. Title deeds of land of which a party defendant is in possession, in an action to recover possession of the land by an adverse title: *Philipps* v. *Philipps*, 4 Q. B. D. 127; 27 W. R. 939; but the defendant must make an affidavit disclosing what they are: *Rumbold* v. *Farteath*, (No. 1) 3 K. & J. 44; *New British Co.* v. *Peed*, 3 C. P. D. 196; *Wrentmore* v. *Hagley*, 46 L. T. N. S. 741; see *Owen* v. *Wynn*, 9 Ch. D. 29; *Lyell* v. *Kennedy*, 8 App. Cas. 217; *Daniel* v. *Ford*,

W. N. 1883, 52. This rule depends on the circumstance that where claims to the same land in fee simple are made by two different persons, they must be based on inconsistent titles; it cannot therefore be applied to a case where the title of the plaintiff and defendant are not absolutely adverse, but may to some extent be proved by the same evidence: *Ponsonby* v. *Hartley*, W. N. 1883, 13: 74 L. T. Jour. 208; affirmed on appeal though on a different ground W. N. 1883, 44. In that case the right to possession was not disputed, but the right to minerals was claimed, and the plaintiff relied on a reservation of them, and the plaintiff was allowed to inspect the title deeds, to see if they supported his case. **Rule 513.**

For a form of statement of objection on this ground, see Sichel & Chance, on Discovery, 210.

7. Mortgage deeds are privileged until the mortgagee is paid what is due; *Chichester* v. *Donegall*, L. R. 5 Chy. 497; *Patch* v. *Ward*, L. R. 1 Eq. 426; *Jones* v. *Jones*, Kay, App. vi.; *Bridgewater* v. *De Winton*, 12 W. R. 40; *Howard* v. *Robinson*, 4 Drew. at p. 526; *Weeks* v. *Stourton*, 13 W. R. 489; *Freeman* v. *Butler*, 33 Beav. 289; *Smith* v. *Barnes*, L. R. 1 Eq. 65; *Anon*, 2 Charl. Ch. Ca. 61; W. N. 1876, 23; Fisher on Mortgages, 4th ed., 302; unless the right to redeem is denied: *Patch* v. *Ward*, and *Jones* v. *Jones*, *sup.*: *Bell* v. *Chamberlen*, 3 Chy. Ch. 429; and where the proceedings are being taken by the mortgagee upon the mortgage deed, inspection of it may be ordered, as of any other document sued on: *Emmens* v. *Middlemiss*, 8 P. R. 320. Mortgagees' deeds.

8. Documents held by a party in a different character from that in which he is sued: *Pindar* v. *Smith*, 6 Madd. 38; *Wagner* v. *Mason*, 6 P. R. 187. Documents held in a different character.

Where a defendant claimed that he held documents only as solicitor for a co-defendant also a party, but who had not been called on for particulars, it was held that he should not have been called on to produce these documents without the co-defendant being called on to show cause: *McGregor* v. *McDonald*, 11 P. R. 386.

9. Documents in which a third person not a party to the action is interested are not for that reason alone protected from production: *Kettlewell* v. *Barstow*, L. R. 7 Chy. 686; *Hutchinson* v. *Glover*, 1 Q. B. D. 138; but when such documents are in the joint legal (not corporeal: see *Reid* v. *Langlois*, 1 Mac. & G. 627; and *B. A. Ins. Co.* v. *Wilkinson*, 6 P. R. 268), possession of the third person and the party from whom production is sought, the latter cannot be required to produce them: see cases *supra*; *Murray* v. *Walter*, Cr. & Ph. 114; *Kearsley* v. *Philips*, 10 Q. B. D. 36, 465, where all the cases are reviewed, unless there is no interest which can be affected by their production other than the interest of the parties to the action: *London & Yorkshire Bank* v. *Cooper*, 15 Q. B. D. 7 and 473. Production will not be required from a party having the sole legal possession, if a third person who is not a party and who has the beneficial interest objects, unless the suit is of such a nature that the Court can say that the party having the legal custody sufficiently represents in the suit the other person interested: *Fraser* v. *Home Ins. Co.*, 6 P. R. 45; but where production will not be ordered, the party must give all the information in his power respecting the documents in his affidavit, and also on any examination: *Fraser* v. *Home Ins. Co. supra*; *Nicholl* v. *Elliott*, 3 Gr. 545; *Clinch* v. *Financial Corporation*, L. R. 2 Eq., 271; *Vyse* v. *Foster*, L. R. 13 Eq. 602; *Hadley* v. *McDougal*, L. R. 7 Chy. 312. Documents in which a third person is interested.

Possession by a party's agent, is of course the possession of the party: *Murray* v. *Walter*, Cr. & Ph. 114.

As to documents in the joint custody of husband and wife, see *Pendall* v. *O'Connell*, 29 Ch. D. 899.

A solicitor cannot set up a lien acquired in the cause against the right of other parties to production; and the fact that a lien which may be set up exists, is not a sufficient reason for not ordering production, as the party may be able to free the documents from the lien: *Vale* v. *Oppert*, L. R. 10 Chy. 340; *Pratt* v. *Pratt*, W. N. 1882, 117; but see *Bainbridge* v. *Blair*, 1 Jur. 256.

Production was not ordered in an action of trespass against a defendant, who was committee of a lunatic, of documents relating to the lunatic's estate, the documents not being in the custody of the party, but in the custody of the Court having jurisdiction in lunacy: *Vivian* v. *Little*, 11 Q. B. D. 370.

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For a form of statement of objection in the affidavit on this ground: see Sichel & Chance on Discovery, 210.

Communications between solicitor and client.

10. Documents which are privileged, as being communications passing between the party and his confidential professional adviser, or agents.

Of this kind are all communications between a party and his solicitor or other legal adviser, whether made *ante*, or *post litem motam*. It is enough if they are communications of a confidential character: *Smith* v. *Daniell*, L. R. 18 Eq. 649; *Original Hartlepool Collieries Co.* v. *Moon*, 30 L. T. N. S. 585; not an open communication: *Foakes* v. *Webb*, 28 Ch. D. 287; *Rawstone* v. *Preston*, 30 Ch. D. 116; made by or to the legal adviser in a professional character: *Minet* v. *Morgan*, L. R. 8 Chy. 367; *Corporation of Hastings* v. *Ivall, Ib.*, 1017; *Macfarlane* v. *Rolt*, L. R. 14 Eq. 580; *Hamelyn* v. *Whyte*, 6 P. R. 143; *Mostyn* v. *West Mostyn*, 34 L. T. N. S. 531; *Wilson* v. *Northampton*, L. R. 14 Eq. 477; *Eadie* v. *Addison*, 47 L. T. N. S. 543; *Mayor, etc. of Bristol* v. *Cox*, 26 Ch. D. 678; *Proctor* v. *Smiles*, 55 L. J. Q. B. 527; *Lowden* v. *Blakey*, 23 Q. B. D. 332; see *Lyell* v. *Kennedy*, 9 App. Cas. 81; including communications with a former solicitor: *Thomas* v. *Sec. of State for India*, 18 W. R. 312; *Marriott* v. *Anchor, etc.*, 3 Giff, 304; *Wilson* v. *Brunskill*, 2 Chy. Ch. 147; and the predecessors in title of the party: *Minet* v. *Morgan*, and *Mostyn* v. *W. Mostyn, supra*.

Communications by a clerk of the defendant company to the company, containing references to advice given by the company's solicitor, whom the clerk had consulted, are privileged, being held to be the same as if written by the solicitors: *Boughton* v. *Citizens Insurance Co.*, 11 P. R. 110.

Extent of this ground of privilege.

The privilege extends to a person who, unknown to the client, had ceased to practice as a solicitor when the communications were made: *Calley* v. *Richards*, 19 Beav. 401; see also L. R. 18 Eq. 654; and to communications with reference to actual or impending litigation coming from any third person employed by the solicitor, or at his instance, such as his town agent: *Catt* v. *Tourle*, 23 L. T. N. S. 485; 19 W. R. 56, or clerk, accountant or other skilled person: see *Lawrence* v. *Campbell*, 4 Dr. 485; *Steel* v. *Stewart*, 1 Ph. 471; *Churton* v. *Frewen*, 2 Dr. & S. 390; *Hooper* v. *Gumm*, 10 W. R. 644; or in any other way procured by the solicitor, or by the client or his agent, at the instance of the solicitor: *Bustros* v. *Whyte*, 1 Q. B. D. 423; *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644; *Taylor* v. *Batten*, 4 Q. B. D. 85; and to documents prepared with a *bonâ fide* intention of being laid before a solicitor in a contemplated action: *Southwark* v. *Quick*, 3 Q. B. D. 315; *Wheeler* v. *Le Marchant*, 17 Ch. D. 675; *Kennedy* v. *Lyell*, 23 Ch. D. 387; afterwards affirmed on appeal to the House of Lords: see 9 App. Cas. 81; *Lowden* v. *Blakey*, 23 Q. B. D. 332; letters from a third person in answer to inquiries by a party's solicitor with a view to anticipated litigation: *McCorquodale* v. *Bell*, 1 C. P. D. 471; *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644; anonymous letters to solicitors about the case: *Young* v. *Holloway*, 12 P. D. 167; documents material to the party's case procured by his solicitors of their own motion for the purposes of the action: *The Palermo* 9 P. D. 6; *Guelph C. Co.* v. *Whitehead*, 9 P. R. 509; documents relating only to the conduct of the suit: *Ingilby* v. *Shafto*, 33 Beav. 31; *Gandee* v. *Stansfield*, 4 DeG. & J. 1; *Turner* v. *Burkenshaw*, 11 W. R. 851; papers relating to a former action and privileged therein: *Bullock* v. *Corry*, 3 Q. B. D. 356; *Bacon* v. *Bacon*, W. N. 1876, 96; *Nordon* v. *Defries*, 8 Q. B. D. 508; *Branford* v. *Branford*, 4 P. D. 72; *Pearce* v. *Foster*, 15 Q. B. D. 114; *Canadian Pacific Ry.* v. *Conmee*, 11 P. R. 297; but not otherwise: *Hutchinson* v. *Glover*, 1 Q. B. D. 138; *Re Worswick*, 38 Ch. D. 370; a doctor's report of an examination at the instance of a party's solicitor: *Friend* v. *London, Chatham and Dover Ry. Co.*, 2 Ex. D. 437; and reports of surveyors as to the condition of a cargo, made solely for the case of one of the parties or for the opinion of his legal adviser: *The Theodore Korner*, 3 P. D. 162; see *Cossy* v. *London, Brighton, etc. Ry. Co.*, L. R. 5 C. P. 146.

Although copies of documents, which are *publici juris*, are themselves unprivileged, a collection of entries in public records and registers and of photographs of tombstones and houses will be protected from production, when it has been made or directed by the solicitors of a party for his defence, and is the result of the professional knowledge, skill and research of those solicitors: *Lyell* v. *Kennedy*, 27 Ch. D. 1; 53 L. J. Chy. 537.

Transcript of shorthand notes of proceedings in open Court are not privileged : *Re Worswick, Robson* v. *Worswick*, 38 Ch. D. 370. **Rule 513.**

The giving of an extract or copy of an opinion of counsel procured by the solicitor for his client on the subject matter of a suit to the solicitor on the other side does not prevent this opinion from being privileged : *Carey* v. *Cuthbert*, 6 L. R. Ir. Eq. 599.

Communications not in professional character.

Protection cannot be claimed on this ground for communications made to a solicitor, but not in his character of solicitor : *Greenough* v. *Gaskell*, 1 M. & K. 98 ; *Rudd* v. *Frank*, 9 C. L. T. 387 ; *Thomas* v. *Rawlings*, 27 Beav. 140 ; as where he was not simply advising as solicitor, but negotiating actively much of the transaction impeached in the action : *Pawson* v. *Merchants Bank*, 11 P. R. 21 ; or was plaintiff's patent agent, as well as his solicitor : *Moseley* v. *Victoria Rubber Co.*, 55 L. T. N. S. 482 ; nor for letters to a party's solicitor, not induced by inquiries : *McCorquodale* v. *Bell*, *supra* ; nor for statements made voluntarily or at the party's request for his own information, by his unprofessional agents : *Bustros* v. *White* ; *Anderson* v. *Bank of British Columbia*, *supra* ; though made in confidence, and so marked : *Hopkinson* v. *Lord Burghley*, L. R. 2 Chy. 447 ; see *Wiman* v. *Bradstreet*, 2 Chy. Ch. 77.

Of collateral information.

In such cases an undertaking may be required not to use the documents for any collateral purpose : *Hopkinson* v. *Lord Burghley*, *supra* ; *Richardson* v. *Hastings*, 7 Beav. 354. Protection also cannot be claimed for information derived from collateral sources and not directly from the client : *Marsh* v. *Keith*, 1 Dr. & Sm. 342 ; *Ford* v. *Tennant*, 32 Beav. 162 ; *Desborough* v. *Rawlins*, 3 M. & Cr. 515 ; *Re Land Credit Society*, 15 W. R. 703 ; nor for mere collateral facts, such as the client's residence, unless communicated confidentially ; *e.g.*, as his client's hiding place : see *Heath* v. *Crealock*, L. R. 15 Eq. 257 ; *Re Arnott*, *Ex parte*, *Chief Official Receiver*, 37 W. R. 223 ; 60 L. T. N. S. 109 ; or address : see *Bursill* v. *Tanner*, 55 L. J. Q. B. 53 ; (see also the distinction between confidential communications, and those of facts patent to the senses : *Kennedy* v. *Lyell*, 48 L. T. N. S. 455 ; 23 Ch. D. 387 ;) nor for documents passing between the party's solicitor and third persons to enable the solicitor to advise his client, unless they were for the purpose of obtaining information, evidence or legal advice with reference to litigation existing or contemplated between the parties to the action : *Wheeler* v. *Le Marchant*, 17 Ch. D. 675 ; *Pavitt* v. *Metropolitan Tramways Co.*, W. N. 1883, 100 ; *Original Hartlepool Collieries Co.* v. *Moon*, 30 L. T. N. S. 193, 585 ; *Betts* v. *G. T. Ry.* 12 P. R. 86, 634 ; *Commee* v. *C. P. Ry. Co.* 9 C. L. T. 36 ; see *Westinghouse* v. *Midland*, *etc.*, 48 L. T. N. S. 98, 462, as to what constitutes *lis mota* ; nor for professional opinions given partly for the benefit of the party requiring production : *Reynolds* v. *Godlee*, 4 K. & J. 88 ; *Talbot* v. *Marshfield*, 13 W. R. 885 ; *Wynne* v. *Humberstone*, 27 Beav. 421 ; nor where fraud is charged : see *Mornington* v. *Mornington*, 2 J. & H. 697 ; *Charlton* v. *Coombes*, 4 Giff. 372, 382 ; *Reynell* v. *Sprye*, 10 Beav. 51 ; 11 Beav. 618 ; *Reg.* v. *Cox*, 14 Q. B. D. 153.

Between solicitor and a third person.

Professional communications are excepted from protection in partnership actions and actions between beneficiaries and trustees, where such communications had been obtained for the sake of and paid for out of the partnership or trust estate : *Gourand* v. *Edison Gower Bell Tel. Co.*, 59 L. T. N. S. 813 ; 57 L. J. Chy. 498.

No privilege can be claimed by a trustee as against his *cestui que trust* for letters passing between the trustee and the solicitor, relating to the trust before action brought : *Re Mason*, *Mason* v. *Cattley*, 22 Ch. D. 609 ; *Talbot* v. *Marshfield*, *supra* ; *Re Postlethwaite*, *Postlethwaite* v. *Rickman*, 35 Ch. D. 722.

Communications with unprofessional agent.

11. Communications with an unprofessional agent in anticipation of litigation, and with a view to the prosecution of, or defence to, a claim to the matter in dispute were held to be privileged in *Ross* v. *Gibbs*, L. R. 8 Eq. 522 ; *Commee* v. *C. P. Ry. Co.*, 11 P. R. 297 ; *Slade* v. *Tucker*, 14 Ch. D. 824 ; *Anderson* v. *Bank of British Columbia*, 2 Ch. D. at p. 658 ; but the documents there were for the purpose of being laid before a legal adviser and would come within *Southwark*, *etc.* v. *Quick*, 3 Q. B. D. 315 ; see also *Macdonald* v. *Norwich Union Fire Ins. Co.*, 10 P. R. 501. The later cases seem to show that such communications are not privileged even when made during, and for the express purpose of litigation. See *Bustros* v. *White*, 1 Q. B. D. 423 ; *Anderson* v. *Bank*

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of British Columbia, supra; Martin v. *Butchard*, 36 L. T. N. S. 732; see also *Reid* v. *Langlois*, 1 Mac. & G. 638; *Hamilton* v. *Nott*, L. R. 16 Eq. 112. Communications with a solicitor in his character of patent agent as to the preparation of specifications for the patent are not privileged: *Moseley* v. *Victoria Rubber Co.*, 55 L. T. 483.

For forms of statement of objection in the affidavit or production on the ground of privileged communications, see Sichel & Chance on Discovery, 208. As to the effect of charges of fraud on privilege, see *Re Postlethwaite, Postlethwaite* v. *Rickman*, 35 Ch. D. 722; *Reg.* v. *Cox*, 14 Q. B. D. 153.

Instances of communications not privileged.

The following are further instances of communications not privileged:—Copies of letters between defendants and third persons procured for the purpose of defence by the solicitors of the defendants from such third persons, the defendants not having kept copies of the correspondence: *Chadwick* v. *Bowman*, 16 Q. B. D. 561.

A transcript of shorthand notes of evidence in an action instituted by a party, with a view to ulterior proceedings not then contemplated, and for the purpose of submitting the same to counsel in such ulterior proceedings if taken: *Rawstone* v. *Preston*, 30 Ch. D. 116.

Opinions of engineers as to the validity of a patent obtained with a view to being forearmed in case litigation should arise: *Toronto Gravel Road Co.* v. *Taylor*, 6 P. R. 227; reports made to an insurance company by their medical officer, and by friends of the assured to whom the company was referred as to his health and habits: *Mahony* v. *National Widow's Life Ass. Fund*, L. R. 6 C. P. 252; reports of persons employed to survey a tug, for the purpose of an action for damages for improperly constructing the tug: *Martin* v. *Butchard*, 36 L. T. N. S. 732; but *query* if this is not contrary to *Southwark, etc.* v. *Quick*, 3 Q. B. D. 315, see *supra*; correspondence between a vendor and a vendee relative to the subject matter of the action by a sub-vendee but which could not be said to be confidential communications with a view to litigation: *English* v. *Tottie*, 1 Q. B. D. 141; letters from a party's unprofessional agent to defendant, relative to the subject matter of an action, not sent in order to be laid before the party's solicitor: *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644; an agreement of compromise between the defendant and a third person relative to the subject matter of an action: *Hutchinson* v. *Glover*, 1 Q. B. D. 138; *Richards* v. *Morgan*, 4 B. & S. 641; or papers obtained from experts, by arbitrators for their guidance: *Ponsford* v. *Swaine*, 1 J. & H. 433.

Correspondence between co-defendants after suit, is not as a general rule privileged: *Hamilton* v. *Nott*, L. R. 16 Eq. 112; see also *Sankey* v. *Alexander*, 8 L. R. Ir. 241; *Hey* v. *De la Hey*, W. N. 1886, 101.

Where a diary that would not have been protected from production has been lost, extracts made from it since the commencement, and for the purposes of the litigation are not protected: *Land Corporation of Canada* v. *Puleston*, W. N. 1884, 1; see *The Palermo*, 9 P. D. 6.

Form of affidavit claiming protection from production.

Form of Affidavit.—The affidavit must give such description of the documents which the party objects to produce as will sufficiently identify them: *Taylor* v. *Batten*, 4 Q. B. D. 85; *Bewicke* v. *Graham*, 7 Q. B. D. 400; *Taylor* v. *Oliver*, 45 L. J. Chy. 774; *Mayor of Bristol* v. *Cox*, 26 Ch. D. 678. A list may be given setting them out in the same way as the documents which the party does not object to produce: see *Hamelyn* v. *Whyte*, 6 P. R. 143; *Fraser* v. *Home Ins. Co.*, 6 P. R. 45. The following have been held sufficient descriptions: "A correspondence between the plaintiff and his predecessors in title on the one hand, and their respective solicitors from time to time on the other": *Minet* v. *Morgan*, L. R. 8 Chy. 361. "Certain documents, letters and correspondence which have passed between my legal advisers and myself, and certain instructions to, and opinion of counsel, which are numbered 50-76 inclusive and are tied up in a bundle marked with the letter A and initialed by me": *Taylor* v. *Batten, supra*. "Bundles of letters" is not a sufficient description of correspondence: *Hamilton* v. *Nott*, L. R. 16 Eq. 112; but letters may be so described with sufficient description to identify them: *Walker* v. *Poole*, 51 L. J. Chy. 840. Too prolix and voluminous an affidavit was ordered to be

taken off the files: *Ib.*, W. N. 1882, 136; or the party filing it may be ordered to pay the costs of it: *Hill* v. *Hart Davis*, 26 Ch. D. 470. **Rule 513.**

It is not sufficient to mention bundles containing a large number of documents, among which the deponent thinks one or two may be material; an affidavit so framed may be ordered to be taken off the files: *Bolton* v. *Natal Land & Col. Co.*, 83 L. T. Jour. 203; W. N. 1887, 143.

Reference generally to letters, etc., as filed in Court on certain specified applications, was held sufficient without scheduling the particulars: *Lyon* v. *McKay*, 10 P. R. 557.

The affidavit must also [see clause 3] assign a reason for objecting to produce the documents and verify the facts upon which the claim to protection is based: *Bromley* v. *Graham*, 11 P. R. 451; *Gardner* v. *Irvin*, 4 Ex. D. 49; *Webb* v. *East*, 5 Ex. D. 108; *Roberts* v. *Oppenheim*, 26 Ch. D. 724. It has been held sufficient to swear to the best of the defendant's knowledge and belief: *Minet* v. *Morgan*, *supra*, but see *Manby* v. *Bewicke*, 8 DeG. M. & G. 476. It is insufficient to swear generally that the documents are privileged: *Gardner* v. *Irvin*, 4 Ex. D. 49.

Where an affidavit of documents had been filed, setting out the number and the dates, but not the parties to title deeds, it was held that as the deeds were privileged, the Court would not order the names of the parties to the deeds to be set out: *Taylor* v. *Oliver*, 45 L. J. Chy. 774; 34 L. T. N. S. 902.

Examples of statements of objection to produce, on ground of privilege.

The following statements have been held to sufficiently disclose some ground of privilege: "The said documents relate solely to the case of the defendants, and not to the case of the plaintiff, nor do they tend to support it, and they do not to the best of our knowledge, information and belief, contain anything impeaching the case of the said defendants, wherefore, we object to produce the same and say they are privileged from production": *Bewicke* v. *Graham*, 7 Q. B. D. 400: see a discussion of that case, 16 L. J. 263; see also *Roberts* v. *Oppenheim*, 26 Ch. D. 724; and *Bulman* v. *Dixon*, 49 L. T. N. S. 736. "I object to produce the documents set forth in the second part of the first Schedule, on the ground that being communications between solicitor and client they are privileged": *Hamelyn* v. *Whyte*, 6 P. R. 143; see also *Macfarlane* v. *Rolt*, L. R. 14 Eq. 580. For a description held not sufficient to protect on the ground of joint interest, see *Fraser* v. *Home Ins. Co.*, 6 P. R. 45.

Portions of books produced, containing entries not relevant to the matters in question may be allowed to be sealed up: *Re Pickering*, 25 Ch. D. 247; *Heugh* v. *Garrett*, W. N. 1874, 229; 1875, 26; *Jones* v. *Andrews*, 57 L. T. N. S. 843; 58 L. T. N. S. 601.

Affidavit in proper form conclusive.

Where the documents are properly identified and described and the ground of protection sufficiently stated, if it is a valid ground the affidavit is *prima facie* conclusive as to the relevancy of documents and privilege claimed: *Bewicke* v. *Graham*, 7 Q. B. D. 400; *Welsh Steam etc., Co.* v. *Gaskell*, 36 L. T. N. S. 352; *Bulman* v. *Young*, 31 W. R. 766; 49 L. T. N. S. 736; and cannot be contradicted by counter affidavits: *Jones* v. *Monte Video Gas Co.*, 5 Q. B. D. 556; *Lyon* v. *McKay*, 10 P. R. 557; see also *Hall* v. *Truman Hanbury Co.*, 29 Ch. D. 307; *Nicholl* v. *Wheeler*, 17 Q. B. D. 101; *McGregor* v. *McDonald*, 12 P. R. 81; *Morris* v. *Edwards*, 23 Q. B. D. 287; but the Master or Judge may see from the nature of the case, that the party has misconceived the effect of the documents, and may therefore disregard, or refuse to act upon his affidavit: *Attorney-General* v. *Emerson*, 10 Q. B. D. 19; *Ponsonby* v. *Hartley*, W. N. 1883, 13, 44; *Lyell* v. *Kennedy*, 31 W. R. 618; *Fraser* v. *Home Ins. Co.*, 6 P. R. 45; *Re Pickering*, 25 Ch. D. 247; *Moxley* v. *Canada Atlantic Ry. Co.*, 11 P. R. 39; (but see *Leslie* v. *Cave*, 35 W. R. 515; 56 L. T. N. S. 332, where it was held that one document being shown not to be privileged as claimed, by relating only to the party's own case, another document is not on that ground to be ordered to be inspected); or if from the affidavit itself: *Jones* v. *Monte Video Gas Co.*, *supra*; *Wagstaffe* v. *Anderson*, 39 L. T. N. S. 332; (where the words "never have had" were omitted), or from the documents referred to, or an admission in the pleading of the party: *Hastings* v. *Ivall*, L. R. 8 Chy. 1017; *Imp. Land Co. of Marseilles* v. *Masterman*, 22 W. R. 66; 29 L. T. N. S. 559; *Jones* v. *Monte Video Gas Co.*, *supra*; or other documents

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affording reasonable suspicion that the affidavit is not sufficient: see *Lyell* v. *Kennedy*, 27 Ch. D. 1; (such as evidence given at a former trial of the case: *Moxley* v. *Canada Atlantic Ry. Co.*, 11 P. R. 39), or in his examination in the cause or on the affidavit: see *Dobson* v. *Dobson*, 7 P. R. 256, and *Rule* 512; or the admission of his solicitor: *Campbell* v. *McArthur*, 7 P. R. 46: or of any officer of a defendant or company: *Pawson* v. *Merchants' Bank*, 11 P. R. 18. the Master or Judge is of opinion that the affidavit is insufficient a further affidavit may be ordered. See also *Ross* v. *Dublin United Tramways Co.*, 8 L. R. Ir. 213; *Compagnie Financiere* v. *Peruvian Guano Co.*, 11 Q. B. D. 55; *Central News (Limited)* v. *Eastern Telegraph Co.*, 28 Sol. Jour. 390; *Robinson* v. *Budgett*, W. N. 1884, 94; 28 Sol. Jour. 411.

Cross-examination upon the affidavit was not allowed in Chancery or under the Jud. Act in England, but it is allowed in Ontario under *Rule* 512. See note to that *Rule*.

It seems, in England, to be a not uncommon practice, on applications respecting discovery to shew the documents upon which a question of privilege arises to the Judge; and where by consent the document are so shewn to the Judge, and his decision thereupon taken, no appeal lies from his order: *Bustros* v. *White*, 1 Q. B. D. 427; see also *Macdonald* v. *Norwich Union*, 10 P. R. 505; but whether this course is right, *quære*: see *Re Holloway*, 12 P. D. 167, 169.

A second application for a better affidavit on production is improper where no objection is made on the first application to the non-production of the documents in question, the second motion not being made upon any material which did not exist at the time of the first motion: *Boughton* v. *Citizen Insurance Co.*, 11 P. R. 110.

Notice to produce documents referred to in pleading or affidavits.

514. Every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, to give notice in writing to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving the notice, or of his solicitor, and to permit him to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in the action or proceeding, unless he satisfies the Court that the document relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with the notice. J. A. Rule 229.

Corresponds substantially with the Eng. R. 1875, O. 31, r. 14, (1883, R. 357).

See notes to *Rules* 508 and 513.

In *Webster* v. *Whewall*, 15 Ch. D. 121, remarks were made by Denman, J., to the effect that "sufficient cause" for not complying with a notice by defendant under this *Rule* would be that the defence had not yet been delivered. This dictum was not approved in *Quilter* v. *Heatly*, 23 Ch. D. 42, where it was held that a defendant was, *prima facie*, entitled to at once inspect a document referred to in the pleadings, and the burden of shewing cause is on the party from whom inspection is demanded; also that the *Rule* applies not only between the plaintiff and a defendant, but also between co-defendants. There Lindley, L.J., said, "There is a material distinction between ordinary discovery, and discovery of documents referred to in the pleadings or affidavits." And Jessel, M.R., said, "The defendant may say 'Your case depends partly on a set of documents which you have set out incorrectly, I wish to see them. It may be that I have made admissions which will put me out of Court. I wish to see the documents to know whether I have made such admissions, and

it is important for me to see them before I put in my defence.' It is reason enough why the defendant should be allowed to see them that the plaintiff has made them part of his statement of claim." **Rules 515, 516.**

The documents need not be particularly identified or referred to; but if more compendiously described by general words, they fall within this *Rule*, and inspection may be ordered: *Smith* v. *Harris*, 48 L. T. N. S. 869. A letter referred to in particulars of plaintiff's claim is a document within the *Rule*: *Cass* v. *Fitzgerald*, W. N. 1884, 18.

The reference in pleading, etc., to a document in respect of which privilege might otherwise be claimed does not render it liable to inspection under this *Rule*, but if production is refused it cannot be used in evidence: *Roberts* v. *Oppenheim*, 26 Ch. D. 724; see also *Mayor of Bristol* v. *Cox*, 26 Ch. D. 678; *Leslie* v. *Cave*, 30 Sol. Jour. 76, and *Green* v. *Amey*, 2 Chy. Ch. 138.

Inspection of a foreign judgment was refused, in an action on a judgment brought under the old procedure: *Matthias* v. *Delcacho*, 1 Charl. Ca. (Court) 123. Inspection of a mortgage deed was refused to a defendant, who wished to find from it the amount in order to redeem, the plaintiff undertaking to give in a week a statement of principal, interest and amount of costs, and of the particulars of all other subsequent incumbrances: *Anon*, 2 Charl. Ch. Ca. 61; W. N. 1876, 23. See *Emmens* v. *Middlemiss*, 8 P. R. 320. In *Lake* v. *Pooley*, W. N. 1876, 54, an action for breach of covenant in a lease, the defendant had made an assignment of one undivided moiety of leasehold property, consisting of land, brewery and fixtures; the plaintiff having applied for an order for inspection of documents, and the defendant having objected that the documents related solely to his own title, Archibald, J., made the order, because it was a case of an undivided moiety, the interest in which could only be realized by the *usufruct* of the whole property.

As to inspection of a company's books by a shareholder, see *Re Credit Co.*, 11 Ch. D. 256.

515. Notice to any party to produce any documents referred to in his pleading or affidavits may be in the Form No. 23 in the Appendix, or to the same effect. J. A. Rule 231. Form of notice to produce.

The Eng. R. 1875, O. 31, r. 15, (1883, R. 358), is in form imperative, stating that the notice "shall be" in the form referred to. See also *Re Credit Co.*, 11 Ch. D. 256.

The form of the usual notice to produce documents at the trial is No. 24 in the App.

As to the effect of not giving a proper notice to produce at the trial: see *Sugg* v. *Bray*, 51 L. T. N. S. 194; 54 L. J. Chy. 132; where parol evidence was not allowed to be given of a document in respect of which a *proper* notice to produce had not been given.

516. The party to whom such notice is given shall, within 2 days from the receipt of the notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in Rule 513, or if any of the documents referred to in the notice have not been set forth by him in any such affidavit, then within 4 days from the receipt of the notice, deliver to the party giving the same a notice stating a time within 3 days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office Notice to inspect.

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of his solicitor, and stating which (if any) of the documents he objects to produce and on what ground. Such notice may be in the Form No. 25, in the Appendix, with such variations as circumstances may require. J. A. Rule 232.

Substantially the same as Eng. R. 1875, O. 31, r. 16, (1883, R. 359).

The same rules that govern the production of documents are applicable where inspection is sought: see *Clegg* v. *Edmonson*, 22 Beav. 125, and notes to *Rule* 508; and there is no right to inspection of documents as to which there is no right to discovery: *Central News (Limited)* v. *Eastern Tel. Co.*, 28 Sol. Jour. 390; see 53 L. J. Q. B. 236.

Inspection may be ordered at any convenient place: see *Prestney* v. *Colchester*, 48 L. T. N. S. 353; W. N. 1883, 114, and note *supra*, p. 499.

Order for inspection on default.

517. If the party served with notice under Rule 516 omits to give such notice of a time for inspection, or objects to give inspection, the party desiring it may apply to a Judge for an order for inspection. J. A. Rule 233.

Identical with the Eng. R. 1875, O. 31, r. 17. That of 1883, R. 360, is different.

Application for order.

518. Every application for an order for inspection of documents shall be made to a Judge. (*a*) And, except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit shewing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party, J. A. Rule 234.

Identical with the Eng. R. 1875, O. 31, r. 18. See Rules of 1883, R. 360.

(a) The Master in Chambers will probably have jurisdiction, as the expression is not "a Judge of the High Court." See notes to *Rules* 2 and 30.

In an action for breach of promise, judgment went by default, and the question of damages was referred to the Master. The plaintiff claimed a right to inspect and take copies of his letters to the defendant, as being material to the question of damages. It was held that the matter was one for the discretionary jurisdiction of the Court or a Judge, and inspection was refused on the ground that it would increase the costs. The Court of Appeal declined to review the decision: *Ladds* v. *Walthew*, 32 W. R. 1000.

When inspection objected to.

519. If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a Judge, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery or

inspection, may order that such issue or question be determined first, and reserve the question as to the discovery or inspection. J. A. Rule 235. Rule 520.

Same as Eng. R. 1875, O. 31, r. 19, (1883, R. 362).

The right to the discovery or inspection of documents may depend, for example, on a disputed allegation of partnership: *Lyon* v. *Tweedell*, 13 Ch. D. 375; or on whether an alteration in a will upon which the rights of the parties depended was validly made: *Hurst* v. *Barber*, 12 P. R. 467; and, in such case, the Court or a Judge may order that question to be determined first, reserving the question as to discovery or inspection.

In an action for an account of profits made by the defendants as the plaintiff's agents, the defendants denying the agency, the Court declined, until after that question should be tried, to order production of the invoices of goods sold by third persons to the defendants, and re-sold by the defendants to the plaintiffs; the defendants having sworn that those invoices had nothing to do with the point at issue, and that the disclosure would be injurious to the defendants if the plaintiffs failed: *Verminck* v. *Edwards*, 29 W. R. 189.

It was held under this *Rule*, that where a question on examination is substantially answered, a further answer ought not to be required when discovery would be oppressive: *McGregor* v. *McDonald*, 11 P. R. 386.

In *Re Leigh*, *Rowcliffe* v. *Leigh*, 6 Ch. D. 256, where an executrix disputed a horse dealer's account, and the dispute was whether or not certain horses were sold on commission, the Court refused to order the horse dealer to disclose the prices, as being immaterial until it had been decided that the horses were sold on commission. The question of liability must be one which is severable from the question of damages. See *Elkin* v. *Clarke*, 21 W. R. 447.

In a suit by an alleged next of kin to an intestate, against the solicitor to the Treasury, to whom administration had been granted, it was held that the defendant was not bound to make an affidavit of documents relating to the estate, until a *prima facie* case had been made by the plaintiff that he was next of kin: *Lane* v. *Gray*, L. R. 16 Eq. 552.

A person who had acted as the foreman of a manufacturer's business, filed a bill against the manufacturer, alleging that the plaintiff was to have a weekly salary, and one-sixth of the profits of the business, and praying an account, and payment of one-sixth of the profits of the business to him accordingly. The defendant by his answer admitted a right to a weekly salary, and to one-twelfth of the profits of the business, coupled, however, with an agreement on the part of the plaintiff, that the latter should take the statements of the defendant as to the profits to be true, and should not demand or question the business transactions, or be entitled to examine or investigate the business books: it was held that he was not compellable to produce them before the hearing, their production not being relevant to the issue whether or not the plaintiff was entitled to a decree for an account: *Turney* v. *Bayley*, 4 DeG. J. & S. 332.

See also *Parker* v. *Wells*, 18 Ch. D. 447; *Wood* v. *Italian Bank*, 34 L. T. 255; and other cases in notes to *Rule* 513, p. 503; also *Johns* v. *James*, 13 Ch. D. 370; *English* v. *Tottie*, 1 Q. B. D. 141.

520. If any party fails to comply with any order for production or inspection of documents, he shall be liable to attachment. If a defendant, he shall be liable to have his defence, if any, struck out, and to be placed in the same position as if he had not defended; and the party who obtained the order for production or inspection may apply to the Court or a Judge for an order to that effect, and an Consequences of disobeying an order for discovery.

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Rule 521.

order may be made accordingly. J. A. Rule 236; Chy. O. 144; 41 V. c. 8, s. 9.

Compare Eng. Rules of 1883, O. 31, r. 21, which is to the same effect, except that the latter also refers to answering interrogatories.

Where a plaintiff fails to comply with an order for production of documents, he is liable to have his action dismissed: *Rule* 648; a plaintiff is also liable to have his action dismissed for neglecting or refusing to attend for examination: *Ib.* A defendant is also liable to have his defence struck out for, (1) neglecting or refusing to attend to be examined, (2) or refusing to be sworn, (3) or refusing to answer lawful questions: see *Rule* 499, and notes.

This provision does not seem to apply in case of disobedience of a notice to produce given under *Rule* 493: see *Merchants' Bank* v. *Pierson*, 8 P. R. 123.

Service of notice on solicitor when sufficient.

521. Where the application for such last mentioned order is made by reason of default in production of books and papers in the Master's office, or pursuant to an order to produce, or in carrying in accounts, service of the notice of motion upon the solicitor of the party required to obey the same, is to be sufficient service. Chy. O. 296.

Motion to commit; service of notice of motion.

The application referred to in this *Rule* is one for an order absolute to commit for non-production of documents in the Master's office, or pursuant to an order to produce, or for not bringing in accounts. Service of a notice of motion to commit is generally required to be personal: *Mann* v. *Perry*, 50 L. J. Chy. 251, and see Gilbert's Chy. Pr. 198-9, but this *Rule* makes an exception to the general rule, in the cases mentioned: *Re Harnden*, *Harnden* v. *Harnden*, 11 P. R. 35; 21 C. L. J. 238.

Formerly the notice of motion to commit for breach of an order, of course was required to be a four clear days' notice: *Gray* v. *Hatch*, 2 Chy. Ch. 12, but two clear days' notice seems now sufficient: *Rule* 479; but see *Exchange Bank* v. *Newell*, 19 C. L. J. 253.

A motion to commit must be made before a Judge in Chambers: *Keefe* v. *Ward*, 18 C. L. J. 166.

Default; how established.

On motions to commit for non-production, or not bringing accounts into the Master's office, the Master is to determine whether the party has been sufficiently notified. The Master's certificate of default is the only evidence of default which is necessary, or can be used: *Paxton* v. *Dryden*, 6 P. R. 83; *Wilson* v. *Wilson*, 7 P. R. 57; but on motions to commit for non-production in the office of the Clerk of Records and Writs, or a Registrar, Local Registrar, Deputy Clerk of the Crown, or Deputy Registrar, it is necessary to prove the due service of the order, and also to produce the certificate of the officer that it has not been complied with: *Ib.*

The certificate of default should bear the latest possible date: *Somerville* v. *Joyce*, 1 Chy. Ch. 202. Such a certificate may be read, though no notice of reading it be given: *Malloch* v. *Plunkett*, 1 Chy. Ch. 381.

Where the order has been complied with, after notice of motion served, the motion will be refused, but the applicant will be entitled to his costs: *Ib.*; *Berrie* v. *Moore*, 1 Chy. Ch. 107.

Discharge from custody, on subsequent obedience.

And even after committal for not bringing in accounts, the party is entitled to be discharged on production of the Master's certificate that the accounts have been brought in, and the sufficiency of the accounts will not be inquired into on the application for discharge, nor will the payment of costs be made a condition precedent of the discharge: *Clark* v. *Clark*, 3 Chy. Ch. 67.

Sufficiency of compliance; how determined.

Where the party has complied with the order, but it is contended his compliance is insufficient, the question of sufficiency must be determined in cases pending in the Master's office, by the Master upon a warrant to bring in a better affidavit, or accounts, as the case may be: *Merkley* v. *Casselman*, 1 Chy. Ch. 292; and see *Wilson* v. *Wilson*, 7 P. R. 57.

But where there is an alleged insufficient compliance with an order in the office of the Clerk of Records and Writs, Registrar, Local Registrar, Deputy Clerk of the Crown, or Deputy Registrar, the question of sufficiency must be determined on motion in Chambers to compel the party to bring in a better affidavit, or in default that he be committed: *Ross* v. *Robertson*, 2 Chy. Ch. 66.

Service of order on solicitor when sufficient.

522. Service of an order for discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may shew in answer to the application that he has had no notice or knowledge of the order. J. A. Rule 237.

Identical with the Eng. R. 1875, O. 31, r. 21, (1883, R. 364, which also includes an order for interrogatories). Chy. G. O. 136, was to the same effect.

This *Rule* was held to apply where after judgment in an action for specific performance, an order was obtained requiring defendant within four days to produce the abstract and all deeds and writings, etc., for the inspection of the plaintiff, and this order was served on the defendant's solicitor: *Joy* v. *Hadley*, 22 Ch. D. 571.

Attachment of solicitor.

523. A solicitor upon whom an order against any party for discovery or inspection is served under the last Rule, who neglects without reasonable excuse to give notice thereof to his client shall be liable to an attachment. J. A. Rule 238.

Same as Eng. R. 1875, O. 31, r. 22, (1883, R. 365).

Rules as to examination, discovery and inspection to apply to parties residing out of Ontario.

524. The preceding Rules as to preliminary examination of parties, and discovery and inspection of documents, shall, so far as practicable, apply to parties residing out of Ontario, and in such cases the Court or Judge may order the examination of the parties to be taken at such place and in such manner as may seem just and convenient, and service of the order for examination, discovery or inspection, and of all other papers necessary to obtain the benefit of the provisions of the said Rules shall be sufficient if made on the solicitor of the party in the action, in the same manner as other papers in the action are served on the solicitor therein; unless the Court or Judge makes other order to the contrary; and if there is no such solicitor, or he cannot for any reason be served, the Court or Judge may order the service in any other manner to be mentioned in the order in that behalf. 41 V. c. 8, s. 9.

See notes to *Rule* 487, p. 485.

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Rules 525, 526.

10 Motions and other Applications.

(i) *Generally.*

Application to Court or Judge to be by motion.

525. Where any application is authorized to be made to the Court or a Judge in an action or proceeding, such application shall be made by motion. J. A. Rule 404.

By the Eng. R. 1875, O. 53, r. 1, (1883, R. 696) it is only to a Divisional Court, or to a Judge sitting in Court, that the application is by motion. When made to a Judge in Chambers, a rule or order to shew cause continues in England to be the course.

A notice of motion for attachment stating that the Court would be moved *at the Royal Courts of Justice* was held sufficient: *Petty* v. *Daniel*, 34 Ch. D. 172.

No rule or order nisi.

526. No summons, rule or order to shew cause shall be granted in any action [or matter]; but when any person other than the applicant is entitled to be heard thereon, he shall be served with a notice of the motion. *See* J. A. Rules 405, 412.

The Eng. R. 1875, O. 53, r. 2, had not the words "or matter," and instead of the last clause, like original *Rule* 405, concluded as follows: "except in the cases in which an application for such rule or order is expressly authorized by these Rules." The Eng. Rule of 1883, R. 697, is different. For want of the omitted words "or matter," there was a difference in England between rules or orders made in actions and those made in "matters."

Thus in motions to set aside an award the old practice was held to prevail: *Re Philips & Gill*, 1 Q. B. D. 78; *Robinson* v. *Robinson*, 24 W. R. 65; 35 L. T. N. S. 337; *Re Ogilvie's Arbitration*, W. N. 1879, 151. But motions against Sheriffs to compel the payment over of moneys levied under an execution: *Delmar* v. *Freemantle*, 3 Ex. D. 237; (but see *Fowler* v. *Ashford*, 45 L. T. N. S. 46); motions to refer back a report to a referee: *Graves* v. *Taylor*, 27 W. R. 412; *Dyke* v. *Cannell*, W. N. 1883, 105; and motions to strike a solicitor off the Rolls: *Re Solicitor*, W. N. 1880, 36; *Re Copp*, 32 W. R. 25, were held not expressly authorized by the *Rules* (prior to 1883, R. 697) to be by rule to shew cause, and therefore should be by notice of motion.

These distinctions probably do not exist in this Province under the wider terms of the above *Rule*.

As to motions to set aside awards, see *Rule* 534.

This *Rule* forbids the granting of a rule to shew cause where an application is made in the County Court against the judgment of a County Court Judge who tries without a jury: *Williams* v. *Crow*, 10 Ont. App. 301.

In *Re Leader Lane Arbitration*, 13 P. R. 163, it was held that a motion on which, before the *Rules*, the applicant was not entitled to be heard may under this *Rule* be made *ex parte*.

In *Hewison* v. *Pembroke*, 6 Ont. 170, Rose, J., held that in motions to quash by-laws the authority to make the motion was not derived from the *Rules* but from s. 322 of the Municipal Act, or s. 334 of 46 Vict. c. 18, and by that section the procedure was to be by rule, more especially since 46 V. c. 18, s. 334, was passed after *The Judicature Act* and *Rules*. Since that decision the Revised Statutes have re-enacted the provisions of above sec. 334 (R. S. O. 1887, c. 184, s. 332), and the Con. *Rules* passed subsequently to the Statutes have repeated the above *Rule* 526. It has therefore been held in *Re Peck & Ameliasburg*, 12 P. R. 664, that on motions to quash by-laws the practice is now derived from the *Rules*, and such motions are therefore no longer to be by rule *nisi*, but by notice of motion under *Rule* 526. In view, however, of the terms of the Mun. Act, (R. S. O., c. 184), s. 332, the notice of motion to quash must be served

four clear days before the day on which the motion is to be made. A notice not sufficient under the last decision, was held to have been waived by demanding affidavits, and obtaining an enlargement of the motion: *Re Farting & Morrisburg*, 9 C. L. T. 109. Rules 527, 528.

Affidavits to be read in support of a notice of motion must be filed before the notice is served: *Rule* 615. Affidavits in answer to a motion must be filed before they can be read but not necessarily filed the day before, as was formerly the practice in Chancery.

Where a party obtained an enlargement on terms to file affidavits, but did not comply with the terms, he was not allowed to read the affidavits: *Campbell* v. *Martin*, 11 P. R. 509.

Notice of motion. When orders *ex parte* can be made.

527. The Court or Judge, if satisfied that the delay caused by proceeding by notice of motion would or might entail irreparable or serious mischief, may make any order *ex parte*, upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or Judge may think just: and any party affected by such order may move to set aside [or vary] the same. J. A. Rule 406.

The Eng. R. 1875, O. 53, r. 3 (1883, R. 698), has not the words, "or vary."

As to what motions are *ex parte*, see Dan. Pr. 5th ed. 1441, 1909, and *Rule* 533.

No order of any moment should be made *ex parte* except in a case of emergency: *Thomas* v. *Storey*, 11 P. R. 417. An *ex parte* order is always taken at the peril of the party, and is liable to be moved against, if improperly made, or if material facts are suppressed on the hearing of it: *Sturgeon* v. *Hooker*, 1 DeG. & S. 484; *Re Gedye*, 15 Beav. 254; *Cartwright* v. *Hinds*, 3 Ont. 384; *Eynes* v. *Fisher*, 4 Ont. 60.

Ex parte orders should be served as soon as possible: *Church* v. *Marsh*, 2 Ha. 652; Dan. Pr. 5th ed. 1436. An order made on a motion on which a party affected appeared, does not necessarily require to be served on such party: *Farden* v. *Richter*, 23 Q. B. D. 124.

A motion for leave to effect substituted service of a notice of motion is *ex parte*: *Hamilton* v. *Davies*, W. N. 1880, 82.

Motions for leave to appeal from a report: *Hamilton* v. *Tweed*, 9 P. R. 448; to stay execution: *G. T. Ry. Co.* v. *Ont. & Quebec Ry. Co.*, 9 P. R. 420; to dismiss an abandoned appeal: *Ormerod* v. *Beausdale*, 54 L. T. N. S. 343; or under *Rule* 566: *Hooey* v. *Gilbert*, 12 P. R. 114, should not be made *ex parte*.

An *ex parte* order for the examination of a witness dangerously ill was upheld as being in accordance with the former Chancery practice: *Baker* v. *Jackson*, 10 P. R. 624.

As to moving against *ex parte* orders: see *Rule* 536 and notes.

Where the party moving does not appear, the motion is called an abandoned motion, and the opposite party is entitled to ask for the costs of it: *Barry* v. *Exchange Trading Co.*, 1 Q. B. D. 77; costs of affidavits prepared but not filed at the date of abandonment were allowed, in *Harrison* v. *Leutner*, 16 Ch. D. 559.

As to proof of service where the opposite party does not appear, see *Smear* v. *Webb*, 25 Ch. D. 84, and note to *Rule* 616.

When guardian to be notified.

528. Where infants are concerned, no order dispensing with payment of money into Court is to be made without notice to the guardian *ad litem* of the infants. J. A. Rule 505.

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Rules 529, 530.

All proper parties not served.

529. If on the hearing of a motion or other application, the Court or Judge is of opinion that any person to whom notice has not been given ought to have had notice, the Court or Judge may either dismiss the motion or application, or adjourn the hearing thereof in order that notice may be given, upon such terms, if any, as the Court or Judge may think fit to impose. J. A. Rule 408.

Identical with Eng. R. 1875, O. 53 r. 5 (1883, R. 701).

Interim alimony.

530. No application for interim alimony shall be made until the time for delivering the defence has expired. Chy. O. 489.

Interim Alimony.—For form of indorsement on writ of claim for interim alimony: see Form 9 (*k*). If the indorsement is omitted, an application for interim alimony may be made, but in such case it will only run from the date of the order; and no costs of the motion will be allowed: *Peterson* v. *Peterson*, 6 P. R. 150.

The application may be made at any time after a statement of defence has been filed: *Gorman* v. *Gorman*, before Proudfoot, V.C., 20th September, 1875; or after the time for delivering it has expired: *Peck* v. *Peck*, 9 P. R. 299; unless the defendant has given notice under *Rule* 738.

The allowance of alimony *pendente lite* depends on the marital relationship between the parties existing *de facto*, and the Court exercises a discretion in granting or withholding alimony *pendente lite* which is regulated by the circumstances of each case: *Walker* v. *Walker*, 10 P. R. 633.

Interim alimony when allowed.

Interim alimony is allowed, when necessary, for the maintenance of the plaintiff: *Soules* v. *Soules*, 3 Gr. 113; *Thompson* v. *Thompson*, L. R. 1 P. & D. 553; but not as of course, and if the plaintiff is shown not to be in need of support, it may be refused: *Bradley* v. *Bradley*, 3 Chy. Ch. 329; *Smith* v. *Smith*, 6 P. R. 51; *Knapp* v. *Knapp*, 12 P. R. 105. Interim alimony is payable from the date of the service of the writ, if there has been no delay in making the application: *Howe* v. *Howe*, 3 Chy. Ch. 494; *Thompson* v. *Thompson*, 9 P. R. 526; 19 C. L. J. 252, and the claim for interim alimony is indorsed on the writ: *Peterson* v. *Peterson*, 6 P. R. 150. Where the plaintiff was living in the defendant's house and brought the action for alimony on the ground of alleged desertion, without alleging cruelty, and the husband by his defence and affidavit offered to resume co-habitation, interim alimony was refused: *Snider* v. *Snider*, 11 P. R. 140; but where it was proved that the plaintiff though living in the defendant's homestead was in need, it was allowed: *Lolande* v. *Lolande*, 11 P. R. 143.

From what date allowed.

Evidence required on motion for interim alimony.

On a motion for interim alimony, it is sufficient if a *de facto* marriage be proved: *Taylor* v. *Taylor*, 1 Chy. Ch. 234; its validity cannot be inquired into: *Bradley* v. *Bradley*, *supra*; *Nolan* v. *Nolan*, 1 Chy. Ch. 368; *Carr* v. *Carr*, 2 Chy. Ch. 71; *Walker* v. *Walker*, 10 P. R. 363; nor can any question affecting the merits of the action; thus, alleged adultery by plaintiff cannot be raised on such an application: *Campbell* v. *Campbell*, 6 P. R. 128; nor the question whether the plaintiff is justified in leaving the defendant: *Wilson* v. *Wilson*, *Ib.*, 129; *Keith* v. *Keith*, 7 P. R. 41.

Plaintiff must undertake to proceed to trial at next sittings.

The plaintiff is usually required to undertake to proceed to a trial of the action at the next sittings; but where the defendant neglected to pay the alimony, and the plaintiff was left without means of taking the case to trial, the undertaking was extended: *Bowslaugh* v. *Bowslaugh*, 6 P. R. 200; and where the cause had been entered for trial, it was ordered to stand over, until a sum sufficient to pay plaintiff's witnesses was paid by defendant: *Haffey* v. *Haffey*, 7 P. R. 137.

Rule 530.

It would seem that the plaintiff's solicitor has no lien for his costs on moneys paid to him for interim alimony: *Cross* v. *Cross*, 43 L. T. N. S. 533; and see *Re Robinson*, 77 L. T. Jour. 23; *Leete* v. *Leete*, 40 L. T. N. S. 788.

Where interim alimony had not been applied for, the Court refused to order the permanent alimony to run from a date prior to the decree: *Soules* v. *Soules*, 3 Gr. 113. But where the husband had agreed to a separation, and to pay the plaintiff an allowance, the Court awarded permanent alimony at the rate agreed to be paid by defendant, and directed payment from the date of the writ, though no application had been made for interim alimony: *Mallory* v. *Mallory*, before Boyd, C., at Cobourg, 2nd April, 1883; and permanent alimony has been granted from the service of the writ, where no application for interim alimony was made, and judgment was obtained on motion in default of defence (the notice of motion for judgment, stating that it would be so asked): *Hagarty* v. *Hagarty*, before Boyd, C., 11th Feb., 1885.

Where interim alimony not applied for, permanent alimony ordered only from date of service of writ. Exception to rule.

The payment of interim alimony has been stayed until the plaintiff produced on oath books and papers which she had taken from her husband, and which deprived him of the means of paying it: *Old* v. *Old*, 9 P. R. 552.

Where, after an order for interim alimony, the wife returned to her husband's house, and resided there for some time, but was afterwards compelled to leave, by reason of cruelty; a motion to set aside the order for interim alimony on the ground of condonation was refused: *Maxwell* v. *Maxwell*, 1 Chy. Ch. 27.

Motion to set aside order.

An order cannot be made in Chambers, even on consent, for payment of permanent alimony, as that is equivalent to a judgment in the action: see *Craig* v. *Craig*, 1 Chy. Ch. 41.

Amount to be Allowed.—There is no fixed rule as to the amount to be allowed for interim alimony. In England, the rule is usually to allow about one-fifth of the annual income of the husband, but it is in the discretion of the Court, and may vary according to the circumstances of the case. But in this Province a percentage on the income is not always the measure for the allowance, and the value of the defendant's labour may also be taken into account: *McCulloch* v. *McCulloch*, 10 Gr. 320. The allowance is usually less than would be allowed as permanent alimony, the wife being bound *pendente lite* to live in retirement and seclusion: Coote Eccl. Pr. 338; *Rees* v. *Rees*, 3 Phill. 389; *Hawkes* v. *Hawkes*, 1 Hagg. 526; *Otway* v. *Otway*, 2 Phill. 108. As to the effect of *The Married Women's Property Act*, on the right to alimony, see *Wilson* v. *Wilson*, 2 Hagg. 204; *Milne* v. *Milne*, 2 L. R. P. & M. 202; 23 L. T. N. S. 877.

Amount to be allowed for interim alimony.

Where the defendant had agreed to pay the plaintiff an allowance for her separate maintenance, and subsequently a suit was brought for alimony, and for specific performance of the agreement, and the plaintiff obtained an order for interim alimony, and subsequently a decree for specific performance, it was held that the plaintiff was bound to credit the sums received as interim alimony on account of the sums payable under the agreement: *Maxwell* v. *Maxwell*, 7 P. R. 63.

Where a plaintiff in an alimony suit improperly registered a *lis pendens* the certificate was vacated, and the costs of the motion were ordered to be deducted from the interim alimony: *Crandell* v. *Crandell*, 20 C. L. J. 329. See *White* v. *White*, 6 P. R. 208, and notes to *Rule* 243, p. 280.

Costs.—In addition to interim alimony, the plaintiff is also entitled to an order for payment *de die in diem* of the cash disbursements, properly made by her solicitor: *Rule* 1185.

Costs *de die in diem.*

These disbursements do not include fees to agents for solicitor's services, but fees to counsel, even where the solicitor or his partner, is the counsel, may be included: *Bradley* v. *Bradley*, 10 P. R. 571; 21 C. L. J. 141; *Ingram* v. *Ingram*, 10 P. R. 569; *Maguru* v. *Maguru*, 10 P. R. 570; but see observations of Osler, J.A., in this case, and *Lolande* v. *Lolande*, 11 P. R. 143, where Proudfoot, J., refused to follow *Maguru* v. *Maguru*, *supra*. But where an order for interim alimony was granted (the defendant not appearing on the motion), for the amount indorsed on the bill, and the defendant subsequently moved to reduce the amount as excessive; a reference was granted, on payment of full costs of the application: *Hooper* v. *Hooper*, 3 Chy. Ch. 114.

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Rules 531-534.

Where before trial an alimony suit is compromised by the parties, the plaintiff returning to co-habitation with the defendant, the solicitor of the plaintiff is not entitled to his costs from the defendant as between solicitor and client, but only to cash disbursements: *Ringrove* v. *Ringrove*, 10 P. R. 299, 596, overruling *Leonard* v. *Leonard*, 9 P. R. 450; *Moore* v. *Moore*, 10 P. R. 284; and see *Thompson* v. *Thompson*, 57 L. T. N. S. 374; but see *Rule* 1170; *Ferris* v. *Ferris*, 7 Ont. 496; *Re Friedburg*, 10 P. D. 112.

Registration of order.

Registration of Order.—An order for payment of interim alimony and disbursements may be registered; see R. S. O. 1887 c. 44, s. 30, *supra* p. 23. *Miller* v. *Miller*, 8 C. L. T. 120.

Adjournment.

531. The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or Judge shall think fit. J. A. Rule 409.

Identical with the Eng. R. 1875, O. 53, r. 6 (1883, R. 702).

Service before appearance.

532. The plaintiff shall, without any special leave, be at liberty to serve any notice of motion or other notice, or any petition upon any defendant, who, having been duly served with a writ of summons to appear in the action, has not appeared within the time limited for that purpose. J. A. Rule 410.

Identical with the Eng. R. 1875, O. 53, r. 7 (1883 R. 703).

Service with writ or before time for appearance.

533. The plaintiff may [also, without any special leave] serve a notice of motion for an injunction, and may, by leave of the Court or a Judge to be obtained *ex parte*, serve any [other] notice of motion, upon any defendant along with the writ of summons, or at any time after issue of the writ of summons, and before the time limited for the appearance of such defendant. J. A. Rule 411.

The words in brackets which were not in the Eng. R. 1875, O. 53, r. 8, are in that of 1883, R. 704; the *Rules* are otherwise the same. The above *Rule* thus makes a distinction between notices of motion for an injunction and other notices of motion, authorizing the former to be served before appearance, without leave, but requiring leave for such service in the case of other notices of motion. The English Rule requires previous leave, in all cases in which notice is served before the time limited for appearance, but the corresponding Irish Rule was held in *French* v. *Colles*, 17 L. R. Ir. 238, not to apply to injunctions.

Where an affidavit was sworn before the issue of the writ, an injunction was granted *ex parte* on the undertaking of counsel to have the affidavit re-sworn and filed: *Green* v. *Prior*, W. N. 1886, 50.

Irregularity to be stated in notice.

534. A notice of motion to set aside any proceeding for irregularity must specify clearly the irregularity complained of and the several objections intended to be insisted on. Chy. O. 277. Rules T. T. 1856, 107.

This *Rule* is to the same effect as Eng. R. of 1883, 1039, and is in accordance with the former Chy. Practice; see *Poole* v. *Poole*, 2 Chy. Ch. 379; *Donelly* *Jones*, 4 Chy. Ch. 48; *O'Reilly* v. *Moore*, 1 C. L. T. 565.

It may be sufficient if the notice refers to grounds of irregularity appearing in the affidavits. Where an irregularity complained of, was not thus specified, the motion was dismissed, though the irregularity was proved: *Dominion S. & I. Co.* v. *Kilroy*, 12 P. R. 19; see also *Blain* v. *Blain*, 9 P. R. 269; and *Petty* v. *Daniel*, 34 Ch. D. 172. Rules 535-537.

A party moving against an irregularity must himself be regular, and is not entitled to any indulgence: *Scott* v. *Burnham*, 3 Chy. Ch. 399; *Waterous* v. *Farran*, 6 P. R. 31; *Poole* v. *Poole*, 2 Chy. Ch. 379; *Donelly* v. *Jones*, 4 Chy. Ch. 48; he must move promptly: *Miller* v. *Miller*, 9 U. C. L. J. 132; and before taking a fresh step in the action: *Manning* v. *Birely*, 2 C. L. J. 331; *Larkin* v. *Armstrong*, 1 Chy. Ch. 31; *Mulkern* v. *Doerks*, 51 L. T. N. S. 429; *Fry* v. *Moore*, 23 Q. B. D. 395; or making any demand respecting the alleged irregular proceedings which would put the opposite party to expense: *Carpenter* v. *Hamilton*, 2 Chy. Ch. 282; *Bennett* v. *O'Meara*, 2 Chy. Ch. 167; *Re Farlinger and Morrisburg*, 9 C. L. T. 109; or he may be held to have waived the irregularity. Party moving must be regular, and move promptly.

Proceedings that are merely irregular are valid until set aside, but a nullity has no effect whatever: *Fuller* v. *McLean*, 8 P. R. 549.

535. Every notice of motion by way of appeal or to set aside an award shall specify the grounds intended to be insisted on. *See* Rules T. T. 1856, 141. Motion against award.

536. Any party affected by an *ex parte* order, except the party issuing the same, may move to rescind or vary the same before the Judge or officer who made the order, or any Judge or officer having jurisdiction, within four days from the time of its coming to his notice, or within such further time as the Court or Judge may allow, and whether it has been acted upon by the party issuing the order or not. *New.* *Ex parte* orders may be moved against.

This *Rule* was passed to meet the objections and difficulties raised in *Ryan* v. *Canada Southern Ry. Co.*, 10 P. R. 535; *McNabb* v. *Oppenheimer*, 11 P. R. 214, and *Taylor* v. *Sisters of Charity*, *ib.* 496; see *Hughes* v. *Field*, 9 P. R. 127.

See also *Boyle* v. *Sacker*, 39 Ch. D. 249.

In *Reid* v. *Trimmer*, 9 C. L. T. 391, it was held that where an order made after an enlargement was refused, and the opposing party had no material in answer to the motion, the order was not an *ex parte* one and a motion against it should be by way of appeal.

An *ex parte* order in general should be served: see Dan. Pr., 5th ed. 1436; an order made on a motion, on which a party affected by the order was represented, does not require to be served on such party: *Farden* v. *Richter*, 23 Q. B. D. 124.

537. All motions, ~~demurrers~~, special cases, appeals and other matters to be heard in Court at the weekly sittings, except *ex parte* applications, shall be set down for argument in the office of the Clerk of Records and Writs, who shall post up in a convenient place a list of the cases so set down, not later than the day before the day for which the same are so set down, and shall furnish a copy of such list Setting down motions.

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Rules 538-540.

to the Registrar or other officer who is to attend the sittings of the Court. *See* J. A. Rule 600.

The operation of this *Rule*, so far as it directs the setting down to be with the Clerk of R. & W., is probably postponed with *Rules* 210-212. The former mode of setting down is in practice still followed.

Mode of setting down motions.

538. All motions and applications to the Court required to be set down for argument, and all appeals, ~~demurrers~~ and special cases shall be set down by delivering to the proper officer a *præcipe* specifying the matter to be set down and the day for argument thereof, and requiring him to set the same down. ~~When a married woman, infant, or person of unsound mind is a party to the action, a copy of the order giving leave to enter a special case for argument shall also be produced.~~ J. A. Rule 202, 252.

Original *Rule* 202 was the same as the Eng. R. 1875, O. 28, r. 13.

Original *Rule* 252 was the same as the Eng. R. 1875, O. 34, r. 5 (1883, R. 393.

As to demurrer-books, and notice to the opposite party, see *Rule* 540.

A special case must be argued before a single Judge, unless all parties agree to its being heard before a Divisional Court: see ss. 61, and 62, of the Act and *Rule* 219.

Setting down demurrer.

539. Where a demurrer either to the whole or part of a pleading is delivered, either party may enter the demurrer for argument immediately, and the party so entering such demurrer shall, on the same day, give notice thereof to the other party. J. A. Rule 195, *first part*.

For form of entry of demurrer for argument, see Appendix Form No. 99; and of notice of entry, No. 28. As to service of an order for leave to amend, see *Rule* 390.

Where there are cross-demurrers, and the burden of proof is on defendant, so that if he fails his cross-demurrer becomes immaterial, he will be entitled to begin: *Clark* v. *Bradlaugh*, 7 Q. B. D. 38.

Setting down demurrers and special cases.

Copy of demurrer book or case to be left for Judge.

540. ~~Demurrers and~~ special cases shall be set down to be heard, and notice thereof given to the opposite party, 6 clear days before the day on which ~~they are~~ to be heard; and a copy of ~~the~~ demurrer book, ~~or of~~ the special case, shall be left at the office of the Clerk of Records and Writs, for the use of the Judge before whom the ~~demurrer, or~~ special case, is to be heard, 2 days before the day appointed for the hearing. Rules H. C. J., v., vi.

See notes to *Rule* 386.

The demurrer-book in cases in the Q. B. and C. P. Divisions will be left with the officer who sits in the Court each week, until such time as *Rules* 210-212 are brought into force: see note to *Rule* 537.

541. All other motions and applications to the Court, except *ex parte* applications, are to be set down at latest on the day before the day of argument, unless the Court otherwise orders. *New.*

Rules 541, 542. Time for setting down.

(ii.) *Application at Chambers.*

The matters which may be disposed of in Chambers are too numerous to specify in detail. Some of them are enumerated in the notes to *Rule* 542. Those applications which may be entertained by the Master in Chambers, and Local Judges and Masters, are specified in *Rules* 30, 41, and 138.

A Judge has jurisdiction to make an order which can be made in Chambers, when sitting in his private room: *Hartmont* v. *Foster*, 8 Q. B. D. 82.

542. The following business shall be disposed of in Chambers, together with such other matters as the Court from time to time thinks may be more conveniently disposed of there than in Court, viz.:—

Business to be transacted in Chambers.

1. For the sale of the estates of infants, under the Revised Statutes of Ontario.

2. As to the guardianship, maintenance and advancement of infants;

3. For the administration of estates upon motion, without action;

4. Relating to the conduct of actions or matters;

5. As to matters connected with the management of property;

6. For the payment into Court of moneys, by parties desiring on their own behalf to pay the same. Chy. O. 197.

Additional cases to which jurisdiction in Chambers extends:

The jurisdiction in Chambers extends to other matters, in addition to the business enumerated in *Rule* 542, *e.g.*:—

Applications to set aside, fraudulent conveyances by judgment debtors.

1. Summary applications to set aside fraudulent conveyances by execution debtors: *Rule* 1007; or for sale of equitable interests of execution debtors in lands: *Rule* 1008. Applications of this kind could formerly only be made to a Judge: *Queen* v. *Smith*, 7 P. R. 429; but now the Master in Chambers, Local Judges, and Local Masters, appear to have jurisdiction. Formerly in such cases the application was made for an order *nisi*: *Wark* v. *Moulton*, 7 P. R. 144, but now the proper mode of procedure is to serve a notice of motion: *Rules* 526, 479. Substituted service on an absconding execution debtor may be allowed: *Dobson* v. *Marshall*, 9 P. R. 1. The debtor may be ordered to pay the costs of an application for sale: *Watts* v. *Hobson*, 7 P. R. 334.

Motions for judgment in mortgage cases

2. Motions for judgment in ordinary mortgage actions, for sale or foreclosure, or for redemption, where infants are concerned: see *Rule* 717. The Master in Chambers, Official Referees when sitting for him, and Local Judges, and in the cases mentioned in *Rule* 138 the Local Masters, have jurisdiction to entertain such applications.

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Rule 542.

Partition.

3. Motions for judgment by adult parties, in actions for partition, under *Rules* 989, 990: motions of this kind cannot be entertained by the Master in Chambers: *Re Arnott, Chatterton* v. *Chatterton*, 8 P. R. 39; but are in certain cases within the jurisdiction of the Local Masters, but not of the County Court Judges, unless they be also Local Masters. See *Rule* 41, which in effect limits the jurisdiction of the County Court Judges, who are not Masters, to that exercised by the Master in Chambers.

Administration.

4. Motions for judgment on summary applications for administration, may also be made in certain cases, to Local Masters, under *Rule* 972; motions of this kind may also be made to the Master in Chambers: *Rule* 965; and County Court Judges who are not Local Masters, but if opposed, their jurisdiction is excluded under *Rule* 30; but opposed applications for administration are not excluded from the jurisdiction of the Local Masters; see *Rule* 972. As to procedure on motions for administration: see *Rules* 965, *et seq.* and notes.

For judgment under *Rule* 739.

5. Motions for leave to enter judgment after appearance to a specially indorsed writ, under *Rule* 739.

To convey free from dower.

6. Applications to enable the owner of land, to convey free from the dower of his wife, under R. S. O. c. 133, ss. 9, 10 and 11; *Re Eagles*, 7 P. R. 241; *Re Campbell*, 25 Gr. 187, 480; but it seems probable that applications of this kind can only be entertained by a Judge.

To appoint, or dispense with appointment of, representative of estate.

7. Applications to appoint, or to dispense with the appointment of, a person to represent the estate of a deceased person under *Rule* 310. The Master in Chambers, Official Referee sitting for him, and County Court Judges; and Local Masters when acting under *Rule* 138, have jurisdiction to entertain such applications: *Collver* v. *Swayzie*, 8 P. R. 42.

Habeas corpus.

8. Applications for writs of *habeas corpus* may be made to a Judge in Chambers; R. S. O. c. 70; *Re Paton*, 4 Gr. 147. As to whether a Judge can in Chambers rescind his own order for a writ of *habeas corpus*, or quash the writ itself on the ground that it issued improvidently, see *Re Ross*, 3 P. R. 301. The Master in Chambers, Local Judges, and Local Masters, cannot entertain applications of this kind: *Rules* 30, 41, 138.

For declaration of lunacy.

9. Applications to declare a person a lunatic under R. S. O. c. 54, s. 8; *Re Paton*, 1 Chy. Ch. 192; *Re Flemming*, 13 C. L. J. N. S. 197; *Re Kelly*, 6 P. R. 220, or for a commission *de lunatico*: *Re Stuart*, 4 Gr. 44. The supposed lunatic is entitled to notice of the application: *Re Miller*, 1 Chy. Ch. 215, unless the Court on proper evidence of its being dangerous, or useless, to serve him, dispenses with service: *Re Newman*, 2 Chy. Ch. 390; *Re Mein*, *Ib.*, 429. Applications of this kind can only be made before a Judge: see *Rule* 30, (3); but where an order has been made declaring the lunacy, the Master in Chambers has jurisdiction to entertain applications respecting the property of the lunatic, under R. S. O. c. 54, s. 11, *et seq.*

Applications in Chambers, to whom to be made:

When Master in Chambers has no jurisdiction, matters may be brought before a Judge.

Applications proper to be made in Chambers, but which are excluded from the jurisdiction of the Master in Chambers, Official Referee, Local Masters, and County Court Judges, may be made before a Judge of the High Court in Chambers. In the Queen's Bench, and Common Pleas Divisions, a Judge sits in Chambers on Tuesday and Friday, and in the Chancery Division on Monday, in each week, except in vacation, when special arrangements are made.

Applications which can be made in Chambers should be made there, and not in Court: *Moffatt* v. *Ruddle*, 4 Gr. 44; *Anon Ib.*, 61; or the costs may be refused: *Murney* v. *Courtney*, 16 Gr. 52; or allowed only as of a motion in Chambers: *King* v. *Connor*, 10 Gr. 364.

The Master in Chambers, County Court Judges, or Local Masters, may refer matters proper for the decision of a Judge of the High Court to a Judge of the High Court: see *Rules* 32 and 42.

Matters not to be unnecessarily brought before a Judge.

Matters coming before any officer of the Court having jurisdiction in Chambers, should not be referred to a Judge because the parties desire it, but only when the officer can certify that it is a proper case to be heard before a Judge; and matters improperly referred to a Judge will not be entertained: *Hughes* v. *Rees*, 9 P. R. 86.

Sale of Infants' Estates.—As to the mode of proceeding for sale of infants' estate, see R. S. O. c. 137, ss. 3, 4, and *Rule* 994 *et seq.* and notes. Rule 543. Sale of infants' estates.

Guardianship, and Maintenance, etc., of Infants.—As to mode of proceeding for appointment of guardians, see *Rules* 996, 997; opposed applications respecting the guardianship of the person, or property, of infants, are excluded from the jurisdiction of the Master in Chambers, see *Rule* 30 (9), and also from that of the Local Judges: *Rule* 41; and Local Masters: *Rule* 138. The authority of the High Court is not excluded by R. S. O. c. 137, ss. 10-12: *Re Stannard*, 1 Chy. Ch. 15. Guardianship of infants.

Applications respecting the custody of infants under R. S. O. c. 137, s. 1, may be made to a Judge in Chambers: see *Re Davis*, 3 Chy. Ch. 277; *Re Keith*, 7 P. R. 138; *Re Eves*, 15 Gr. 580; *Re Murdoch*, 9 P. R. 132; *Re Smith*, 8 P. R. 23; *Re Scott*, *Ib.* 58; *Re Ferguson*, *Ib.* 556; but not to the Master in Chambers: see *Rule* 30, (6); nor to the Local Judges: *Rule* 41; nor to the Local Masters: *Rule* 138.

Injunctions, and Receivers.—Applications for injunctions and receivers, are usually made in Court, but where a receiver has been appointed and dies, the application for the appointment of another in his place may be made in Chambers: *Grote* v. *Bing*, 9 Hare App. 1; but the appointment was made in the first instance in Chambers, by consent in *Blackborough* v. *Ravenhill*, 16 Jur. 1085, and in a proceeding originating in Chambers, 22 Sol. Jour. 914. Injunctions, and receivers.

Appeals from the Master in Chambers, Local Masters, County Court Judges, or Official Referees, where exercising the jurisdiction of the Master in Chambers: *Rule* 846; and also appeals from the taxation of costs: *Rule* 851, may now be brought before a Judge in Chambers. Appeals.

Motions to Commit.—Motions to commit for contempt, by reason of disobedience of an order in Chambers, or a *præcipe* order, may be made in Chambers, but where the disobedience is of a court order the motion should be made in Court: *Verral* v. *Hardy*, 9 C. L. T. 310, following *Klein* v. *Union Fire Ins. Co.*, 3 C. L. T. 601.

543. An order shall be in the Form No. 120 in the Appendix hereto, with such variations as circumstances require. It shall be (*a*) marked with the name of the Judge or officer by whom it is made. J. A. Rule 413. Form of order.

(*a*) The Eng. R. 39 of April 1880, has here the additional words "sealed and." The two *Rules* are otherwise the same.

Orders in Chambers should be dated on the day on which they are finally made, and should not be ante-dated, nor contain recitals of affidavits sworn after the date of the order: *Ashley* v. *Taylor*, 10 Ch. D. 768; nor upon an application by a defendant against the plaintiff, should the order be drawn up stating that a co-defendant appeared who, in fact did appear, but who had not been served with the notice or summons: *Evelyn* v. *Evelyn*, 28 W. R. 531.

Where an order is expressed to last until a particular day "or until further order," the words "further order" mean an order made on an earlier day than the day specified: *Bolton* v. *London School Board*, 7 Ch. D. 766.

Where an order is made by consent without mistake, such consent cannot be withdrawn, even before the order is passed and entered: *Harvey* v. *Croydon*, 26 Ch. D. 247, over-ruling *Rogers* v. *Horn*, 26 W. R. 432: see also *Holt* v. *Jesse*, 3 Ch. D. 177: *Elsas* v. *Williams*, *infra*; *Re West Devon Coal Mines*, 38 Ch. D. 51; 58 L. T. N. S. 61. But the Court has jurisdiction to discharge an order made on an interlocutory application by consent where it is proved to have been made under a mistake, though that mistake was on one side only: *Mullins* v. *Howell*, 11 Ch. D. 763; and even a judgment pronounced by consent has been given on the faith of an instrument being genuine, which afterwards turned out to be a forgery: *Priestman* v. *Thomas*, 9 P. D. 210; 51 L. T. N. S. 843; but a consent order will not be set aside because one of the parties finds it to

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Rules 544-547.

be less beneficial than he expected: *Cousineau* v. *London Fire Insurance Co.* 12 P. R. 512; *Powell* v. *Smith*, L. R. 14 Eq. 85; *Midland and G. W. Ry. Co.* v. *Johnson*, 6 H. L. C. at p. 811.

A consent to a perpetual injunction was not allowed to be withdrawn merely because the defendant afterwards discovered that he had a defence: *Elsas* v. *Williams*, 52 L. T. N. S. 39; 54 L. J. Chy. 336.

Where the Judge at the trial ruled adversely to the defendant, but in compliance with the request of his counsel modified his ruling; it was held that the judgment was not by consent, and defendant was not precluded from moving against it: *Sweeney* v. *Sweeney*, 16 Ont. 92.

A defendant gave an undertaking at the hearing to make certain payments to the plaintiff; the order was drawn up two or three weeks later, and the undertaking was embodied in it; the undertaking was given under a misapprehension of fact; but application to discharge the defendant from the undertaking was refused, on the ground that the facts were ascertainable by the defendant, and that the application was under these circumstances too late: *Attorney-General* v. *Tomline*, 7 Ch. D. 388.

Clerk to sign orders in Judge's Chambers.

544. All orders made by a Judge of the High Court in Chambers in Toronto shall be signed by the Clerk in Chambers, whose duty it shall be to see that such orders are in due form before signing the same. J. A. Rule 582.

Appeals.

545. Every appeal to be heard in Chambers shall be set down for argument with the Clerk ~~of Records and Writs~~ at latest on the day before the day of argument, and a list of cases to be heard on any day shall be prepared and exposed as soon as the time expires for setting down cases for that day. *New.*

This *Rule* is considered to apply at present in the Chy. Div., where the practice has been in accordance with it, but its general operation is postponed with *Rules* 210-212.

Certain orders to be entered in full.

546. All orders for administration, or partition, made in Chambers shall be drawn up as judgments and entered in like manner as other judgments are required to be entered. All orders declaring persons lunatics, or for the sale of infants' estates, or for payment of money into, or out of, Court, or for continuing proceedings upon the death or transmission of interest of any party to an action, and all final orders of sale or foreclosure, and all vesting orders, shall be entered in full in a book to be provided for the purpose, before the same shall be issued or acted on. J. A. Rule 583.

Where account taken in Chambers

547. Where an account is taken in Chambers, special directions may be given with respect to the mode in which the account is to be taken and vouched; and the proceedings shall be as nearly as may be the same as upon a refer-

ence to a Master under Rules 63 to 66 and 46 to 48. *See* Chy. O. 200. Rules 848-850.

Accounts are now rarely taken in Chambers, except in infancy matters; a reference to the Master being usually directed.

548. The Court may adjourn for consideration in Chambers any matter which, in the opinion of the Court, may be disposed of more conveniently in Chambers; and any matter pending in Chambers may be adjourned to open Court; and such matter may be so adjourned at the request of either party, subject to such order as to costs or otherwise as the Court thinks right to impose. Chy. O. 203. Matters may be adjourned from Court to Chambers, or *vice versa*.

549. A Judge sitting in Chambers may exercise the same power and jurisdiction, in respect of the business brought before him, as is exercised by the Court; all orders made by a Judge in Chambers are to have the force and effect of orders of the Court; and all or any of the powers, authorities, and jurisdictions, given to the Master by any Act or Acts now in force, or by any Rule of the Court, may be exercised by a Judge in Chambers. Chy. O. 210. Judge in Chambers may exercise powers of Court, and also powers of the Master.

For the general powers conferred on Masters by these *Rules*, see *Rules* 46-88.

As regards the conducting of sales, settling conveyances and investigating titles, see *Rules* 89-115.

As regards the appointment of receivers and committees of lunatics, and passing their accounts, see *Rules* 116-123; and as regards actions for foreclosure, sale and redemption, see *Rules* 124-137.

11. Inquiries and Accounts.

550. The Court will not refer to arbitration. *New.* Arbitration.

Prior to this *Rule* there were three modes of referring matters not adjudicated upon at the trial: (1) to a Master, under the former Chy. Pr.; (2) to an arbitrator or referee, under secs. 189, 195 and 197 of the *C. L. P. Act* (R. S. O. 1877 c. 50), re-enacted in the R. S. O. 1887, c. 53, ss. 1, 7 and 9; (3) to an Official Referee under the Jud. Act. (see secs. 101 and 102 *supra* pp. 95-101.

The object of this *Rule*, in conjunction with *Rules* 35, 36, 848-850, was to simplify and make more uniform the practice. Accordingly this *Rule* abolishes (see 51 V., c. 4, s. 4, Ont.) the modes of referring questions otherwise than to a Master or Official Referee; *Rule* 35 makes uniform the practice on references to a Master or Referee of such matters as may be referred to a Master, or a Referee, under sec. 101 of the Act; *Rule* 36 provides the practice on references to a Referee under sec. 102 of the Act; and *Rules* 848-50 provide a uniform mode of appeal from the Masters and Referees.

The R. S. O. 1887, c. 53 respecting arbitrations can have now little, if any, operation except in regard to voluntary references out of Court.

See also notes to sec. 104, *supra* p. 101.

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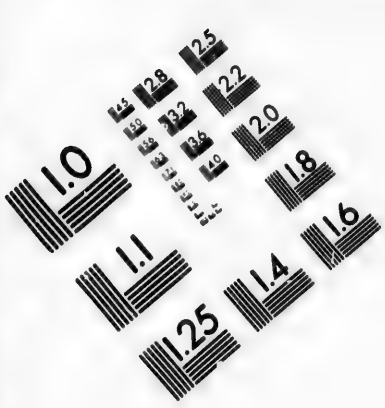
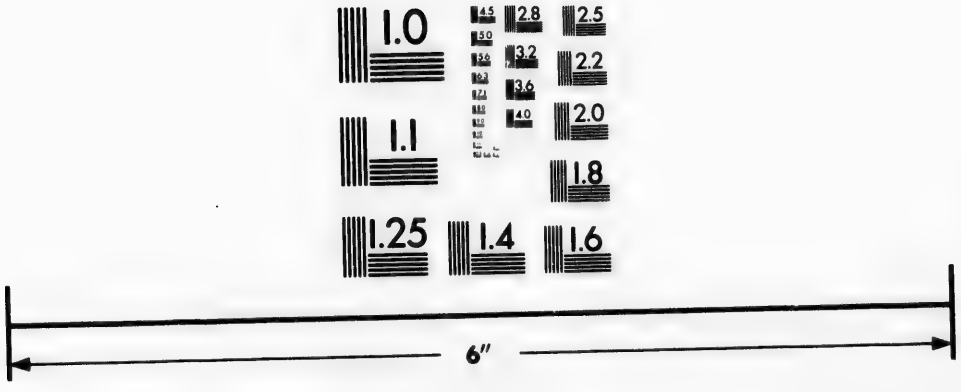
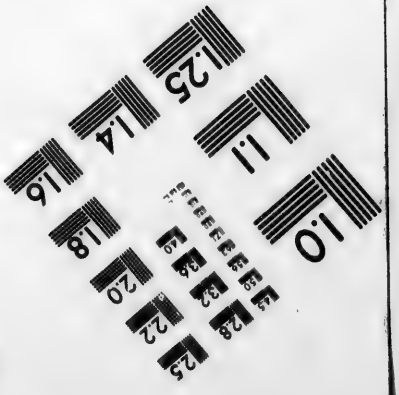




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Rules 551, 552. Reference at any stage.

551. The Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner. J. A. Rule 244.

Identical with the Eng. R. 1875, O. 33 (1883, R. 381).

A reference under this *Rule* may be to a Master, or other proper officer, or to an Official Referee, under sec. 101 of the Act. See notes to that section.

An inquiry was directed in *West London Dairy Soc.* v. *Abbott*, 29 W. R. 584; 44 L. T. N. S. 376, as to a question of fact, leaving questions of law for subsequent determination; and in *Turquand* v. *Wilson*, 1 Ch. D. 85, for taking of accounts of a partnership which defendant had admitted, by answer filed before the Judicature Act.

An order may sometimes be made under the combined authority of this *Rule* and *Rule* 757. See notes to that *Rule* and *Turquand* v. *Wilson*, *supra*; see also *Re Barker's Estate*, 10 Ch. D. 165-6; *Rolfe* v. *Maclaren*, 3 Ch. D. 106; *Rumsey* v. *Reade*, 1 Ch. D. 643.

An order under this *Rule* is not proper, where the issue in the action becomes thus liable to be tried on the reference: *Garnham* v. *Skipper*, 29 Ch. D. 566; see also *Macdonald* v. *Piper*, 10 P. R. 586.

By a judgment to set aside a contract and cancel a conveyance, an account was ordered to be taken, of moneys expended by the plaintiffs and received by them in respect of the purchased property, and a lien was given them for purchase money and any balance on the taking of the accounts. The defendants were in liquidation, and had no assets except the property. Taking of accounts was stayed as a useless expense, because the amounts due to the plaintiffs must in any case exceed the value of the property, with liberty to the defendants to proceed with the accounts at any time on giving security to abide by the Judge's order as to costs: *Exchange, etc.* v. *Ass. of Land Financiers*, 34 Ch. D. 195.

Provisions of reference to official or other referee.

552. Where a reference is made to any Official or other Referee under the Judicature Act, the Referee shall have all the powers as to certifying and amending of a Judge of the High Court of Justice, and shall make his report of and concerning the matters ordered to be tried pursuant to the statute;

(*a*) The Referee may, if he thinks fit, examine the parties to the action, and their respective witnesses, upon oath or affirmation, and the parties shall produce before the referee all books, deeds, papers and writings in their or either of their custody or power relating to the matters ordered to be tried;

(*b*) Neither the plaintiff nor the defendant shall bring or prosecute any action against the Referee, or against each other, of or concerning the matters ordered to be tried, and if either party by affected delay or otherwise wilfully prevents the Referee from making his report, he or they shall

pay such costs to the other as the High Court, or any Judge thereof, may think reasonable and just; Rules 553, 554,

(*c*) In the event of the Referee declining to act, or dying before he has made his report, the parties may, or if they cannot agree, one of the Judges of the High Court may, upon application by either party, appoint a new Referee. J. A. Rule 245.

This *Rule* is taken from Form H. 32 in the Schedule appended to Eng. R. Sup. C., April, 1880. That was the form of an order for trial under the section corresponding to section 102 of the Act. The expression "the matters ordered to be tried" in the first clause, and clause (*a*), also indicates that this *Rule* only applies to references under section 102 "for trial" and not to references under section 101 "for inquiry and report."

Form 139 in the Appendix gives the form of an order under section 101, of the Act, and it is similar to the English form.

Form 140 is the form of order under section 102 of the Act. The English form contains the directions, etc., contained in this *Rule*. The present *Rule* and *Rule* 553 render unnecessary and improper the specification of these directions in orders in Ontario.

Clause (*c*) enables a Judge of the High Court to appoint a new Referee. The Master in Chambers has therefore no jurisdiction in the matter. See *Rules* 21 and 30.

Where an action has been referred under section 102, *quære* whether the Referee under this *Rule* has power to issue an order or direction for production like a Master; or whether an order on *præcipe* may still be obtained: see *Hilderbroom* v. *McDonald*, 8 P. R. 389. The Court may make an order: see *Re Leigh, Rowcliffe* v. *Leigh*, 4 Ch. D. 661; *Dauvillier* v. *Myers*, 17 Ch. D. 346; *Cochrane* v. *Morrison*, 10 P. R. 606. If the order of reference is made at a Sittings where the case has been brought down for trial, production will ordinarily have been previously obtained under *Rule* 508.

553. An order under the next preceding Rule shall be read as if it contained the provisions set forth in the said Rule, and shall not set forth the said provisions, but may contain any variation therefrom, and any other directions which the Court or Judge sees fit to make. J. A. Rule 247. Orders to be read as containing above provisions.

See notes to *Rules* 552.

12. Special Cases.

554. The parties may after the writ of summons has been issued in any action, or in any pending matter not commenced by writ, concur in stating the questions of law arising in the action or matter in the form of a special case for the opinion of the Court; Parties may concur in stating special case.

Compare Eng. R. 1875, O. 34, r. 1; that of 1883, R. 389, was, like this *Rule*, made to apply not merely in an action.

(*a*) The parties to a special case may, if they think fit, enter into an agreement in writing, that on the judgment

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Rule 554. of the Court being given in the affirmative or negative of the question or questions of law raised by the special case, a sum of money, fixed by the parties, or to be ascertained by the Court or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, either with or without costs of the action or matter; and the judgment of the Court may be entered for the sum so agreed or ascertained, with or without costs, as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless stayed on appeal;

Compare Eng. R. 9 of April, 1880.

(*c*) Upon the argument of such case the Court and the parties shall be at liberty to refer to the whole contents of the documents referred to, and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial. J. A. Rule 248.

Compare Eng. R. 1875, O. 34, r. 1 (1883, R. 389).

The several parts of this *Rule* correspond with the English Rules referred to, except in omitting a provision as to stamp duty.

The power of stating a special case in the Common Law Courts of Ontario depended upon R. S. O. 1877, c. 50, ss. 185, 186; c. 51, s. 24, and the previous statutory enactments to the same effect. The like power in Chancery was given by R. S. O. 1877, c. 40, s. 85. That section was taken from 28 Vict. c. 17, s. 1 (Canada), which had the effect of introducing the Imperial Act, 13 & 14 Vict. c. 35, on the subject.

As to stating special cases where infants or persons not *sui juris* are interested, see *supra*, p. 26, and *Rule* 557.

The *Rules* authorize the stating of a special case before statement of claim: *Metropolitan Board of Works* v. *New River Co.*, 1 Q. B. D. 727; 2 Q. B. D. 67.

Where pleadings are delivered and are admitted to state the facts, the case may come on as a motion for judgment under *Rules* 748 and 755: see *Till* v. *Till*, 15 Ont. 133.

The provision in the last part of the *Rule*, enabling the Court to refer to documents, was new as respects the Common Law Courts. Those Courts were confined within the four corners of the case, so that it was often necessary to set out documents, a part only of which was likely to prove material. The power to draw inferences of fact also did not exist in Common Law Courts as of right; though it was commonly specially reserved to the Court in well drawn cases. In cases stated in the Court of Chancery, the Court had both these powers under ss. 8, and 14, of 13 & 14 Vict. c. 35 (Imp.); 28 Vict. c. 17, s. 1; R. S. O. 1877, c. 40, s. 85.

A special case must be upon a real state of facts, not a hypothetical one: *Republic of Bolivia* v. *Bolivian Navigation Co.*, 24 W. R. 361; *Bright* v. *Tyndall*, 4 Ch. D. 189; *Pryse* v. *Pryse*, L. R. 15 Eq. 86; *Smith* v. *Gibson*, 25 L. T. N. S. 559; 20 W. R. 88; *Savage* v. *Tyers*, 20 W. R. 817; *Bardwell* v. *Sheffield Water Works Co.*, L. R. 14 Eq. 517; and where not an original case (*e.g. Bright* v. *Tyndall*, *supra*) but stated in an action, only such questions of law can properly be raised as must necessarily arise in the action: *Republic of Bolivia* v.

National Bolivian Navigation Co., 24 W. R. 361. The Court should not be asked, upon a case stated without pleadings, to answer questions which could not be raised upon proper pleadings: *Taylor* v. *Campbell, Postmaster-General*, 33 U. C. Q. B. 264. Rule 554.

The Court is not bound to answer every question the parties may think fit to put: *Viscount Barrington* v. *Liddell*, 2 DeG. M. & G. 480, 506; Seton 34. It will not in general declare future rights: *Savage* v. *Tuers*, 20 W. R. 817; *Lady Langdale* v. *Briggs*, 8 DeG. M. & G. 426, 427, 428; *Earl of Tyrone* v. *Waterford*, 6 Jur. N. S. 567; *Greenwood* v. *Sutherland*, 10 Ha. App. 12; *Garlick* v. *Larron*, *Ib.* 15; but has occasionally done so: *Bogg* v. *Midland*, L. R. 4 Eq. 310; *Byam* v. *Byam*, 19 Beav. 58; nor will the Court make any order where the facts stated do not enable it to determine the rights of the parties: *Bulkeley* v. *Hope*, 8 DeG. M. & G. 36.

A very special order having by consent been made for the purpose of obtaining the judgment of the Court under Eng. R. 1875, O. 40, r. 8 (corresponding with *Rule* 754) the Master of the Rolls discharged the order, as the effect of it would be to make the Judge an arbitrator between the parties, who would thus, contrary to their intention, be deprived of the right of appeal: *Republic of Bolivia* v. *National Bolivian Navigation Co.*, W. N. 1876, 77; 24 W. R. 361.

Except by consent a special case, after having been finally agreed to, cannot be reopened: *Hamilton* v. *Staley*, 28 Sol. Jour. 478. Affidavits cannot be received to alter or modify a special case stated by consent. The only relief open to the party complaining that a case has been misstated, is to apply to amend or vacate it, and *quære* whether it could be amended after judgment: *Cousineau* v. *City of London F. Ins. Co.* 15 Ont. 329.

A special case was amended by leave, at the hearing, by adding a party in existence before the case was filed, but accidentally omitted; and the case as amended was ordered to be set down against the added defendant: *Barnaby* v. *Tassell*, L. R. 11 Eq. 363. Where new parties come into existence after a special case is set down they should be made parties to the proceeding: *Palmer* v. *Flower*, 18 W. R. 887; *Atty* v. *Etough*, L R. 13 Eq. 462; *Savage* v. *Snell*, L. R. 11 Eq. 264 See *Peter* v. *Peter*, W. N. 1884, 45, 60; 32 W. R. 409, and 515, in note to *Rule* 622.

Amendment after judgment on a special case was refused: *Re Taylor, Tomlin* v. *Underhay*, 22 Ch. D. 495. But where a special case is stated in an action and a decision given upon it, under a mistake of fact, the Court is not bound by the decision, unless it has been adopted by subsequent orders, but may disregard it and direct the action to go on to trial: *Ib.*

The following are examples of special cases under *The Judicature Act*:—*Lysaght* v. *Edwards*, 2 Ch. D. 499, a question arising in an action for specific performance: *Gen. Finance Co.* v. *Liberator, B. S.* 10 Ch. D. 15, a question of title in an action for recovery of land; *Wilson* v. *Dundas*, W. N. 1875, 232, a question as to the liability of a garnishee; and *Marshall* v. *Aiglewood*, W. N. 1881, 3, a question as to the construction of the power of appointment in a will: *Ashbury* v. *Watson*, 51 L. T. N. S. 766, a question under the Companies Act: *Rosher* v. *Rosher*, 51 L. T. N. S. 785, a question as to the validity of a condition annexed to a devise in fee.

Upon the argument of a special case stated in replevin, the plaintiff has the right to begin: *Vigar* v. *Dudman*, 24 L. T. N. S. 734.

Where the answers to the special case dispose of the action, the proper course is, to take the decision as a judgment making declarations to the same effect; and the answers ought to be followed by the words: "and the Court doth declare accordingly." In such a case the Registrar was directed to draw up the judgment as answering the special case, on motion for judgment: *Harrison* v. *Cornwall Minerals Ry. Co.*, 16 Ch. D. 66.

An appeal lies from the judgment on a special case: *Re Taylor's estate*, 22 Ch. D. 495; see *Allum* v. *Dickinson*, 9 Q. B. D. 632.

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Rules 555, 556. Preliminary question of law.

555. If it appears to the Court or a Judge, either from the statement of claim or defence or reply, or otherwise, that there is in any action [or matter] a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the Court or Judge may make an order accordingly, and may direct such question of law to be raised, (*a*) either by special case or in such other manner as the Court or Judge may deem expedient; and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed. J. A. Rule 249.

(*a*) The Eng. R. 1875 O. 34, r. 2, had here the words "for the opinion of the Court"; and, like original Ont. *Rule* 249, had not the words in brackets. The Eng. R. 1883, R. 390, is, like the present, *Rule* extended so as to apply not merely to ctions. The *Rules* are otherwise the same.

Rule 554 enables the parties to state a case by consent; the present *Rule* enables a Judge to require a question of law to be stated by special case or otherwise, without reference to consent, and to direct that question to be decided before the issues of fact are decided: *Metropolitan Board* v. *New River Co.*, 1 Q. B. D. 727; affirmed 2 Q. B. D. 67.

See *Rule* 655, which enables a Judge to direct the trial of one or more questions of fact before others.

By analogy to that *Rule* the Court will, at the trial of an action involving questions both of law and of fact, decide the question of law first, if it shall appear that the decision of such question may render it unnecessary to try the question of fact: *Pooley* v. *Driver*, 5 Ch. D. 460.

Where defendants contended that, assuming questions of fact to be found against them, they were as a matter of law liable for a small sum, which they would pay into Court rather than go to the expense of evidence, an order was made under this *Rule* for determination of the questions of law first: *Tattersall* v. *National Steamship Co.*, W. N. 1884, 32.

This *Rule* is not limited to cases in which the point of law appears by the pleadings. The Court may look at the circumstances, whether brought to its knowledge by pleadings, affidavit, or otherwise: *Metropolitan Board* v. *New River Co.*, 1 Q. B. D. 727; affirmed, 2 Q. B. D. 67. Hence, an order may be made after writ, and before statement of claim: *Ib.* The Court of Appeal will not interfere with the discretion of the Court below in such a matter, except in a very strong case: *Ib.*

After appearance the plaintiffs, on an affidavit (uncontradicted by the defendants), that the sole question between the parties was, whether the defendants were bound to supply water by meter for road use, obtained an order under the above *Rule*, and it was held that the order was rightly made. The writ of summons was indorsed, "the plaintiffs claim damages from the defendants for refusing to supply them with water by meter, under sec. 41 of the New River Act, 1852": *Ib.*

The Court directed a special case to be set down for hearing on the application of the executrix, the first tenant for life and the trustees being defendants, the persons interested in remainder, who were absent in New Zealand, being omitted as parties: *Bagley* v. *Miles*, 21 L. T. N. S. 784.

See also cases referred to under *Rule* 655.

Preparing case.

556. Every special case shall be signed by the several parties or their solicitors, and shall be filed by the plain-

tiff. Copies for the use of the Judges shall be delivered by the plaintiff. J. A. Rule 250. Rules 557-560.

The Eng. R. 1875 O. 34, r. 3, (1883, R. 391), requires the case to be printed, and printed copies to be delivered to the Judges. This *Rule* is in other respects the same.

Signature of counsel is not now necessary: *Hare* v. *Hare*, W. N. 1876, 44.

557. No special case in an action to which a married woman, not being a party thereto in respect of her separate property, or of any separate right of action by or against her, or an infant, or person of unsound mind not so found by inquisition, is a party shall be set down for argument without leave of the Court or a Judge, the application for which must be supported by sufficient evidence that the statements contained in such special case, so far as the same affect the interest of such married woman, infant, or person of unsound mind, are true. J. A. Rule 251. Persons under disability.

Same as the Eng. R. 1875, O. 34, r. 4, (1883, R. 392).

The statement of counsel that the statements were true was considered sufficient evidence in *Elwes* v. *Elwes*, 20 W. R. 480.

See also sec. 32 of the Act and notes thereto.

558. The 4 next preceding Rules shall apply to every special case stated in an action [or matter] or in any proceeding incidental to an action. J. A. Rule 253. Application of rules.

The words in brackets are new, being taken from the Eng. R. of 1883 R. 395, otherwise this *Rule* is the same in effect as the Eng. R. 10 of April 1880 (1883, R. 395).

13. Evidence Generally.

(i) *Subpœnas, etc.*

559. All writs of subpœna may be tested, or may bear date upon the day when the same are issued. R. S. O. 1877, c. 62, s. 15. Subpœnas.

560. No subpœna for the production of an original record, or of an original memorial from any registry office, shall be issued, unless the order of the Court or a Judge is produced to the officer issuing the same, and filed with him, and unless the writ is made conformable to the description of the document in such order. Rules T. T. 1856, 31. Subpœna to produce original record not to issue without order.

The application for the order may be made to the Master in Chambers. The application should be supported by an affidavit showing the necessity for producing the original, and that the production of a certified copy will not be sufficient.

The *Rule* applies to records of the Court, and memorials in the offices of Registrars of Deeds; an assignment of a squatter's right filed in the Crown

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Rules 561, 562.

Lands Department was held not to be a record within the meaning of the *Rule*: *McGuirr* v. *Sneath*, 2 U. C. L. J. 184.

Original papers filed in Court should not be sent away to be used in evidence at *nisi prius*, unless it is shown that the production of the originals is essential; and the party applying to have them transmitted has some right in them; or the interests of public justice require their transmission: *Gaynor* v. *Scott*, 24 U. C. Q. B. 180.

In an action for malicious arrest the production of an examined copy of the affidavit on which the arrest was made, and shown to have been used in the cause, is sufficient *prima facie* proof of such affidavit and that it was made by the defendant: *Spafford* v. *Buchanan*, 3 O. S. 391; *Wilson* v. *Thorpe*, 18 U. C. Q. B. 443. But in an action for malicious prosecution, the production of the original indictment indorsed "no bill" is not sufficient proof of its termination, a record must be drawn up and an examined copy produced: *McCann* v. *Preneveau*, 10 Ont. 573; and see *Gunn* v. *Cox*, 3 S. C. R. 296; *Henry* v. *Little*, 11 U. C. Q. B. 296; *Aston* v. *Wright*, 13 P. R. 14. A conviction returned to the Sessions and filed by the Clerk of the Peace becomes a record and may be proved by a certified copy: *Graham* v. *McArthur*, 25 U C. Q. B. 478.

Any public document filed in a public office of the government may be proved by a certified copy: *McLean* v. *McDowell*, 1 U. C. Q. B. 13; R. S. O. c. 61, ss. 23, 25; but see *Langtry* v. *Dumoulin*, 7 Ont. 499. As to proof of orders of the Lieutenant Governor in Council, see R. S. O. c. 61, s. 21, and orders of the Governal General in Council, *Ib.* s. 22; registered instruments may be proved by certified copies: R. S. O. c. 61, ss. 42-45. Certified copies of registered memorials are sufficient evidence of such memorials: *Lynch* v. *O'Hara*, 6 C. P. 259; but a memorial is not always sufficient proof of the deed to which it relates: *Gough* v. *McBride*, 10 C. P. 166; *Ansley* v. *Breo*, 14 C. P. 371; for the cases in which the memorial proves the deed, see R. S. O. c. 112, s. 1, (2); 3, (2); *Re Higgins*, 17 Gr. 303.

As to proof of wills, see R. S. O. c. 61, ss. 38-41; where the probate is admissible as evidence under this statute, it is evidence of the testator's death, as well as of the will: *Davis* v. *Van Norman*, 30 U. C. Q. B. 437.

A Crown patent must be proved by the production of the original, or an exemplification thereof: *Reid* v. *Banks*, 10 C. P. 202; *McCollum* v. *Davis*, 8 U. C. Q. B. 150; a certified copy is not sufficient: *Prince* v. *McLean*, 17 U. C. Q. B. 463. Under *The Quieting Titles Act*, certified copies of patents are, however, received.

Any number of names may be included in one subpœna.

561. Any number of names may be included in one subpœna, and no more than one subpœna shall be allowed on taxation of costs, unless a sufficient reason be established to the satisfaction of the taxing officer for issuing more than one. Rules T. T. 1856, 163.

Although several names are included in one subpœna, it is not necessary that the copies served should contain the names of any other witness than the one on which the copy is served.

Calling opposite party.

562. Wherever any party in any civil action desires to call the opposite party as a witness at the hearing or trial he shall either subpœna such party or give him or his solicitor at least eight days notice of the intention to examine him as a witness in the cause, and if such party does not attend on such notice or subpœna, such non-attendance shall be taken as an admission *pro confesso* against him in any such action, unless otherwise ordered

by the Court or Judge in which or before whom such examination is pending, and a general finding or judgment may be had against the party thereon, or the plaintiff may be non-suited, or the proceedings in the action may be postponed by the Court or Judge, on such terms as the Court or Judge sees fit to impose. R. S. O. 1877, c. 62, s. 18. Rules 563-564.

"At least eight days" means eight clear days: see *Rule* 475. Sundays will also probably be excluded. The last day for giving notice of trial (see *Rule* 661) will therefore usually be the last day for giving the notice mentioned in this *Rule*, but if two Sundays would occur before the date of the sittings the notice may have to be given before notice of trial. It is to be observed that this *Rule* does not say that the notice is to be given eight clear days before the commencement of the sittings. It perhaps therefore may be sufficient if eight clear days elapse before the case comes on.

563. Upon proof to the satisfaction of the Judge presiding at the sittings of any Court of the service of a subpœna upon any witness who fails to attend or to remain in accordance with the requirements of the subpœna, and that a sufficient sum for his fees as a witness had been duly paid or tendered to him, and that the presence of such witness is material to the ends of justice, the said Judge may, by his warrant, directed to any sheriff or other officer of the Court, or to any constable, cause such witness to be apprehended and forthwith brought before him or any other Judge who may thereafter preside at such sittings, to give evidence, and in order to secure his presence as a witness, such witness may be taken on such warrant before the presiding Judge and detained in the custody of the person to whom the warrant is directed, or otherwise, as the presiding Judge may order, until his presence, as such witness, shall be required, or, in the discretion of the said Judge, he may be released on a recognizance (with or without sureties) conditioned for his appearance to give evidence. Bench warrants.

(*a*) The warrant may be similar to the Form No. 202 in the Appendix, and may be executed in any part of Ontario. 44 V. c. 5, ss. 83, 84.

(ii) *Evidence at Trials and References.*

564. In the absence of any agreement between the parties, and subject to these Rules, the witnesses at the trial of an action or at an assessment of damages shall be examined *viva voce* and in open Court, but the Court or a Judge may at any time for sufficient reason order that any Evidence on trial to be *viva voce*.

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Rule 564. particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with, be examined before an examiner; provided that where it appears to the Court or Judge that the other party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of the witness to be given by affidavit. J. A. Rule 282.

The Eng. R. 1875, O. 37, r. 1 (1883, R. 483), provides for the examining by interrogatories, or otherwise, of a witness whose attendance is dispensed with. The *Rules* are otherwise the same. The use of affidavits at a trial was permissible in the Common Law Courts; but in Chancery, exhibits might formerly be proved at the hearing in that way. See also *Rule* 567.

In an administration action, the Court may under this *Rule*, or *Rule* 567, if it thinks fit, receive fresh affidavit evidence on further consideration: *May* v. *Newton*, 34 Ch. D. 347; see, however, *Downey* v. *Roaf*, 6 P. R. 89, as to the usual material which may be used on further directions.

For the procedure where evidence is to be by affidavit see *Rule* 301. The Court has only power to order the evidence for the trial of the action to be taken by affidavit. It has no power on a motion for judgment by default of pleading to receive evidence by affidavit to prove the allegations of the statement of claim against infants or *non compotes mentis*, except where *Rule* 756, is applicable: see *Ellis* v. *Robbins*, 50 L. T. N. S. 512; 17 C. L. J. 342; and *Re Fitzwater*, 52 L. J. Chy. 83.

The Judge should, in every case of fairly contested or disputed facts coming on to be tried, take the evidence orally unless some good reason to the contrary is shown: *Atty.-Gen.* v. *Metropolitan District Ry. Co.*, 5 Ex. D. 218; see also *Nagle-Gillman* v. *Christopher*, 4 Ch. D. 173; *Blackburn* v. *Brooks*, 7 Ch. D. 68; *Warner* v. *Mosses*, 16 Ch. D. 101.

In the absence of agreement, evidence must be taken *viva voce* at the trial, and affidavits used on a motion cannot be used at the hearing: *Perkins* v. *Slater*, 45 L. J. Chy. 224; but where an interlocutory motion had been ordered to stand over till the hearing and a deponent had died in the meantime, the Court allowed the affidavit to be read at a trial with evidence *viva voce*, although the deponent had not been cross-examined: *Elias* v. *Griffith*, 46 L. J. Chy. 806.

Where none of the parties cited had appeared in an action to prove a will in solemn form, Hannen, P., refused to allow the execution and attestation of the will to be proved by affidavit: *Cook* v. *Tomlinson*, 24 W. R. 851. In *Gowall* v. *Mason*, 12 P. D. 142, an action for revocation of probate, an affidavit made by the witness eight years previously to obtain probate was allowed to be read as evidence in support of the will.

In *Drewitt* v. *Drewitt*, 58 L. T. N. S. 684, an affidavit used on a motion in the cause made by a witness who was unable to attend at the trial was allowed to be put in as evidence. This was not allowed in *Blackburn Union* v. *Brooks*, 7 Ch. D. 68, where cross-examination of the witness was desired.

The consent to take evidence by affidavit must be a formal written consent, and not one to be gathered from a correspondence between the parties: *New Westminster Brewery Co.* v. *Hannah*, 1 Ch. D. 278; and may be given by a guardian *ad litem*: *Knatchbull* v. *Fowle*, 1 Ch. D. 604. The Court has no power to order the whole evidence to be so taken without consent: *Gardiner* v.

Hardy, W. N. 1876, 153; *Pattison* v. *Wooler*, 1 Ch. D. 464; but the Court has a discretion to punish a party with costs where consent is unreasonably refused: see *Patterson* v. *Wooler*, 2 Ch. D. 586. **Rules 565-566.**

The guardian of an infant may decline the responsibility of consenting or refusing to consent to the use of affidavits, and leave the Court to determine whether they should be filed and read or not; or he may, if he chooses, give the necessary consent without the order or leave of the Court: *Fryer* v. *Wiseman*, 24 W. R. 205; 33 L. T. N. S. 779.

Affidavits sworn in one action may be read as evidence in another, against such of the defendants as are parties to both: *Brown* v. *White*, 24 W. R. 456.

The fact that an affidavit has been read on an interlocutory motion gives no right to read it at the trial: *Perkins* v. *Slater*, 45 L. J. Chy. 224; 1 Ch. D. 83; *Blackburn* v. *Brooks*, 7 Ch. D. 68; see *Drewitt* v. *Drewitt*, *supra*.

As to supplementing by *viva voce* evidence the evidence given by affidavit, see *Glossop* v. *Heston Loc. Board*, 47 L. J. Chy. 536; 26 W. R. 433; W. N. 1878, 72.

In the *Baltic Co.* v. *Simpson*, 24 W. R. 390, it was held that the Court ought not, under 15 & 16 Vict. c. 80, s. 42, or s. 57 of the Jud. Act (Ont. Act, s. 102), to make an order before trial, appointing a scientific person to report on a question of fact.

The Judge, at any period in a case, may allow further evidence to be called by either party for his own satisfaction, though it be doubtful whether it would be admissible, on the request of the party desiring it, as of right: *Budd* v. *Davison*, 29 W. R. 192.

In England, parties as well as witnesses may be excluded from Court during the examination of other witnesses: *Outram* v. *Outram*, W. N. 1877, 75, but a witness will not be excluded during the reading of affidavit evidence: *Penniman* v. *Hill*, 24 W. R. 245. See also W. N. 1876, 297. In Ontario the exclusion of parties is in the discretion of the Judge: see *Rule* 674.

As to proof of registered instruments, see *Barber* v. *McKay*, 17 Ont. 562; as to evidence of experts, see *Rule* 207.

565. All witnesses in any matter pending before a Master, Local Master or Referee, shall give their testimony *viva voce*, and be subject to examination before the Master, unless it is otherwise ordered by the Master, or by the Court or a Judge, on special grounds, or with the consent of the parties in the suit or controversy to which the testimony relates. R. S. O. 1877, c. 40, s. 100. Or before a Master.

566. The Court or a Judge may, in any cause or matter where it appears necessary for the purposes of justice, make any order for the examination upon oath before an officer of the Court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to the cause or matter to give such deposition in evidence therein, on such terms, if any, as the Court or Judge may direct. J. A. Rule 285. Depositions.

Identical with the Eng. R. 1875, O. 37, r. 4 (1883, R. 487).

This *Rule* has received a very liberal construction. It applies only where there is pending litigation between contesting parties: *Re Hewitt*, 15 Q. B. D. 159, 163; and may be applied at any stage of a cause, and though no motion Construction of Rule.

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Rule 566.

is pending: *Fisken* v. *Chamberlain*, 9 P. R. 283; wherever a case of justice is made out: see *Warner* v. *Mosses*, 16 Ch. D. 100. Under it, examination has been ordered of a party as a witness: *Nadin* v. *Bassett*, 25 Ch. D. 21, or for discovery, *e.g.*, of a defendant: *Fisken* v. *Chamberlain*, *supra*; or of a plaintiff: *Boulton* v. *Blake*, 11 P. R. 196; *Tate* v. *Globe*, 11 P. R. 253; for discovery before pleading; but this right of extraordinary discovery must be jealously guarded and only conceded when clearly proved to be necessary in furtherance of justice: *Boulton* v. *Blake*, *supra*. See *Wallis* v. *Newton*, 7 C. L. T. 138, where discovery was allowed the defendant being ignorant of facts within the plaintiff's knowledge. In *McNally* v. *McDonald*, 9 C. L. T. 54, leave to examine defendant and his bookkeeper was refused because the plaintiff did not shew that he had a good cause of action, or point out the particular information he was in need of in order to frame his statement of claim: see also *Martin* v. *Nairn*, before Galt, C.J., 12 Nov., 1889.

Persons not parties to the action may, in a proper case, be examined for discovery under this *Rule*; *e.g.*, in *McMaster* v. *Mason*, 12 P. R. 278, the father of defendant from whom both plaintiff and defendant claimed to have purchased the land in question in the action, as he might have been made a party to the action; and in *Brown* v. *Pears*, 12 P. R. 396, an action for specific performance, two sisters of the vendor from whom a conveyance had been obtained at a price which seemed to cast suspicion upon the validity of the conveyance.

The *Rule* also applies to the examination of a witness on a pending motion who has not made an affidavit: *Monaghan* v. *Dobbin*, 18 C. L. J. 180; 2 C. L. T. 260; a witness, when it is desired to obtain information, in order to serve a defendant with the writ: *Seager* v. *Barber*, 27 Aug., 1881, Mr. Dalton. Examinations for the last two purposes also can be had under *Rule* 578, corresponding to the former Chy. O. 266: see *McMillan* v. *Wansborough*, 10 P. R. 377, and notes to *Rule* 578.

An order under this *Rule* should generally not be made *ex parte*: *Hooey* v. *Gilbert*, 12 P. R. 114.

Examination for discovery.

A plaintiff advancing a claim, *e.g.*, a charge of fraud, and alleging that he has no knowledge of the fact, is not in a similar position in regard to discovery before pleading to a defendant resisting such a claim: *Ib.*

This *Rule* does not authorize the making of an order for examination before trial of a person not a party, where no greater necessity exists than the convenience of the applicant in presenting his case for trial: *Carnegie* v. *Federal Bank*, 10 P. R. 69.

In an action on a bill accepted by the defendant's clerk, the defendant denied the authority to accept. It was held that the clerk could not be examined for discovery under this *Rule*, nor the Toronto manager of the defendant's business: *Rosenheim* v. *Silliman*, 11 P. R. 7.

In *Turner* v. *Kyle*, 18 C. L. J. 402; 2 C. L. T. 598, an action for seduction, the defendant denied all knowledge of the plaintiff's daughter on any occasion, and the plaintiff on being examined did not know anything about the alleged seduction; the defendant having exhausted all regular and ordinary means of obtaining discovery with effect, was held entitled to examine the plaintiff's daughter under this *Rule* that he might know the case to be met at the trial.

In *Lamb* v. *Dodds*, (Mr. Dalton, 8th May, 1883), the action was to establish an alleged will, suspected by the defendant to have been a forgery of the plaintiff's husband, who was not a party; the plaintiff having been examined had no knowledge of it, but the circumstances under which it had come into her hands were suspicious, and an order was made, under this *Rule*, on defendant's application for examination of the plaintiff's husband for discovery.

Where the defendants asserted, as a counter-claim, a claim against the plaintiff which they had bought from the assignee of F. & L., stock brokers (not parties to this suit) for the balance of an account for carrying stock for the plaintiff, and the plaintiff made affidavit that he believed F. & L. had dealt improperly with the stock they were carrying for him, but that he had no means of discovering this except by examining them, an order was granted to examine them for discovery only, under this *Rule*: *Carnegie* v. *Cox*, 11 P. R. 311.

Where the plaintiff was assignee of A. S. M., an insolvent trader, and was sued by A. S. M.'s father claiming to rank on the estate, an order was made for the examination of A. S. M., the plaintiff having no knowledge of the claim: *Murray* v. *Warner*, 11 P. R. 440. **Rule 586.**

In *Gordon* v. *Phillips*, 11 P. R. 540, an order for examination was made to enable the plaintiff to ascertain particulars of slander, in order to frame his statement of claim.

In applying under this *Rule* to examine witnesses before trial, it is not sufficient to shew that the examination will materially benefit the applicant. It must be shewn that he has unsuccessfully used the regular and ordinary means for discovery, or some other special reason must be given why the witness should be examined, out of the regular course, and not at the trial for the first time: *Hendrie* v. *Neelon*, 19 C. L. J. 18; 2 C. L. T. 599. For purposes of the trial.

Where an order is made, only material documents need be produced, such as would be produced at a later stage in the action. The examiner has the same powers as a special examiner under *Rule* 497, as to directing production of documents: *Orpen* v. *Kerr*, 11 P. R. 128.

Under this *Rule*, or *Rule* 588, orders may be made for examination of a witness *de bene esse*, for use at the trial, or on a reference in the Master's office; *Re Dunsford*, 9 P. R. 172; see also *Rule* 588.

Examination of a witness *de bene esse* is allowed where there is danger of losing testimony from death, or absence, at the time of the trial. An order will therefore be made where a necessary witness is going abroad, or is from illness, age, or other infirmity, likely to be unable to attend the trial: *Warner* v. *Mosses*, 16 Ch. D. 100; and generally speaking wherever justice requires it, though as a rule only where the evidence is to be used for some definite judicial proceeding pending: *Whitehead* v. *Buffalo & L. H. Ry.*, U. C. L. J. 232, where an order was made in contemplation of a reference to a Master not yet directed. Examination *de bene esse*.

If the ground is that the witness is over 70 years, or dangerously ill, or going immediately abroad, the application may be made *ex parte*: Dan. Pr., 5th ed., 817; *Oliver* v. *Dickey*, 2 Chy. Ch. 87; *Crippen* v. *Ogilvey*, *ib.* 304; *Bidder* v. *Bridges*, 26 Ch. D. 1; *Baker* v. *Jackson*, 10 P. R. 624; but the Court in its discretion refused to apply this rule to the extraordinary case of thirty witnesses over 70 years in *Bidder* v. *Bridges*, *supra*.

In other cases notice should be served: see *Anderson* v. *Anderson*, 1 Chy. Ch. 291; *Spears* v. *Waddell*, 7 P. R. 260.

If the only ground is that the witness is the only witness as to some fact this should be clearly shewn: *Hope* v. *Hope*, 3 Beav. 317; *Jameson* v. *Jones*, 3 Chy. Ch. 98; but the order may provide that the examination is not to be used at the trial unless the attendance of the witness cannot be procured: *Elliott* v. *C. P. Ry. Co.*, 12 P. R. 593.

That the witness is going abroad is a sufficient ground. He need not be going permanently, or be the only witness: *Spears* v. *Waddell*, 7 P. R. 260.

As to what must be shewn at the trial before the deposition when taken can be used as evidence, see Dan. Pr., 5th ed., 819.

The form of order *de bene esse* in Seton, 4th ed., 1635, is not correct. It should not state absolutely that the depositions may be used at the trial: *Burton* v. *Staffordshire Ry. Co.*, 35 W. R. 536; 56 L. T. N. S. 601; *Solicitor of the Treasury* v. *White*, 55 L. J. Pro. 79; W. N. 1886, 144.

In consequence of the provision of original *Rule* 289, requiring consent to enable the evidence under a commission to be taken *viva voce*, and of original *Rule* 299, staying the trial until the return of a commission, the examination of witnesses out of the jurisdiction orally, or without a stay, used sometimes to be ordered under this *Rule*. Though those reasons no longer exist, this *Rule* may still be invoked if necessary to obtain the evidence of a witness for use at the trial, without the issue of a commission, whether the witness be without, or within the jurisdiction, wherever it may be necessary and just: see notes to *Rules* 586 *et seq.* Examination of a witness abroad.

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Rules 657, 653.

Examination abroad under this *Rule* will be ordered upon the same principles and under the same circumstances as a commission would be ordered: as to which see *Rule* 558 and notes.

There is a difference between a party seeking to have his own examination abroad and a mere witness. In both cases it is a matter of judicial discretion, but the discretion will be exercised in a stricter manner in the case of a party: *Coch* v. *Allcock*, 2 Q. B. D. 178, 181.

An order for examination of a plaintiff otherwise than before the Court and jury was considered not proper, where the issue was forgery of the plaintiff's name or a personation of the plaintiff: *Thomas* v. *Storey*, 11 P. R. 417.

It is not necessary to apply under this *Rule* for an order to examine witnesses on a reference after judgment; the former practice of subpœnaing without leave is not abolished: *Raymond* v. *Tapson*, 22 Ch. D. 430.

Affidavits by consent, or by leave of the Court.

567. At the trial of an action, or of any further directions therein, affidavits of particular witnesses, or affidavits as to particular facts and circumstances, may be used by consent, or by leave of the Court; and such consent may be given on behalf of persons under disability, with the approbation of the Court. Chy. O. 176.

As to matters which may, and may not, be proved by affidavit under this *Rule*: see Dan. Pr., 5th ed., 777, 1236; *Dercy* v. *Thornton*, 9 Ha. 233; *Foder* v. *Reynal*, 15 Jur. 1019; *Delevante* v. *Child*, 6 Jur. N. S. 118; *Bush* v. *Watkins*, 14 Beav. 33; *Hoghton* v. *Hoghton*, 15 Beav. 278; *Bear* v. *Smith*, 5 D. & S. 92; *Fallows* v. *Dillon*, 2 W. R. 507; *Bateman* v. *Margerison*, 2 W. R. 607; *Howard* v. *Chaffers*, 11 W. R. 585; *Evans* v. *Lewis*, 2 L. T. N. S. 559; *Fleming* v. *Ernst*, Kay App. lii.; *Macdonald* v. *Antelme*, W. N. 1884, 72.

Affidavits as to defendant's conduct after judgment may be read by the original plaintiff on the question of costs; but not affidavits as to defendant's conduct before judgment; but it would seem that persons added as defendants in the Master's office, or who are served with the judgment under *Rule* 322, may read affidavits as to the defendant's conduct before, or after judgment, on the question of costs: *Re Revill, Leigh* v. *Rumney*, 55 L. T. N. S. 542.

See also *Rule* 564 and notes.

When to be filed by plaintiff.

568. In case the parties in any action consent to the evidence being taken by affidavit as between the plaintiff and the defendant, the plaintiff within 14 days after such consent has been given, or within such time as the parties may agree upon, or a Judge in Chambers may allow, shall file his affidavits and deliver to the defendant or his solicitor a list thereof. J. A. Rule 301.

Same in effect as the Eng. R. 1875, O. 38, r. 1, (1883, R. 545).

As to when evidence may be by affidavit, see *Rule* 564 and notes.

Where the parties to an action agree under this *Rule* to take the evidence by affidavit, and either party subsequently finds himself unable to procure affidavit evidence, either by reason of the reluctance of some of his witnesses to make affidavits or other good cause, his proper course is to move to be relieved from the agreement, and the Court will, in a proper case, make an order that the reluctant witnesses be examined *viva voce* at the trial, or, at the option of the other party, discharge the agreement, and direct all the evidence to be taken *viva voce* at the trial: *Warner* v. *Mosses*, 16 Ch. D. 100.

Where the agreement does not specify that the evidence shall be taken by affidavit "alone" it is competent to a witness who has made an affidavit, to

supplement his evidence by evidence *viva voce*: *Glossop* v. *Heston, etc., Local Board*, W. N. 1878, 72; 26 W. R. 433; 47 L. J. Chy. 536. Rules 569-571.

Where the parties have agreed to have evidence by affidavit, the action must be tried by a Judge without a jury: *Brooke* v. *Wigg*, 8 Ch. D. 510.

The Court has authority to order witnesses to be examined orally at the trial, and exclude affidavits filed by agreement, if of the opinion that that course is necessary: *Lovell* v. *Wallis*, 49 L. T. N. S. 593, 53 L. J. Chy. 494.

When to be filed by defendant.

569. The defendant within 14 days after delivery of such list, or within such time as the parties may agree upon, or a Judge in Chambers may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof. J. A. Rule 302.

Identical with the Eng. R. 1875, O. 38, r. 2, (1883, R. 546).

Where the plaintiff files no affidavit the time for filing defendant's affidavits, in the absence of agreement or special order, will not begin to run till the plaintiff has given express notice that he does not intend to file affidavits: *Eames* v. *Brady*, 5 L. R. Ir. 580.

Filing affidavits in reply.

570. Within 7 days after the expiration of the said 14 days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matter strictly in reply, and shall deliver to the defendant or his solicitor a list thereof. J. A. Rule 303.

Identical with the Eng. R. 1875, O. 38, r. 3, (1883, R. 547).

Affidavits filed by a plaintiff in reply will not, upon an interlocutory motion, be ordered to be taken off the files upon an allegation by the defendant that they are not confined to matters strictly in reply, though at the hearing, if it should turn out to be so, the Court will not regard them, or may give leave to the defendant to answer them: *Gilbert* v. *Comedy Opera Company*, 29 W. R. 169; 43 L. T. N. S. 665.

It has been held in England, that affidavits in reply may bring forward additional evidence in support of the original case, and are not restricted by this *Rule*, to the points raised by the defendant's evidence: *Peacock* v. *Harper*, 7 Ch. D. 648; see also *Adair* v. *Young*, W. N. 1879, 8; *Roe* v. *Davies*, 2 Ch. D. 731.

Cross-examination on affidavit.

571. Where the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed, a notice in writing, requiring the production of the deponent for cross-examination before the Court at the trial, such notice to be served at any time before the expiration of 14 days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court or a Judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court. The party producing such deponent for cross-examination shall

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Rules 572-573.

not be entitled to demand the expenses thereof in the first instance from the party requiring such production. J. A. Rule 304.

Same as Eng. R. 1875, O. 38, r. 4, (1883 R. 548).

When *in an inquiry in an action* it is proposed to read an affidavit, the Court has jurisdiction, upon proper application being made, to require the deponent to be produced for cross-examination, if satisfied that this is requisite, but such an application is not properly made under this *Rule* merely by a notice for the production of the deponent for examination without specifying any time or place: *De Mora* v. *Concha*, 32 Ch. D. 133; 11 App. Cas. 541.

A plaintiff, served with a subpœna requiring her attendance for cross-examination on her affidavit, omitted to attend on the ground that her expenses had not been given her. On motion she was ordered to attend at her own expense: *Mansel* v. *Clauricarde*, *Mansel* v. *Norton*, 53 L. T. N. S. 496; 54 L. J. Chy. 982.

Query whether this *Rule* applies not only to cross-examination of deponents before the Court at the trial, but also, after the trial, in proceedings on a reference, or before a special examiner: *Buckhouse* v. *Alcock*, 28 Ch. D. 669. See also *Summers* v. *Kingcote*, 29 Sol. Jour. 334; and *Re Baker*, 29 Ch. D. 711, not following *Re Knight*, *Knight* v. *Gardiner*, 25 Ch. D. 297. See *Concha* v. *Concha*, 11 App. Cas. 541, 558, 559.

The fact that a witness has disobeyed an order to attend and be cross-examined, is not ground for taking his affidavit off the files; because by this *Rule* it can only be used by special leave: *Meyrick* v. *James*, 46 L. J. Chy. 579; W. N. 1877, 120; see notes to *Rule* 568. See also *Phosphate Sewage Co.* v. *Hartmont*, W. N. 1875, 235.

This is not the only penalty for non-attendance. Attendance may be compelled as in other cases if a subpœna is served: *Re Baker*, 29 Ch. D. 711; see *Rule* 572.

The opposite party may cross-examine witnesses who have made affidavits though they are not read: *Re Ottaway*, W. N. 1882, 9; 30 W. R. 282; *Re Quartz Hill, etc., Co.*, 21 Ch. D. 642; but see *Massam* v. *Thorley's Food Co.*, W. N. 1879, 181.

Compelling attendance of witness.

572. The party to whom such notice as is mentioned in the last preceding Rule is given, shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined. J. A. Rule 305.

Identical with the Eng. R. 1875, O. 38, r. 5 (1883, R. 549).

Libel or slander, particulars.

573. In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the Judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence. *New.*

Taken from Eng. Rules 1883, R. 461.

Where the defence does assert the truth of the statement complained of, it has been held that evidence as to the plaintiff's character with a view to mitigation of damages, is not admissible unless the facts relied on are pleaded: *Scott* v. *Sampson*, 8 Q. B. D. 491. **Rules 574-577.**

Copies of depositions certified by person taking the same admissible in evidence.

574. Where an examination of any party or parties, witness or witnesses, has been taken before a Judge of the High Court, or of any County Court, or before any other officer or person appointed to take the same, copies of such examinations and depositions certified under the hand of the Judge, officer or other person taking the same shall, without proof of the signature, be received and read in evidence, saving all just exceptions. 42 V. c. 15, s. 3.

Evidence of service of notice to produce.

575. An affidavit of the Solicitor in the cause or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of such notice to produce, shall be sufficient evidence of the service of the notice, and of the time when it was served. R. S. O. 1877, c. 50, s. 173.

(iii) *Evidence on Motions.*

Evidence on motion, or petition.

576. Upon any motion or petition, evidence may be given by affidavit.

Cross-examination on affidavits.

577. Every person who makes an affidavit to be used (*a*) in any action or proceeding shall be liable to cross-examination thereon, and may be required to attend in the same manner, and subject to the same rules, as a party to be examined in the cause. *New.* See Chy. O. 268.

(*a*) Instead of "in any action or proceeding" Chy. O. 268 had the words "or which shall be used on any motion, petition or other proceeding before the Court."

The affidavit of justification of a surety in an appeal bond filed, was held to be an affidavit used in a proceeding within Chy. O. 268: *Hughes* v. *Hughes*, 17 C. L. J. 110; 1 C. L. T. 189

See *Russell* v. *Macdonald*, 12 P. R. 458, in note to *Rule* 493.

When the proceeding for which the affidavit has been filed has been disposed of, the right of cross-examination is gone: *Catholic Printing Co.* v. *Wiman*, 11 W. R. 399; *Felan* v. *McGill*, 3 Chy. Ch. 56; *Clendinning* v. *Varcoe*, 7 P. R. 61.

Deponents making affidavits in reply, are liable to cross-examination: *Re Foster*, 6 P. R. 95; 9 C. L. J. 313.

A party cannot withdraw an affidavit which he has given notice of reading so as to avoid a cross-examination of the deponent: *Clarke* v. *Law*, 2 K. & J. 28; *Pike* v. *Dickinson*, 21 W. R. 862; W. N. 1873, 178; *Re Quartz Mining Co.*, 47 L. T. N. S. 644; 21 Ch. D. 642. The party cross-examined cannot insist on the passage in his affidavit being read, or shown, to him, before he answers: *Gwynne* v. *Watney*, 31 L. T. O. S. 231.

As to expense of producing witness for cross-examination: see *Knight* v. *Gardiner*, 49 L. T. N. S. 94; W. N. 1883, 152; 19 C. L. J. 273, in notes to *Rule* 571.

See also note to *Rules* 490, and 578.

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Rules 578-579.

Attendance of witnesses for examinations on motions, how procured.

578. A party to any action or proceeding may, by a writ of subpœna *ad testificandum*, or *duces tecum*, require the attendance of a witness to be examined before the Court, or before any officer having jurisdiction in the County where the witness resides for the purpose of using his evidence upon any motion, petition or other proceeding before the Court, or any Judge or judicial officer in Chambers.

(*a*) The attendance of such witness is to be secured in the same manner, and subject to the same rules, as upon the examination of a party in the cause. J. A. Rule 598.

Motion must be pending.

A motion must be pending to enable a party to proceed under this *Rule*: *Traders' Bank* v. *Kean*, 13 P. R. 60. Depositions taken when no motion or other proceeding is pending, are irregular, and can not be read: *Storel* v. *Coles*, 3 Chy. Ch. 362.

Subpœna, date of.

A subpœna for the examination of a witness, dated prior to the time at which the party issuing the same was entitled to examine the witness, was held to be irregular: *McMurray* v. *Grand Trunk Ry. Co.*, 3 Chy. Ch. 130.

Notice of examination.

The party required to be examined is entitled to reasonable, but not necessarily to 48 hours', notice: *Re North Wheal Exmouth Mining Co.*, 31 Beav. 628; 8 Jur. N. S. 1168; *Rule* 490; unless he has no solicitor, in which case he is entitled to 48 hours' notice: *Rule* 491; *Watson* v. *Ham*, 1 Chy. Ch. 293.

The examination of a *party* is upon an appointment of the examiner, a copy of which, as well as a copy of the subpœna must be served: see *Rule* 490. The same procedure should be taken under this *Rule*: clause (*a*).

Witness fees to be paid.

A witness, whether a party, or stranger to the cause, who is required to attend for examination, is entitled to be paid ordinary witness fees, and may refuse to attend, or, if attending, may refuse to be sworn, until paid: *Brocas* v. *Lloyd*, 23 Beav. 129; *Wiltshire* v. *Marshall*, W. N. 1866, 80; *Davey* v. *Durrant*, 24 Beav. 493, and see *Robins* v. *Carson*, 2 Chy. Ch. 343; *Bolkow* v. *Foster*, 7 P. R.. 388; *Smith* v. *Greey*, 11 P. R. 345.

Examination of party out of jurisdiction.

Where the witness, or party, required to be examined in support of a motion is out of the jurisdiction, an order for a commission may be obtained as soon as the notice of motion is served: *Farrell* v. *Cruikshank*, 1 Chy. Ch. 12; or if a resident in Quebec a subpœna may be ordered to issue under C. S. C. c. 79, s. 4; *Moffatt* v. *Prentice*, 6 P. R. 33; *McKerchie* v. *Montgomery*, 1 Chy. Ch. 225.

Default of witness, how punished.

Default of Witness.—The certificate of default should show that the witness had been duly subpœnaed, a statement in the certificate, that evidence of the service had been produced, is insufficient; *Waddle* v. *McGinty*, 2 Chy. Ch. 442; and see *Sutherland* v. *Rogers*, *Ib.*, 191.

A witness failing to attend is liable to be committed for default. A witness who attends, but refuses to answer proper questions, may, on motion, be ordered to attend again and submit to answer the questions at his own expense, or in default be committed.

A motion to commit must be made before a Judge: *Keefe* v. *Ward*, 18 C. L. J. 166; 2 C. L. T. 260.

A witness attending for examination, is not bound to wait more than half an hour, unless notified that his examination is to be proceeded with: *Perks* v. *Stottart*, 1 N. R. 563.

Court or Judge may, on hearing any motion or sum-

579. Upon the hearing of any motion before the High Court or a Judge the Court or Judge at discretion, and upon such terms as it or he thinks reasonable, may from time to

time order to be produced such documents as it or he thinks fit, and may order such witnesses as it or he thinks necessary, to appear and be examined *viva voce* before such Court or Judge, or before a Judge of any County Court, or before any other person, and upon reading the report of the Judge of the County Court, or other person, as the case may be, or if no such reference is made, then upon examining such documents or hearing such witnesses by the Court or Judge, the Court or Judge may make such order as seems just; and in cases within the jurisdiction of a County Court, the Court or a Judge therein having jurisdiction in the case, may order the production of documents or the attendance of witnesses before such Court or Judge, or before the Clerk of such County Court, and upon hearing such evidence or reading the report of the Clerk, may make such order as seems just, in like manner as if the proceedings were had in the High Court. R. S. O. 1877, c. 50, s. 175.

Rules 580, 581.

mons, order the production of documents or *viva voce* examinations.

And may make rule or order thereon.

580. The Court or Judge may, by the order, command the attendance of the witnesses named therein for the purpose of being examined, or may command the production of any writings or other documents, to be mentioned in the rule or order, and in the case of a Judge, he may, if necessary or convenient so to do, direct the attendance of the witness to be at his own place of abode or elsewhere. R. S. O. 1877, c. 50, s. 176.

Power by order to compel attendance of witnesses or production of documents in such cases.

It would seem that the production can only be ordered for the purposes of a pending motion and that the Court has no power under this *Rule* to order a person, not a party to the action, to produce documents in his possession merely for the purpose of enabling a party to the action to inspect the same before trial: see *Straker* v. *Reynolds*, 22 Q. B. D. 262; 60 L. T. N. S. 107; *Central News Co.* v. *Eastern News Telegraph Co.*, 53 L. J. Q. B. 236.

581. If in addition to the service of the order an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, is also served together with or after the service of the order, the wilful disobedience of the order shall be a contempt of Court, and proceedings may be forthwith had by attachment. But—1. Every person whose attendance is so required, shall be entitled to the like payment for attendance and expenses as if he had been subpœnaed to attend upon a trial; 2. No person shall be compelled

Disobedience to be a contempt of Court.

Witnesses to be paid expenses.

What documents need

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Rules 582-585.

not be produced.

Examinations may be adjourned.

to produce under any such rule or order, any writing or other document which he would not be compellable to produce at the trial of the cause; 3. The Court or Judge, or person appointed to take the examination, may adjourn the same from time to time as occasion may require. R. S. O. 1877, c. 50, s. 117.

How prisoners may be brought to give evidence.

582. The sheriff, gaoler, or other officer having the custody of any prisoner, shall take the prisoner for any examination authorized by these Rules, when so directed by an order of the Court or Judge; which order may be issued by the Court or Judge under such circumstances as appear to warrant the production of the prisoner. R. S. O. 1877, c. 50, s. 178.

Certified copies of proceedings may be obtained from the office where filed.

583. Wherever any party wishes to produce to the Court or a Judge, the writ or any pleading, or other proceeding filed in any office of the Court, he may demand and receive from the officer in whose office the writ, pleading or other proceeding is, a copy of the same certified by the officer to be a true copy of the original, and the copy so certified shall be admissible in evidence in all causes and matters and between all persons and parties, to the same extent as the originals would be admissible. *New.*

Default in payment, how to be proved.

584. Where default is made in the payment of money appointed to be paid into a Bank, the certificate of the Cashier, Manager, or Agent of the Bank, where the same is made payable, or of the like Bank officer, shall be sufficient evidence of default. Where the affidavit of the party entitled to receive the same is by the present practice required, the same shall still be necessary. Chy. O. 257.

Certificate of non-payment, how to be signed.

The certificate should be signed by the cashier, manager, or agent, or like officer. The certificate of an accountant in the bank is not sufficient: *Campbell* v. *Garrett*, 1 Chy. Ch. 255. A certificate of default should state that the money was not paid before, as well as on, or since, the day appointed: *Farrell* v. *Stokes*, 1 Chy. Ch. 201. The certificate does not prove itself, but must be verified by an affidavit.

The affidavit of the plaintiff of non-payment is usually required on the motion for a final order for sale, or foreclosure, in addition to the certificate of the bank: see *Rule* 353, note.

Power given to High Court to receive further evidence in all appeals, etc.

585. In all appeals, either to the Court of Appeal or the High Court or a Judge, and on all motions to set aside or vary verdicts or judgments or hearings in the nature of appeals, the Court or Judge appealed to shall have all the

powers and duties as to amendment and otherwise of the Court, Judge or officer appealed from, together with full discretionary power to receive further evidence upon questions of fact; such evidence to be either by oral examination before the Court or Judge appealed to, or by affidavit, or by depositions taken before a special examiner or Commissioner. Rule 586.

Semble, that this *Rule* does not apply to newly discovered evidence after the trial: *Bank of B. N. A.* v. *Western Assurance Co.*, 11 P. R. 434.

(2) Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

See *Sanders* v. *Sanders*, 45 L. T. N. S. 637; 51 L. J. Chy. 276; 18 C. L. J. 236; *Re Compton*, *Norton* v. *Compton*, 27 Ch. D. 392; *Robinson* v. *Bradshaw*, 32 W. R. 95.

(3) Upon appeals from a judgment upon the merits at the trial or hearing of any action or matter, such further evidence (save as aforesaid) shall be admitted on special grounds only, and not without the special leave of the Court. 41 V. c. 8, s. 7. R. S. O. 1877, c. 38, s. 22.

See also notes to *Rule* 846, and *Re Rouse*, 59 L. T. N. S. 887.

For remarks as to the caution to be observed in giving leave to adduce further evidence in the Appellate Courts: see *Merchants Bank* v. *Lucas*, 12 P. R. 526, and *Arnison* v. *Smith*, 41 Ch. D. 98; and the remarks of Cotton, L.J., against allowing fresh evidence to meet defects in the case seen after trial: *Re Leonard & Ellis Trade Mark*, 26 Ch. D. 289. Where further evidence is allowed to be adduced, the opposite party has the right to cross-examine thereon: *Spencer* v. *Ancoats V. B. Co.* 84 L. T. Jour. 440.

(iv) *Commissions to examine Witnesses.*

586. In case a party to any civil action is resident out of Ontario, and in case the opposite party requires a commission to examine such non-resident party and states by affidavit the facts intended to be proved before such commission, and in case the Court or Judge is satisfied that such commission is applied for in good faith and not for purposes of delay the Court in which the action has been brought, or any Judge thereof may, at the instance of the opposite party, issue a commission for the examination of such non-resident party in the same manner as a commission may be issued for the examination of witnesses. R. S. O. 1877, c. 62, s. 19. Non-resident party.

This *Rule* provides only for the case of the examination of an opposite party: see notes to *Rule* 588.

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Rules 587, 588.
Refusal to attend.

587. If such party refuses to attend before the Commissioners, such refusal, being proved by affidavit or otherwise to the satisfaction of a Judge of the Court in which the action or the trial is pending, shall authorize a verdict or judgment to pass against the party, or he shall be nonsuited. R. S. O. 1877, c. 62, s. 20.

See also *Rule* 562.

Aged or infirm persons within Ontario.

588. In case the plaintiff or defendant in any action in the High Court or in any County Court, is desirous of having at the trial thereof the testimony of any aged or infirm person resident within Ontario, or of any person who is about to withdraw therefrom, or who is residing without the limits thereof, the Court in which the action is pending, or a Judge thereof, may, upon the motion of such plaintiff or defendant, and upon hearing the parties order the issue of a commission or commissions under the seal of the Court in which the action is pending, to a Commissioner or Commissioners, to take the examination of such person or persons respectively. R. S. O. 1877, c. 62, s. 21.

This *Rule* provides for the issue of a commission for the examination of a witness, *de bene esse*. The examination is more usually had by order under *Rule* 566. See notes to that *Rule*.

Foreign commission.

There is no hard and fast rule as to granting or refusing a foreign commission. It is a matter of judicial discretion: *Mills* v. *Mills*, 12 P. R. 473; *Coch* v. *Allcock*, 21 Q. B. D. 1, 178; see also *Re Imperial Land Co. of Marseilles*, W. N. 1877, 236; 37 L. T. N. S. 588; an order was refused where it would cause delay, and the applicant had been dilatory in trying to obtain it: *Steuart* v. *Gladstone*, 7 Ch. D. 394; *Temperance Colonization Socy.* v. *Evans*, 7 C. L. T. 46. So, where the Court was not satisfied on the materials adduced, that the evidence was material: *Langen* v. *Tate*, 24 Ch. D. 522; *Smith* v. *Greey*, 10 P. R. 531; and where there was another action pending in the foreign country for the same cause: *Mair* v. *Anderson*, 11 U. C. Q. B. 160.

In *Grant* v. *Banque Franco-Egyptienne*, referred to in 27 W. R. p. 226, Brett, L.J., said: "I apprehend that the granting of a commission is a matter of discretion, and that the grounds upon which a commission is granted or refused is always a matter of comparison, namely, whether it is more convenient that the commission should go, than that witnesses should be examined before the tribunal here, and the exercise of that discretion depends upon the circumstances of each particular case." See the remarks of the same Judge in *Coch* v. *Allcock*, 21 Q. B. D. 181.

Where the person to be examined abroad is the party himself who asks for the commission, the Court will be more circumspect as to making an order than in the case of an ordinary witness: *Mills* v. *Mills*, 12 P. R. 473; *Light* v. *Anticosti*, 58 L. T. N. S. 25.

Terms as to reading the depositions at the trial were imposed where the plaintiff applied to examine himself by commission: *Nadin* v. *Bassett*, 25 Ch. D. 21; and as to security for costs in *Sheppard* v. *Dalbiac*, 80 L. T. Jour. 26.

In *Re Boyse*, *Crofton* v. *Crofton*, 20 Ch. D. 760, it was held that upon an application for a commission to take evidence abroad, the Court ought to be satisfied that the application is made *bonâ fide*. Where the Court thought the witness should be subjected to a strict cross-examination on part of a claim in

which he was interested, and the French practice was to have the examination take place through the Judge only, a commission was refused: see also *Berdan* v. *Greenwood*, 46 L. T. N. S. 524; 20 Ch. D. 764 (note), where the case turned on the fact that the person to be examined was the plaintiff himself, and the Court was not satisfied he could not attend so as to be cross-examined *vivâ voce*, but, on the contrary, was keeping out of the way: see *Langen* v. *Tate*, 24 Ch. D. 522; *Spiller* v. *Paris Skating Rink Co.*, W. N. 1878, 228; 27 W. R. 225; *Grant* v. *Banque Franco-Egyptienne*, *supra*; and *Thomas* v. *Storey*, and *Lawson* v. *Vacuum Brake Co.*, 27 Ch. D. 137, as explained in *Coch* v. *Allcock*, 21 Q. B. D. 1, 178. **Rule 588.**

In the absence of special circumstances making it desirable that the plaintiff should face the Court or jury in person, there is no reason why his evidence should not be taken by commission where he is residing abroad: *Armour* v. *Walker*, 25 Ch. D. 673; *Banque Franco-Egyptienne* v. *Lutscher*, 28 W. R. 133; 41 L. T. N. S. 468; W. N. 1879, 183; *Coch* v. *Allcock*, 21 Q. B. D. 1, 178; see *Price* v. *Bailey*, 6 P. R. 256. A commission may issue to examine a witness notwithstanding that his character for veracity is impeached. The proper course in such a case is to call witnesses at the trial for that purpose: *Nordheimer* v. *McKillop*, 10 P. R. 246.

A commission to examine as a witness a person who has absconded from the Province, will not be refused on the ground that he is alleged not to be a credible witness, and that his cross-examination in open Court is desired: *Nordheimer* v. *McKillop*, 10 P. R. 246.

The fact that the witness was a co-defendant with the party applying was considered no obstacle to the granting of a commission: *Wilson* v. *McDonald*, 13 P. R. 6.

In *The M. Moxham*, 1 P. D. 115, a commission to take evidence in Spain as to the law of Spain, was refused, as it was not shown that competent Spanish advocates could not attend the trial without difficulty, and in the opinion of the Judge it would, under the circumstances, be more satisfactory to have the witnesses examined in Court. See also *Russell* v. *G. W. R. Co.*, 3 U. C. L. J. 116, and *Atty.-Gen.* v. *Gooderham*, 10 P. R. 259, where the object was merely to obtain scientific, or expert testimony. **Expert evidence.**

A motion for a commission is usually to be made after issue joined: *Smith* v. *Greey*, 10 P. R. 531; but it is not essential that the action be technically at issue. The motion may be made whenever it can be shown that some issue is raised on the pleadings which must be tried in the action: *Smith* v. *Greey*, 11 P. R. 38. **When motion to be made.**

The form of order is given in the App. No. 138, and the form of a commission No. 118. **Order.**

Books and documents produced in an action may be sent out of the jurisdiction for the purpose of examining witnesses on a foreign commission; but documents produced in another action which is *sub judice* will not be sent away: *Clarke* v. *Union*, (*Chabot's Case*), 10 P. R. 413.

Where the application is to examine a witness who is travelling, it should be shewn that he will remain at the place to which the commission is directed, a sufficient time to allow of its due execution: *Singer* v. *Williams Manufacturing Co.*, 8 P. R. 483.

A commission issues only pursuant to the order. Where, therefore, an order provided for examination of one witness M. *vivâ voce*, and others upon interrogatories, it was held that the commission could not issue to examine M. only, without amending the order: *Smith* v. *Babcock*, 8 P. R. 175.

An objection to a witness affirming instead of taking an oath, on a commission, ought to be taken at the time of his appearing before the commissioner: *Rickards* v. *Hough*, 30 W. R. 676; 51 L. J. Q. B. 361.

See *Darling* v. *Darling*, 8 P. R. 391. for irregularities which were held not to invalidate the proceedings under a commission.

Where a witness previously examined by commission stated that he had further evidence to give, to explain or correct his former evidence, a re-examination was allowed under a new commission. The witness in such a case should

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Rules 589-592.

be considered the witness of the party applying to re-examine him : *Rogers* v. *Manning*, 8 P. R. 2.

Return.

Where the time for the return of a commission was extended to a certain day and on that day the witnesses were examined, it was held, that, having been executed within the time, the necessary delay occasioned by its transmission did not render it irregular : *Darling* v. *Darling*, 9 P. R. 560.

Opening.

Commissions after their return should only be opened on notice to all parties interested.

The Court in permitting a foreign commission to be opened before the trial, will not impose restrictions as to the use to be made of the knowledge of the evidence which would be acquired by the solicitors by such opening : *Smith* v. *Greey*, 11 P. R. 238.

Notice of commission.

589. Due notice of every such commission shall be given to the adverse party, to the end that he may cause the witnesses to be cross-examined. R. S. O. 1877, c. 62, s. 22.

Commissions on Master's certificate.

590. Foreign commissions for the examination of witnesses without the jurisdiction of the Court, in proceedings before a Master, may, on the certificate of the Master, be issued upon præcipe. Chy. O. 221.

The Master may direct witnesses to be examined before any other Master, or Examiner, of the Court, without the consent of the parties : *Re Casey, Biddell* v. *Casey*, 1 Chy. Ch. 198.

Foreign commission not issued of course.

The Master cannot grant a certificate for a commission *ex parte* : *McLennan* v. *Helps*, 3 Chy. Ch. 193 ; except where the reference is *ex parte*. A commission to take evidence is not granted as of course : *Price* v. *Bailey*, 6 P. R. 256; *Berdan* v. *Greenwood*, 46 L. T. N. S. 524, note *a* ; *Vivian* v. *Mitchell*, 13 C. L. J. 198 ; *Re Boyse, Crofton* v. *Crofton*, 46 L. T. N. S. 522; and other cases cited in note to *Rule* 588, *supra*, and see as to proceedings under a commission, *Rules* 591 *et seq.*

Where an application is made to the Master for a commission to cross-examine a plaintiff resident abroad, on an affidavit filed by him in support of his account, the Master cannot properly refuse it, so long as the plaintiff relies on the affidavit in support of his claim : *Townend* v. *Hunter*, 3 C. L. T. 310.

The Master's certificate for a commission should, *mutatis mutandis*, follow, as nearly as may be, the form of order as given in the Appendix. See Form No. 138.

Notice of motion.

591. Upon an application for a commission to take evidence the applicant is in the notice of motion to state the name of the commissioner to whom he desires the commission to be issued ; and where the opposite party desires to name another commissioner, he is, on the return of the motion, to give notice to the applicant of the name of any other commissioner. J. A. Rule 286.

Commission to whom directed.

592. Upon the hearing of the motion the Court or Judge (or officer before whom the motion is made) may order the issue of the commission directed to the persons so named or to such other person or persons as may seem proper. J. A. Rule 287.

Rules 593-596.

593. The order or certificate for the issue of a commission is to state the name of the commissioner to whom it is to be directed, and whether the examination of witnesses thereunder is to be taken upon oral questions or upon written interrogatories, and also whether or not notice of the execution thereof is to be given to the opposite party; and in case notice is to be so given, then the name and the address of the person on whom such notice is to be served are to be stated in the order. J. A. Rule 288. Particulars to be stated in order.

Commissions may provide for the examination of unnamed persons at a particular place: *Nadin* v. *Basset*, 25 Ch. D. 21; *Armour* v. *Walker*, 25 Ch. D. 676.

594. The examination of witnesses under a commission is to be taken either orally or upon written interrogatories, or partly in one way and partly in the other, as the Court or a Judge may direct. All oral questions shall be reduced into writing and with the answers thereto returned with the commission. See J. A. Rule 289. Mode of examination.

There was formerly no jurisdiction to order the examination to be wholly oral unless all parties consented, as original *Rule* 289 so provided. That *Rule* has, however, been amended by the present *Rule* under which and *Rule* 604, the Judge or officer making the order will be able to provide whatever may be proper in this respect. See *Watson* v. *McDonald*, 8 P. R. 354, under the old practice, and Taylor on Evidence, 451.

Costs.—As to the costs of commission, see *Dominion, etc.* v. *Stinson*, 9 P. R. 177, in note to *Rule* 1214.

595. Where the examination is to take place upon written interrogatories, the interrogatories in chief are to be delivered to the opposite party (unless otherwise ordered) at least 8 days before the issue of the commission; and the cross-interrogatories are to be delivered to the opposite party (unless otherwise ordered) within 4 days after the receipt of the interrogatories in chief; and in default of cross-interrogatories being so delivered, the opposite party may send the commission without cross-interrogatories. J. A. Rule 290. Examination on written interrogatories.

The rules of evidence as to leading questions at a trial cannot be strictly applied to interrogatories administered under a foreign commission in the Master's office: *Lockwood* v. *Bew*, 10 P. R. 655.

It is not proper to apply to strike out interrogatories for impertinence, the proper course is for the witness to demur to the impertinent questions: *Williams* v. *Corby*, 8 P. R. 83; see *Lockwood* v. *Bew*, 10 P. R. 655, and *Swabey* v. *Dovey*, 55 L. J. Chy. 631.

596. An examination may be executed *ex parte*, unless the opposite party shall, upon the hearing of the application for the order or Master's certificate for the issue of the Examination *ex parte*.

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commission, require notice of the execution of the commission, and give the name and place of abode of some person resident within two miles of the place where the commission is to be executed, upon whom notice may be served. J. A. Rule 291.

By the word "examination," "commission" is probably intended.

Notice of execution of commission.

597. Where notice of the execution of the commission is required to be served, 48 hours' notice shall be sufficient; such notice is to be in writing, stating the time and place of the intended examination, and is to be addressed to the person named for that purpose in the order or certificate for the issue of the commission; and service upon him, or upon a grown up person, at the address stated in the order or Master's certificate, shall be sufficient. If the name or address stated in such order or certificate shall prove to be illusory or fictitious, or if the party so notified fails to attend, pursuant to the notice, the commission may be executed *ex parte*. J. A. Rule 292.

Copies as evidence.

598. In the event of any witness on his examination, cross-examination or re-examination, producing any book, document, letter, paper or writing, and refusing for good cause to be stated in his deposition, to part with the original thereof, then a copy thereof, or extract therefrom, certified by the commissioners or commissioner present to be a true and correct copy or extract, shall be annexed to the witness' deposition. J. A. Rule 293.

Oath of witness.

599. Every witness to be examined under the commission shall be examined on oath, affirmation, or otherwise in accordance with his religion, by or before the said commissioners or commissioner. J. A. Rule 294.

See *Rule* 588 note.

Examination through an interpreter.

600. If any one or more of the witnesses do not understand the English language (the interrogatories, cross-interrogatories, and *viva voce* questions, as the case may be, being previously translated into the language with which, he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters, to be nominated by the commissioners or commissioner, and to be previously sworn according to his or their several religions by or before the

said commissioners or commissioner truly to interpret the questions to be put to the witness or witnesses, and his and their answers thereto. J. A. Rule 295. Rules 601, 604.

601. The depositions to be taken under and by virtue of the said commission shall be subscribed by the witness or witnesses, and by the commissioners or commissioner who shall have taken such depositions. J. A. Rule 296. Depositions to be signed.

602. The interrogatories, cross-interrogatories, and depositions together with any documents referred to therein, or certified copies thereof or extracts therefrom, shall be sent to the Judge or officer on or before such day as may be ordered in that behalf, enclosed in a cover under the seal or seals of the said commissioners or commissioner, and office copies thereof may be given in evidence, on the trial of the action, by and on behalf of the said parties respectively, saving all just exceptions, without any other proof of the absence, from this country, of the witness or witnesses therein named, than an affidavit of the solicitor or agent of the party as to his belief of such absence. J. A. Rule 297. Return of commission and use thereof as evidence.

603. Where, upon the application for a commission to take evidence, the opposite party desires to join in the commission and examine witnesses on his own behalf thereunder, or names a commissioner, each party is to pay the cost of the commission consequent upon the examination of his witnesses and the appointment of his commissioner, without prejudice to the question by whom such costs are ultimately to be borne; and if for any reason the commissioner named by either party refuses to act in the execution of the commission upon receiving 48 hours' notice in writing from the other of them so to do, the commission may be executed by the commissioner giving such notice alone. J. A. Rule 298. Parties joining in commission.

604. Every order for a commission shall be read as if it contained the above particulars, and shall not set forth the same, but may contain any variations therefrom, and any other directions, which the Court or Judge shall see fit to make. J. A. Rule 300. Order for commission to be read as including above particulars.

See note to *Rule* 594.

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Rule 605.

(v.) *Affidavits.*

Form of affidavits.

605. Every affidavit shall be drawn up in the first person, stating the name of the deponent at the commencement in full, and his description and true place of abode, and shall be signed by him. J. A. Rules 464, 465; Chy. O. 258.

Style of cause in affidavits.

See Eng. Rs. of 1880 12 and 13 (1883, Rs. 527, 528).

An affidavit should be entitled in the cause or matter in which it is to be used. The shortened style of "A. B. and others, plaintiffs, and C. D. and others, defendants," may be used: *Rule* 451; *Dickey* v. *Heron*, 2 Chy. Ch. 490; but not "Brown *v.* Jones." An affidavit styled in the H. C. J., but not in the proper Division is amendable: *Robertson* v. *Coulton*, 9 P. R. 16; an affidavit by a person who was a stockbroker was held not to state his description and true place of abode, by describing him as a "stock exchange stockbroker": *Re Levy, Levin* v *Levin*, 60 L. T. N. S. 317; 37 W. R. 296.

Erroneously entitled, may be resworn.

Affidavits erroneously entitled have been allowed to be taken off the files, and resworn without a fresh stamp: *Pearson* v. *Wilcox*, 10 Ha. app. xxxv.; *Hawes* v. *Bamford*, 9 Sim. 653.

Affidavits by parties to the cause.

In affidavits made by parties to the cause it was sufficient in Equity to describe the deponent as the above-mentioned plaintiff, or defendant, without specifying any residence, or other addition: *Crockett* v. *Bishton*, 2 Madd. 446; *Rogers* v. *Crookshank*, 4 C. L. J. 45. And the same rule prevailed at Common Law: *Poole* v. *Pembrey*, 1 Dowl. P. C. 693; *Brooks* v. *Farlar*, 5 Dowl. P. C. 361; *Lyman* v. *Brethron*, 2 C, L. Ch. 108; *Ewing* v. *Lockhart*, 3 U. C. Q. B. 248. But affidavits in which the plaintiff in a divorce proceeding gave no address or an illusory one, were rejected by the Court, and the case disposed of on the defendant's affidavits: *Hyde* v. *Hyde*, 59 L. T. N. S. 523. An affidavit as to the fitness of a proposed trustee which the deponent was described as a "gentleman," was held insufficient: *Re Orde*, 24 Ch. D. 271; *Re Horwood*, 55 L. T. N. S. 373.

Affidavits received, though irregularly drawn.

The Court has sometimes received affidavits sworn abroad, although drawn in the third person: *Re Husband*, 12 L. T. N. S. 303; and see *Dryden* v. *Frost*, 8 Sim. 380. And an affidavit without the signature of the deponent was received: *Re Howard*, L. R. 9 C. P. 347; but see *contra*, *Anderson* v. *Stather*, 9 Jur. 1085.

Where the initial only of the deponent's second Christian name was given the affidavit was held to be regular: *De Forrest* v. *Bunnell*, 15 U. C. Q. B. 370.

An affidavit omitting the words "make oath" will be rejected: *Allen* v. *Taylor*, 10 Ex. 52; *Phillips* v. *Prentice*, 2 Ha. 542; *Re Newton*, 2 D. F. & J. 3.

Affidavits may be sworn in Ontario before commissioners appointed under R. S. O. c. 62, or before a notary public of Ontario: see R. S. O. c. 153, s. 3.

Affidavits sworn abroad.

Affidavits sworn out of Ontario may be sworn before any of the persons enumerated in R. S. O. c. 61, s. 34. Affidavits sworn before any other person than those mentioned in that statute cannot be read: *McEwan* v. *Boulton*, 3 Chy. Ch. 63.

Affidavits before whom to be sworn.

Affidavits sworn before the solicitor, or partner, or managing clerk, or agent, of the solicitor, of the party on whose behalf the affidavit is filed, cannot be read: *Dunn* v. *McLean*, 1 C. L. J. 212; 6 P. R. 95; *Duke of Northumberland* v. *Todd*, 7 Ch. D. 777; and see *Rule* 613. But this rule does not apply to the partner of a counsel engaged in the cause, but not otherwise connected therewith: *Wilde* v. *Crow*, 10 C. P. 406; nor to affidavits to hold to bail: *Rule* 613.

Commissioner should not take voluntary affidavits.

A commissioner ought not to take affidavits not made in any cause, nor authorized by statute to be taken by him. Such oaths are voluntary: *Jackson* v. *Kassel*, 26 U. C. Q. B. 341; *McElroy* v. *Hall*, 25 U. C. Q. B. 303; and see R. S. C. c. 141.

The officer taking the affidavit should add after his signature the name of his office. The words "A Commissioner, etc.," or "A Commissioner," or "A Comr.," have been held sufficient: *Henderson* v. *Harper*, 2 U. C. Q. B. 97; *Brown* v. *Parr*, 2 U. C. Q. B. 98; *Murphy* v. *Boulton*, 3 U. C. Q. B. 177; *Pawson* v. *Hall*, 1 P. R. 294; *Brett* v. *Smith*, *ib.*, 309. But the signature alone has been held sufficient: *Babcock* v. *Bedford*, 8 C. P. 527. "Sworn before, etc.," omitting "me," was held sufficient: *Martin* v. *McCharles*, 25 U. C. Q. B. 279; and see *De Forrest* v. *Bunnell*, 15 U. C. Q. B. 370. Rules 606-608. Officer should add his name of office.

The addition of a deponent is only descriptive and not an allegation of fact: *Hood* v. *Cronkrite*, 4 P. R. 279. The usual form of oath "you swear that the contents of this affidavit are true," however, would seem to pledge the deponent to the truth of the addition, as well as of the matters formally deposed to.

In drawing affidavits, the following observations of Wilson, J., in *Fisher* v. *Green*, 2 C. L. J. N. S. 16, may be useful to the student: "I regret to find, in several instances lately, that superlative words are used in stating facts in affidavits. There can be no stronger expression of the very truth than that it is stated on oath. If less certainty is intended, the statement should be qualified. The terms to which I object are, '*I most positively swear*,' etc. I can only show my disapproval of such language, by refusing to allow costs to be taxed for affidavits drawn in this style, when costs are in my discretion. In one of the affidavits before me I observe the expression, that the statement made by another person in another affidavit was 'false.' I suppose the affidavit was drawn by a young man of little experience, for the one had detailed a transaction in one light, and the other had stated the same transaction in another light, but the term 'false,' as applied by one to the other, could in no way verify the statement of him who used the offensive expression," and see *Davidson* v. *Grange*, 5 P. R. 258. *Fisher* v. *Green*. Superlative, needlessly offensive expressions not to be used in affidavits.

A solicitor introducing impertinent and irrelevant matter into his affidavit may be ordered to pay the costs of the application in which it is used: *Anon*, 4 P. R. 242; and see *Corby* v. *Robbin*, 5 U. C. L. J. 225.

Where affidavits were badly written, scarcely legible and difficult to decipher, the Court refused all costs connected with their preparation, although costs of the suit were given: *Burnham* v. *Garvey*, 27 Gr. 80.

606. In every affidavit made by two or more deponents the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents. J. A. Rule 466. Affidavits made by two or more deponents.

Identical with the Eng. R. 14th of April, 1880, (1883, R. 529).

607. The jurat may be in the form or to the effect following: Jurat.

Sworn before me at , in the County of ,
on the day of A.D. . Chy. O. 258.

Where there are several deponents, their names are to be stated in the jurat *e.g.*, 'sworn by the said A. B. and C. D. before me at, etc.': *Rule* 506.

608. There shall be appended to or indorsed upon every affidavit a note shewing on whose behalf it is filed. J. A. Rule 467. Indorsement.

Taken from the Eng. R. 15th of April, 1880.

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Rules 609, 610.
Affidavits how framed.

609. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. *See* J. A. Rule 284; Chy. O. 259.

Identical with Eng. R. 1875, O. 37, r. 3, (1883, R. 523).

Under Chy. Ord. 259, each statement in an affidavit to be used as evidence on any proceeding before the Court was required to show the deponent's means of knowledge. This provision, however, is not embodied in these *Rules*.

Under this *Rule* the grounds of statements made on "belief" are required to be stated, but not the means of knowledge for positive allegations: see *Bidder* v. *Bridges*, 26 Ch. D. 1.

A statement by plaintiff's agent that he had the management of all plaintiff's business in this country was held sufficient to show his means of knowing of the plaintiff's ownership of certain property deposed to: *McEwen* v. *Boulton*, 2 Chy. Ch. 399.

Where the deponent swore that to disclose his means of knowledge would defeat the ends of justice, the requirements of Chy. O. 259 were dispensed with: *Merchants Express Co.* v. *Morton*, 15 Gr. 274; 2 Chy. Ch., 319.

An affidavit in which the deponent stated that he was credibly informed and believed certain facts, without stating the name of his informant, or the ground of his belief, was held not to comply with this *Rule*, and was insufficient proof of the facts deposed to: *Gilbert* v. *Stiles*, 13 P. R. 121.

Evidence on information and belief, though generally admissible on interlocutory applications, is not admissible on a proceeding which, though interlocutory in form, finally decides the rights of parties; and the party against whom it is adduced, is not bound to contradict it; but if in the Court below he deals with the evidence as admissible, he may be precluded from objecting to it before the Court of Appeal: *Gilbert* v. *Endean*, 9 Ch. D. 259.

Notwithstanding this *Rule*, an affidavit by a practitioner verifying a petition was held to be sufficient, (under a *Rule* under the Companies' Act, which required only an affidavit on belief as to the acts and deeds of other persons) though some of the allegations in the affidavits were only as to the belief of the petitioner, and although there are other affidavits in support of the petition which show the sources of the petitioner's belief: *Re New Callao*, 47 L. T. N. S. 175.

Costs of setting out the contents of written documents were disallowed in *Hirst* v. *Procter*, W. N. 1882, 12.

Scandalous affidavits.

Affidavits may be ordered to be taken off the files, if scandalous or irrelevant: *Sadleir* v. *Smith*, 7 P. R. 409; 15 C. L. J. 52; *Osmaston* v. *Association of Land Financiers*, W. N. 1878 101; *Kernick* v. *Kernick*, 12 W. R. 335; *Goddard* v. *Parr*, 3 W. R. 633; or the scandalous matter may be expunged: *Warner* v. *Mosses*, W. N. 1881, 69; *Re Fitch*, 2 Chy. Ch. 288; and see *Rule* 421 and note.

Costs of scandalous affidavits will be disallowed: *Vanstaden* v. *Vanstaden*, 10 P. R. 428.

Affidavits by officers for corporation.

610. Any affidavit in an action or proceeding to which a municipal or other corporation is a party may be made by any officer, servant, or agent of the corporation having knowledge of the facts required to be deposed to, and he shall state therein that he has such knowledge. J. A. Rule 595.

Rules 611-614.

611. No affidavit having in the jurat or body thereof, any interlineation, alteration, or erasure shall without leave of the Court or a Judge be read or made use of in any matter pending in Court unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit; nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are rewritten, and signed or initialed in the margin of the affidavit by the officer taking it. J. A. Rule 468.

Alterations in affidavits.

Taken from the Eng. R. 16th of April, 1880, (1883, R. 532) which contains also special provision for the case of an affidavit being taken at the "Central office."

A line drawn through words though leaving them legible is an erasure: *Williams* v. *Clough*, 1 A. & E. 376.

Where an interlineation was uninitialed by the Commissioner, it was held that under this *Rule* the affidavit could not be read, but leave was given to refile it properly sworn: *Boyd* v. *McNutt*, 9 P. R. 493.

No alteration can properly be made in affidavit after it has been sworn: see W. N. 1882, Part 2, 81.

612. Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his or her signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court or a Judge is otherwise satisfied that the affidavit was read over to and apparently perfectly understood by the deponent. J. A. Rule 469.

Affidavits by illiterate persons.

Identical with the Eng. R. April 1880, R. 17, (1883 R. 533).

Where an affidavit of an illiterate person did not appear to have been read over in the presence of the Commissioner, it was taken off the files: *Blenkharn* v. *Longstaffe*, 52 L. T. N. S. 681; 54 L. J. Chy. 516.

613. No affidavit shall be read or made use of for any purpose, if sworn before the solicitor of the party in the cause on whose behalf the affidavit is made, or before the clerk, or partner, of such solicitor; but this Rule shall not extend to affidavits to hold to bail. Rules T. T. 1856, 114.

No affidavit to be sworn before solicitor of party.

See Eng. Rules 1883, R. 536, 537.

See notes to *Rule* 605.

614. All affidavits and other papers required to be filed in any action or matter on motions and other

Stamps on affidavits.

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Rules 615, 616,

matters shall, before being used, be stamped with a proper filing stamp, and at or before the time of using them shall be filed in the proper office of the Division of the High Court to which the action or matter is assigned. *See* J. A. Rule 470; Chy. O. 260.

See Eng. R. April 1880, R. 18, (1883 R. 535).

On motions before the Master in Chambers, the affidavits in support of, or opposition to, the motion, are required to be filed with the Clerk in Chambers.

In actions in the Chancery Division the papers filed in Chambers, are transmitted to the Clerk of Records and Writs, on the conclusion of the motion: *Rule* 615; in actions in the other Divisions the papers are retained by the Clerk in Chambers.

On motions before a Judge of the County Court, or Local Master, the affidavits in support of, or opposition to, such motions, will have to be filed, in the former case, with the Local Registrar, or Deputy Clerk of the Crown, as the case may be, and in the latter case, with the Master himself.

Chy. Ord. 30 required the Registrar to transmit all affidavits and papers filed with him to the Clerk of Records and Writs. This provision has not been expressly continued in these *Rules*, but the practice is still maintained.

Affidavits, where filed.

615. Affidavits to be used on a motion in Chambers shall be filed with the Clerk in Chambers, who shall, in cases in the Chancery Division, transmit them to the Records and Writs office when the motion is disposed of. *See* Chy. O. 30.

Affidavits in chief, when to be filed.

616. All the affidavits upon which a notice of motion, or petition is founded, must be filed before the service of the notice of motion or petition, Chy. O. 261.

Chy. Ord. 261 provided that affidavits in answer must be filed not later than the day before that appointed for the hearing of the motion, or petition, This provision, however, is not embodied in these *Rules*, and no time whatever is prescribed for filing affidavits in answer, or reply.

Affidavits in support to be mentioned in notice of motion.

The affidavits and papers intended to be used in support of a motion, must be mentioned in the notice of motion: *Farish* v. *Martyn*, 1 Gr. 300, and when the motion is intended to be supported by affidavits filed previous to the date of the notice of motion, the date of the filing of such affidavits should be stated in the notice, or they cannot be used: *Fraser* v. *Fraser*, 13 Gr. 183; *McMartin* v. *Dartnell*, 2 Chy. Ch. 322; *Mackenzie* v. *Carter*, 12 P. R. 544; documents referred to in the affidavits filed in support of a motion may be read without special reference to them in the notice: *Johnson* v. *Ashbridge*, 2 Chy. Ch. 251. If a party gives notice of reading an affidavit in support of a motion, but declines to do so, the opposite party may, nevertheless, read it: *Clark* v. *Law*, 2 K. & J. 28; *Cauty* v. *Houlditch*, 14 Sim. 75, and may cross-examine the deponent though the party filing it offers to withdraw it: *Pike* v. *Robinson*, W. N. 1873, 178.

Affidavits of service must be filed at latest before the rising of the Court on the day on which the application is made: *Miltown* v. *Stuart*, 8 Sim. 34; but see *contra*, *Secar* v. *Webb*, 25 Ch. D. 84; 49 L. T. N. S. 94, where it was held that they were filed in time, if filed at any time before the order was drawn up; but see *Re Rosier*, *Jones* v. *Bartholomew*, 49 L. T. N. S. 442.

(vi) *Admissions.*

Rules 617-619.

617. Either party may call upon the other party to admit any document, saving all just exceptions. J. A. Rule 241. Notice to admit documents.

Identical with the first clause of Eng. R. 1875, O. 32, r. 2, (1883, R. 372).

This *Rule* extends to all documents which a party proposes to adduce in evidence and not merely those in his custody or control: *Rutter* v. *Chapman*, 8 M. & W. 388.

Among the "just exceptions" are the admissibilty of the documents as evidence: *Phillips* v. *Harris*, Car. & M. 492, and their legal effect: *Hills* v. *London Gas Light Co.*, 1 F. & F. 346; but not an objection to their reception on the ground of interlineation: *Freeman* v. *Steggall*, 14 Q. B. 202.

Admissions between defendants cannot be used as evidence against the plaintiff: *Dodds* v. *Tuke*, 25 Ch. D. 617.

618. A notice to admit documents may be in the Form No. 26, in the Appendix. J. A. Rule 242. Form of notice.

Same as Eng. R. 1875, O. 32, r. 3, (1883, R. 373).

A notice to admit must be given a reasonable time before trial: *Tynn* v. *Billingsley*, 3 Dowl. 810; *Cary* v. *Cumberland*, 1 P. R. 140, and holds good upon a subsequent trial: Day, C. L. P. Act, 3rd ed. 103; *Wilson* v. *Baird*, 19 C. P. 98.

A notice to admit may be given, even where the document is not in the possession or under the control of the party: *Rutter* v. *Chapman*, 8 M. & W. 388; *Conger* v. *McKechnie*, 1 C. L. Cham. 220; including a foreign judgment: *Smith* v. *Bird*, 3 Dowl. 641; and documents, the validity of which is directly in issue: *Spencer* v. *Barough*, 9 M. & W. 425.

For notices which may be given to enable secondary evidence to be given of wills, registered instruments, telegraphic messages, letters, etc., see R. S. O. c. 61, ss. 38, 43, 45, 46.

Sec. 44 of that Act does not enable a party to use as evidence a certified copy of a registered probate without the notice provided for by sec. 38: *Barber* v. *McKay*, 17 Ont. 562.

619. The production of any written admissions purporting to be admissions in the action, and to be made in pursuance of any notice to admit documents or otherwise, and to be signed by the solicitor of the party by whom, or on whose behalf, they purport to be made, shall be sufficient *prima facie* evidence of such admissions. J. A. Rule 243. Proof of admissions.

Not similar to the Eng. R. 1875, O. 32, r. 4, which was the same as The C. L. P. Act, R. S. O. c. 50, sec. 173. The Eng. R. of 1883, extends to admissions of facts, and requires an affidavit of the solicitor or his clerk as to the signature of the admissions. The Chancery Practice in Ontario was to dispense with an affidavit, and the present *Rule* adopts that practice.

The mere fact that documents are admitted in admissions signed by the solicitor, will not make them evidence unless put in at the trial: *Watson* v. *Rodwell*, 11 Ch. D. 150; and the admission of a copy does not entitle the plaintiff to put in the copy without first accounting for the original: *Sharpe* v. *Lambe*, 11 A. & E. 805. The admission when made is conclusive: *Langley* v. *E. of Oxford*, 1 M. & W. 508.

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Rule 620.

14. Transmission of Interest *pendente lite.*

Action not to abate by reason of marriage, etc., or death between verdict and judgment.

620. An action shall not become abated by reason of the marriage, death or bankruptcy of any of the parties, if the cause of action survives or continues, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*. And whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered notwithstanding the death. J. A. Rules 383, 601.

The first clause is identical with Eng. R. 1875, O. 50, r. 1. That of 1883, R. 178, is the same as this *Rule* except that it is made to apply to "a cause or matter" instead of "an action" only.

The former Eng. R. of 1875 was held to apply to a petition: *Re Atkins*, 1 Ch. D. 82; but not to a charging order: *Finney* v. *Hinde*, 4 Q. B. D. 102.

Abatement and Revivor under former practice.

Both in the Common Law Courts and in the Court of Chancery, the old and inconvenient methods of making good a suit which had become defective by reason of death or otherwise were long since superseded by simple, inexpensive methods of procedure. But the procedure was different in the several Courts.

In the Common Law Courts of this Province the practice was governed by R. S. O. 1877, c. 50, s. 228, *et seq.* Under these enactments the procedure varied a little according to the nature of the defect which had occurred, and the stage at which it occurred. In the case of death, the plaintiff was empowered to enter a suggestion of the death, and proceed with the action in the name of or against the proper parties; and the truth of that suggestion might have been traversed and tried. If the plaintiff omitted to enter the necessary suggestion, the defendant might by summons require him to do so, and in default might do so himself.

In Chancery the matter was governed in this Province by the Chy. Orders numbered from 337 to 351.

The method of revivor, according to the Chancery procedure, has in substance been adopted by these *Rules*.

Under the old practice there were cases in which, though the cause of action does not survive, proceedings having reached a certain stage might go on without an alteration in the style of cause, *e.g.*, in the case of defendant's death between the verdict and judgment: see Day, C. L. P. Act, 4th ed., 156. The above *Rule* following in the last clause the Eng. R. of 1883 now provides for such cases.

Under present Rules.

There is nothing in the *Rules* on this subject to alter the existing law as to what causes of action do and what do not survive; thus where the cause of action or the interest of the party is terminated by death, etc., the action is at an end: *Twycross* v. *Grant*, 4 C. P. D. 40; *Kirk* v. *Todd*, 21 Ch. D. 484; *Ashley* v. *Taylor*, 10 Ch. D. 768; 27 W. R. 228; *Bowker* v. *Evans*, 15 Q. B. D. 565; 53 L. T. N. S. 801. See notes to *Rule* 622. Nor is there anything to preserve to any person a right of action which by the ordinary rules of law has passed from him. Thus, on the bankruptcy of a plaintiff, where the right of action is one which passes to the trustee, the action cannot be carried on by the bankrupt, but only by the trustee: *Jackson* v. *North-Eastern Ry. Co.*, 5 Ch. D. 844; *Warder* v. *Saunders*, 10 Q. B. D. 114; see also *Emden* v. *Carte*, 17 Ch. D. 169. If, in such a case, there are two trustees, and one refuses to go on, the other may do so, and make his co-trustee a defendant: *Jackson* v. *North-Eastern Ry.*, *supra*.

If the trustee elects not to proceed, it is not open to the plaintff to do so, and if he does the action may be stayed on motion or dismissed: *Warder* v. *Saunders*, 10 Q. B. D. 114. **Rule 620.**

If the trustee elects to proceed he becomes liable for all costs including those already incurred: *Borneman* v. *Wilson*, 28 Ch. D. 53; *Watson* v. *Holliday*, 20 Ch. D. 780.

Where, pending an action, the plaintiff assigned in bankruptcy but subsequently obtained a discharge, and a re-assignment from the trustee, it was held that the cause of action continued, and the action had not abated by the bankruptcy: *Barker* v. *Johnson*, 60 L. T. N. S. 64.

In *United Telephone Co.* v. *Bassano*, 31 Ch. D. 630, judgment was given against the defendants, who appealed, but before the appeal was heard became bankrupt. It was held that having an interest in being relieved from the injunction awarded by the judgment, they might appeal, on giving security for costs.

A married woman and her husband were co-plaintiffs; after the action had been entered for trial, the husband became bankrupt and obtained a discharge in liquidation. No one appeared at the trial, and it was held properly dismissed with costs as the husband was still liable for costs and they were not provable in the liquidation: *Vint* v. *Hudspith*, 52 L. T. N. S. 741; 29 Ch. D. 322.

If the death or change of interest takes place before the writ is served the action cannot be revived or continued: *Watson* v. *Ham*, 1 Chy. Ch. 295; see *Foster* v. *Ward*, 9 L. R. Ir. 447. Death, etc., before writ.

A writ was issued but not served within six years from the accrual of the cause of action. The defendant died within a year from the issue of the writ. A new writ against his representatives was issued after the year from the issue of the old writ, but within a year from the death of the defendant. It was held that this was a reasonable time under the 4th sec. of 21 Jac. 1, c. 16, (Statute of Limitations), and that *The Judicature Act* does not alter the right to bring fresh actions: *Swindell* v. *Bulkeley*, 35 W. R. 189; 18 Q. B. D. 250.

The present *Rule* applies to enable the action to be proceeded with in case of marriage, death, or bankruptcy, without further order or notice, only where the cause of action survives or continues in some person who is before the Court: *Eldridge* v. *Burgess*, 7 Ch. D. 411; see *Allchin* v. *Buffalo, etc.*, 2 Chy. Ch. 45. Thus where five defendants were jointly and severally liable, two of whom became bankrupt, Fry, J., offered to allow the trial to stand, that the other three might serve notice on the trustees of the bankrupts if they wished to do so; as they declined, the suit was held not to be defective and the trial was ordered to proceed: *Lloyd* v. *Dimmack*, 7 Ch. D. 398; see also *Walker* v. *Blackmore*, W. N. 1876, 112. When action may proceed without order.

Where partners have recovered a judgment, and one of them dies, the action survives, so that the surviving partner may issue execution: *Davies* v. *Andrews*, 28 Sol. Jour. 411; W. N. 1884, 94.

In an action for damages for misrepresentations against several defendants, one defendant died after issue joined. It was held that the action could be proceeded with against the survivors: *Beatty* v. *Neelon*, 9 Ont. 385.

Where, however, a *sole* plaintiff or defendant dies or becomes bankrupt, the action abates or becomes defective: *Eldridge* v. *Burgess*, 7 Ch. D. 411; *Jackson* v. *N. E. Ry. Co.*, 5 Ch. D. 844; *Barter* v. *Debeux*, 7 Q. B. D. 413; *Emden* v. *Carte*, 17 Ch. D. 169; *Chorlton* v. *Dickie*, 13 Ch. D. 160; *Warder* v. *Saunders*, 10 Q. B. D. 114, and requires to be continued under the subsequent *Rules* by the proper parties: *Walker* v. *Blackmore*, *supra*. When order necessary.

On the bankruptcy of plaintiff, the defendant, wishing to have the action dismissed for want of prosecution, was required to give notice to the trustee: *Wright* v. *Swindon Ry. Co.*, 4 Ch. D. 164; see also *Re Atkins*, 1 Ch. D. 82; *Cameron* v. *Eager*, 6 P. R. 117.

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Rules 621, 622.

In an action by the indorser of a bill of exchange against the drawer who had become bankrupt, and suffered judgment by default, the trustee applied for leave to defend, complaining that judgment had been snapped. Quain, J., said, "It is only a question of terms. I will order the judgment to be set aside on payment of costs, and that the trustee be at liberty to defend in the name of the debtor: *Goddard* v. *Poole*, W. N. 1875, 230; 1 Charl. Ch. Ca. 126.

Assignment *pendente lite*.

621. In case of an assignment, creation or devolution of any estate or title *pendente lite*, the action may be continued by or against the person to or upon whom such estate or title has come or devolved. J. A. Rule 384.

Identical with the Eng. R. 1875, O. 50, r. 3 (1883, R. 180).

Incumbrancers, or purchasers, becoming such after writ sued out, and a *lis pendens* registered, will be bound by the judgment and need not be made parties whether the plaintiff have notice of them or not: Dan. Pr., 5th ed., 242; *Robson* v. *Argue*, 25 Gr. 407; see *Wallbridge* v. *Martin*, 2 Chy. Ch. 275. But in cases where there has been a change in ownership of the legal estate and a conveyance is required, it may be necessary to add parties: Dan. Pr. 243; and *supra* p. 152; additional parties may be, in such cases, added by the plaintiff by the common *præcipe* order: *Matthews* v. *Mears*, 21 Gr. 99; see also *Lowe* v. *Watson*, 1 Sm. & Giff. 123; but not parties who acquired their interest before action: *McKenzie* v. *McDonnell*, 15 Gr. 442.

Whether an agreement respecting the assignment of the subject of an action made with persons not parties, *pendente lite*, renders the action defective depends upon the nature of the agreement, and whether according to its legal effect the Court can give the relief claimed without the addition of the other persons: *Scott* v. *Benedict*, 9 C. L. T. 181.

Rule 324 has been also applied to add parties for example, in *Kino* v. *Rudkin*, 6 Ch. D. 160, to add a person at his own request to whom an assignment *pendente lite* had been made by defendant; and in *Scar* v. *Lawson*, 16 Ch. D. 121, on defendant's motion to add a person to whom the plaintiff had assigned his interest. In such a case as the last, the action may be stayed till security is given, or the suit continued in the name of the assignee: *Swan* v. *Adams*, 7 P. R. 147; see also *Ashley* v. *Taylor*, 10 Ch. D. 768.

The *Rule* applies only to devolutions or assignments *pendente lite*, not after final judgment: *Atty.-Gen.* v. *Birmingham Corp.*, 15 Ch. D. 423; but in a foreclosure action, where a party had assigned his interest after decree, the assignee was made a party after order for foreclosure absolute: *Campbell* v. *Holyland*, 7 Ch. D. 166; but in *Abell* v. *Parr*, 9 P. R. 564, it was held that persons to whom defendants had assigned *pendente lite*, could not be added after judgment and declared bound by it, where they claimed to be entitled independently of the assignment.

An order adding a trustee in bankruptcy under this *Rule* as a defendant for discovery only, was set aside as improper: *Symonds* v. *City Bank*, 79 L. T. Jour. 175.

Where a trustee in bankruptcy suing as such is removed, and a new trustee appointed, the latter must obtain an order to continue the action: *Pooley's Trustee* v. *Whetham*, 28 Ch. D. 38.

Order to add parties on change of interest how obtained.

622. Where by reason of marriage, death or bankruptcy, or any other event occurring after the commencement of an action and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, it becomes necessary or desirable that any person not already a party

to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceeding in the action shall be carried on between the continuing parties to the action and such new party, may be obtained on *præcipe*, (*a*) upon an allegation of such change, or transmission of interest cr liability, or of such person interested having come into existence. J. A. Rule 385. Rule 622.

(*a*) The Eng. R. 1875, O. 50, r. 4 (1883, R. 181), has the words "*ex parte*," instead of the words "on *præcipe*"; it is otherwise the same.

This *Rule* applies where the cause of action survives or continues to some person not already a party. Where the cause of action does not survive, the action cannot be continued under this *Rule*: see *Lowe* v. *Watson*, 1 Sm. & Giff. 123; *Dendy* v. *Dendy*, 5 W. R. 221; *Greenhough* v. *Rumney*, 5 W. R. 465; *Williams* v. *Williams*, 9 W. R. 296.

All actions survive which do not fall within the maxim, "*actio personalis moritur cum persona*," as modified by statute: see *Twycross* v. *Grant*, 4 C. P. D. 40.

Subject to statutory exceptions, actions for injuries merely personal do not survive: see *Twycross* v. *Grant*, *supra*; *Bowker* v. *Evans*, 15 Q. B. D. 565; (an action of tort referred to arbitration, and notwithstanding the mention of the personal representatives in the submission): *Udy* v. *Stewart*, 10 Ont. 591 (an action for seduction); *Finlay* v. *Cherney*, 20 Q. B. D. 494 (an action for breach of promise of marriage); *Hatchard* v. *Mège*, 18 Q. B. D. 771 (an action for defamation, whether of the private character of a person or in relation to his trade).

But an action for a false and malicious statement, causing damage to the plaintiff's personal estate, survives: *Hatchard* v. *Mège*, *supra*; and generally in actions for torts, where the injury has been to the estate of the deceased, the action survives to his personal representatives; *Twycross* v. *Grant*, 4 C. P. D. 40, and where a defendant in an action of tort dies, and his estate has benefitted by the tort, the action survives against his personal representatives: *Ashley* v. *Taylor*, 10 Ch. D. 768; *Phillips* v. *Homfray*, 24 Ch. D. 439; *Hamilton Provident* v. *Cornell*, 4 Ont. 623.

For this reason, an action to restrain the infringement of a trade mark survives: *Oakey* v. *Dutton*, 35 Ch. D. 700. Trade-mark.

In an action for damages for breach of covenants for title, the plaintiff died before the trial. His personal representative was held entitled to the damages accrued in his lifetime, and therefore, the action survived to his administratrix, although the future claim survived to the heir: *Platt* v. *G. T. Ry.*, 11 Ont. 246. Covenant for title.

An action for breach of promise of marriage where no special damage is alleged does not survive. The special damage which would cause the right of action to survive must be damage to the property and not to the person of the promisee, and must be within the contemplation of both parties at the date of the promise, and the action can be brought against the executors for such special damage only and not for general damages: *Finlay* v. *Cherney*, 20 Q. B. D. 494. Breach of promise of marriage.

But where the defendant in an action of tort died before trial and at a date later than six months after the commencement of the action, and had not got any benefit by the act complained of, but had only injured the plaintiff, it was held that the action did not survive, and could not be continued against his personal representatives: *Kirk* v. *Todd*, 21 Ch. D. 484; see also *Phillips* v. *Homfray*, 24 Ch. D. 439; *Chapman* v. *Day*, 31 W. R. 767; 48 L. T. N. S. 907; 49 L. T. N. S. 436; see also *Leslie* v. *Calvin*, 9 Ont. 207.

Practice.—An order to add parties under this *Rule* is an order on *præcipe*: *Oshawa Cabinet Co.* v. *Note*, 18 C. L. J. 69; application in Court is not neces- Practice.

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Rule 622. sary: *Crane* v. *Loftus*, 24 W. R. 93; *Roffey* v. *Miller*, *Ibid.*, 109; *Dyer* v. *Painter*, W. N. 1881, 105.

After an order under this *Rule*, the practice is as formerly, that in the subsequent proceedings the title of the revived action shall be added to the original style: *Miller* v. *Huddlestone*, W. N. 1881, 171; *Seear* v. *Lawson*, 16 Ch. D. 121.

A party served with notice of the judgment and having liberty to attend the proceedings after judgment, may obtain an order under this *Rule*: *Burstall* v. *Fearon*, 24 Ch. D. 126; but not a person who has not obtained such liberty as he is not a party: *Delaney* v. *Delaney*, 27 Sol. Jour. 418.

In the case of transmission of interest of a party served with notice of judgment an order under this *Rule* is not proper; the successor should be served with notice of the judgment: *Re Wicks*, W. N. 1888, 9.

An executor continuing an action becomes, as formerly, when he obtained an order of revivor under the old practice, liable for costs: *Boynton* v. *Boynton*, 9 Ch. D. 250; 4 App. Cas. 733.

Where two of several plaintiffs having separate causes of action died before trial but, in ignorance of their death, the trial proceeded and the action was dismissed, an application by the executors of the deceased plaintiffs to continue the action was refused: *Arnison* v. *Smith*, 40 Ch. D. 567.

An order of revivor is in force from its service, and notice of trial served within 14 days after such service, for a day after the expiration of the 14 days was held good: *New York Piano Co.* v. *Stevenson*, 10 P. R. 270.

Where on the death of the sole defendant after notice of trial, persons in whom his interest vested were added as defendants. It was held that new notice of trial to them was necessary: *Johnston* v. *English*, 55 L. T. N. S. 55; 35 W. R. 29; W. N. 1886, 131.

Examples. On the death of an accounting party the Court may on an *ex parte* motion order the action to continue between continuing parties and the executor of deceased, notwithstanding that the executor is resident out of the jurisdiction: *Jameson* v. *Marshall*, 46 L. T. N. S. 480; but see *Morrice* v. *Smart*, 73 L. T. Jour. 398.

Where the plaintiff died within fourteen days from trial, the Court made an order, on the application of the executors, continuing proceedings, the executors undertaking to apply forthwith for probate, and to produce the same at the trial of the action if obtained: *Hughes* v. *West*, 13 L. R. Ir. 224.

Two sons were under their father's will appointed trustees on attaining twenty-one, and an administration action was commenced on the elder attaining that age, in which the infant son was a plaintiff and the other a defendant as trustee. Upon the infant attaining twenty-one and becoming a trustee and thus changing his interest and liability, an order was made *ex parte* making the infant son a co-defendant: *Re Goold*, *Goold* v. *Goold*, 51 L. T. N. S. 417; W. N. 1884, 185.

In an action on a promissory note, where the defendant became bankrupt, it was held that the trustee should not be added, as the judgment would not be for recovery, but would only amount to a declaration of a right to prove, which ought to be made in the bankruptcy proceedings: *Barter* v. *Deheux*, 7 Q. B. D. 413.

Where a petitioner had died after an order directing inquiries, it was ordered that the petition be carried on by the executors: *Re Atkin's Estate*, 1 Ch. D. 82. See note to s. 2 of the Act.

If an action becomes defective by the birth, since its commencement, of an infant who is a necessary party thereto, and proceedings since its birth have been taken in the action, the common order under this *Rule* will not render such proceeding binding on the infant. A special form of order to meet this case will be found in Seton, 4th ed., 1527, Form 3, and *Peter* v. *Peter*, 26 Ch. D. 181.

Where a party becomes a lunatic pending action, as to continuance of the action by his committee, see *Re Green*, 41 L. T. N. S. 30; 48 L. J. Chy. 681.

In *Wallis* v. *Smith*, 46 L. T. N. S. 473; 51 L. J. Chy. 577, a judgment creditor who had obtained an order attaching a judgment debt, was held entitled to be added under this *Rule* as co-plaintiff with his debtor in the action in which the debtor had obtained the judgment, and to have notice of all proceedings taken in that suit to recover the debt. This decision proceeded to a great extent upon the terms of Eng. Ord. 50, R. 2, (1883, R. 179), which applied to the case of the devolution of estate by operation of law, and which not been adopted in the Ontario Act. **Rule 623.**

This *Rule* is not inapplicable to the case where there is a transmission of interest by reason of a subsequent incumbrancer having redeemed the plaintiff in a foreclosure suit. In such case, a new account may probably be taken without order under *Rule* 132. The costs of an order under this *Rule* were allowed in *Mitchell* v. *Barrett*, 3 C. L. T. 265.

Where a sole plaintiff in an administration action died, an order to continue the action was granted to a person who had been served with notice of the judgment and had obtained liberty to attend the proceedings, he being held to be in the same position as a party to the action: *Burstall* v. *Fearon*, 24 Ch. D. 126. The personal representative of the plaintiff might obtain an order to continue the proceedings: *Dyer* v. *Painter*, W. N. 1881, 105.

Where an appeal to the Court of Appeal becomes defective by death, transmission of interest, or other cause, proceedings to continue the appeal by or against the proper parties should be taken under this *Rule*, and in the Court of first instance. The appeal is a step in the cause or matter: *Rule* 863, and the present *Rule* being applicable the express provision to the same effect made by R. S. O. 1877, c. 38, s. 40, has been omitted as unnecessary in the Revision of the Statutes and *Rules*: see also *Ranson* v. *Patton*, 17 Ch. D. 767; *Re Knight*, *Knight* v. *Gardner*, 84 L. T. Jour. 205. Appeal.

The Court has a discretion to allow a suit to be revived where it has abated more than twenty years: *Curtis* v. *Sheffield*, 20 Ch. D. 398; and see 21 Ch. D. 1; see also *Russell* v. *Dowding*, 27 Ch. D. 237.

Where the suit abates by the death of a party, no express provision was by the original Rules made corresponding to the old practice by which a motion may be made by the defendant or his representatives to compel the representatives of the plaintiff, or the plaintiff, to obtain an order to continue within a limited time, or in default that the action be dismissed against them: *Motion* v. *King*, 29 W. R. 73. R. S. O. 1877, c. 50, ss. 241 and 242 (now *Rule* 629) contained such provision; see also *Cameron* v. *Eager*, 6 P. R. 117; *Chowick* v. *Dimes*, 3 Beav. 290.

In *Wingrove* v. *Thompson*, 11 Ch. D. 419, the Court acting under 15 & 16 V. c. 56, s. 44 (see *Rule* 310), appointed a person to represent the estate of a deceased plaintiff, who died insolvent and intestate, so that the defendant might have somebody against whom to move to have the action dismissed for want of prosecution.

See *Oshawa Cabinet Co.* v. *Note*, in note to *Rule* 376.

A counter-claim may be revived, in the same way as an original action, by the representatives of the deceased counter-claiming defendant: *Andrew* v. *Aitken*, 21 Ch. D. 175; see also *Lumsden* v. *Winter*, 8 Q. B. D. 650. Counter-claim petition, etc.

As to the case of consolidated actions, see *Re Wortley*, 4 Ch. D. 180.

The *Rules* on this subject apply to petitions as well as actions: *Re Atkins*, 1 Ch. D. 82; *Re Dynevor*, W. N. 1878, 199.

Where, after judgment, it is merely desired to issue execution, and rights or liabilities have become changed by death or otherwise, the person seeking to issue execution may proceed under *Rule* 886.

Where it becomes necessary to enforce a judgment against persons who have subsequently acquired a title an action must be brought for the purpose: *Atty.-Gen.* v. *Cor. of Birmingham*, 15 Ch. D. 423.

623. An order so obtained shall, unless the Court or a Judge otherwise directs, be served upon the continuing Service of order.

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Rules 624-626.

party or parties to the action or their solicitors, and also upon each such new party (unless the person making the application be himself the only new party), and the order shall from the time of such service, subject nevertheless to the next five following Rules, be binding on the person served therewith. J. A. Rule 386.

(*a*) The Eng. R. 1875, O. 50, r. 5 (1883, R. 182) names two instead of five following Rules, these two being the Rules corresponding with 624 and 625 *infra:* the other three here following *Rules* are not taken from the English Rules.

The English Rule has the following additional words at the end of the Rule: "and every person served therewith who is not already a party to the cause or matter shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons." The Ont. Rules do not require an appearance to be entered by the person served.

Application to discharge order.

624. Where any person who is under no disability, or under no disability other than coverture, or being under any disability other than coverture, has a guardian *ad litem* in the action, shall be served with such order, such person may apply to the Court or a Judge to discharge or vary such order at any time within 14 days from the service thereof. J. A. Rule 387.

Same as the Eng. R. 1875, O. 50, r. 6 (1883 R. 183), except that the time there limited is 12 days, as was also the case in orig. *Rule* 387.

This *Rule* is very similar in its terms to Chy. G. O. 339, under which it was held to be not sufficient to give notice of the motion to discharge within the time allowed, but the motion had to be made returnable within that time: *Harris* v. *Myers*, 16 Gr. 117; *Jackson* v. *Gardiner*, 2 Chy. Ch. 385; 15 Gr. 425; *McIlroy* v. *Hawke*, 3 Chy. Ch. 66; see *Fox* v. *Wallis*, 2 C. P. D. 45. The time may be extended: see *Smith* v. *Dunn*, 2 Chy. Ch. 230 and *Rule* 485. The motion was formerly made to the Court and set down for the proper day, but *quære* whether it may under the present *Rule* be made in Chambers.

A notice of trial served before the 14 days had expired for a sitting commencing after the 14 days was held good, no motion against the order having been made: *New York Piano Co.* v. *Stevenson*, 10 P. R. 270.

Indorsement on order.

625. Upon every copy of such order served, there shall be indorsed a memorandum in the form or to the effect set forth in Form 20 in the Appendix. J. A. Rule 388.

No form is given in the English Rules.

Application to discharge order by persons under disability.

626. Where any person being under any disability other than coverture, and not having had a guardian *ad litem* appointed in the action, is served with any such order, such person may apply to the Court or a Judge to discharge or vary the order, at any time within 14 days from the appointment of a guardian *ad litem* for such party, and

until such period of 14 days shall have expired the order shall have no force or effect as against such last mentioned person. J. A. Rule 389. Rules 627-631.

Same as the Eng. R. 1875, O. 50, r. 7 (1883, R. 184).

627. Where the order is served out of Ontario, the party served is to have the same time to apply to discharge the order, as a defendant has to appear to a writ of summons so served; but an application may be made for shortening the time. J. A. Rule 390. Application to discharge order when served out of Ontario.

Not taken from any English Rule. As to the time for appearance to a writ of summons served out of the jurisdiction, see *Rule* 276.

628. Where the Court or a Judge authorizes publication instead of service, the Court or Judge is at the same time to appoint such time for applying to discharge the order as seems proper. J. A. Rule 391. Application in case of order allowing service by publication.

Not taken from any English Rule.

629. Where an action would but for these Rules have abated by reason of the death of either party, and in which the proceedings may be continued under these Rules, the defendant or person against whom the action may be so continued, may apply on notice to compel the plaintiff, or person entitled to proceed with the action, to proceed according to the provisions of these Rules within such time as the Court or a Judge may order or in default for an order dismissing the action or for payment of the costs thereof or for such order as may be just. R. S. O. 1877, c. 50, ss. 241, 242. Right of defendant in action which may be so continued.

630. Wherever any judgment or order has been made for payment of costs and the action or matter would, but for these Rules, become abated, any person interested under the judgment or order may under these Rules continue the proceedings and thereupon prosecute and enforce the judgment or order. See R. S. O. 1877, c. 40, s. 102. Costs.

631. In case an action on a bill or a note is brought against more than one defendant, who must otherwise have been sued separately, and it happens that any defendant dies pending the action, an action may nevertheless be brought against the executors or administrators of such deceased defendant. R. S. O. 1877, c. 50, s. 138. When executors of deceased defendants may be sued.

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Rule 632.

15. Payment into Court in Satisfaction.

When defendant may pay in.

632. A defendant may, either before or at the time of delivering his defence, or afterwards by leave of the Court or a Judge, pay into Court a sum of money in satisfaction of the cause or a part of the cause of action, or one or more of the causes of action for which the plaintiff sues, and the money when so paid in shall remain in Court subject to further order, unless the plaintiff elects to take it out. But the payment of money into Court shall not be deemed an admission of the cause of action in respect of which it is so paid. *New.*

This *Rule* makes a considerable change in the practice, and is in many respects different from the English practice under Rules of 1883, Rr. 255-265.

(1) It is not confined to any particular kind of action. It therefore will at any rate apply in any "action to recover a debt or damages," which was the language of the original *Rule* 215 (as also of the present Eng. Rule 255), which extended the right theretofore existing at Law: see Maclennan Jud. Act, 2nd ed., 349. The former *Rule* was held not to apply in an action where an account was claimed: *Nichols* v. *Evens*, 22 Ch. D. 611.

(2) It enables the defendant to deny the plaintiff's causes of action, and at the same time pay into Court: see *Berdan* v. *Greenwood*, 3 Ex. D. 251; *Hawkesley* v. *Bradshaw*, 5 Q. B. D. 22, 302; even in actions for libel or slander: *Hawkesley* v. *Bradshaw*, *supra*, which are expressly excepted by the Eng. Rule. *Quære*, however, in some cases, such as actions to try a right, or to establish a character which is assailed or where fraud is charged: *Berdan* v. *Greenwood*, *supra*.

The principle is, that the Court ought not "to preclude defendants in actions from saying and doing that which, as practical men, before the action they might reasonably say and do, viz., say that they entirely deny a person's right to sue them, yet pay, or offer to pay, a sum of money as the price of peace, and for the prevention of further litigation": *Berdan* v. *Greenwood*, 3 Ex. D. 259. In *Spurr* v. *Hall*, 2 Q. B. D. 615, an action for nuisance, the defendant was not allowed to plead payment into Court together with a denial of the right of action; but the subsequent cases make the propriety of that decision at least doubtful. See also *Potter* v. *Home and Colonial Insurance Co.* cited 2 Q. B. D. 622.

(3) The payment into Court is not to be an admission of liability. Under the Eng. Rule payment in satisfaction is an admission of liability of the cause of action in respect of which the money is paid into Court; but with his defence a defendant may (except in action for libel or slander; *Fleming* v. *Dollar*, 23 Q. B. D. 388) pay in money and deny liability: *Wheeler* v. *United Telephone Co.*, 13 Q. B. D. 597.

(4) Payment may be made in satisfaction of part of a cause of action, or of any one or more of several causes of action as well as of the whole action.

(5) The plaintiff may not take the money out, unless he accepts it in satisfaction of the cause of action in respect to which it was paid in: *Rule* 635.

The result will be that notwithstanding any defence denying liability, the acceptance will satisfy the cause of action, and the action, except as to costs, will come to an end, if the payment in is in satisfaction of the whole cause of action: see *Re Earl of Stamford*, 33 W. R. 909, where plaintiff, after taking the money proceeded with the action, and was required to stop proceedings or pay the money in again; see also *Kane* v. *Mitchell*, 13 P. R. 118.

Formerly the payment in enabled the plaintiff to take the money out, not accepting it in full, and proceed with the action; and he might keep the

money in the end though his action failed: see Macleman Jud. Act, 2nd ed., 350. The money will, under the present *Rule*, remain in Court as the defendant's money, if not accepted by the plaintiff in satisfaction, to be dealt with by the Court in the judgment or by other order in the action: see *Maple* v. *Earl of Shrewsbury*, 35 W. R. 819. It will not be paid out on motion by the plaintiff, he not accepting it in full: *Kane* v. *Mitchell*, *supra*. **Rules 633-636.**

Where the money is not accepted in full, and the plaintiff does not succeed in obtaining more, it would seem that the defendant has established a defence to the whole action, entitling him to the general costs of it: see *Wheeler* v. *United Telephone Co.*, 13 Q. B. D. 597, and *Kane* v. *Mitchell*, *supra*.

633. Payment into Court shall be signified in the defence and the claim or cause of action in satisfaction of which the payment is made shall be specified therein. *New*. To be signified in defence.

Taken from Eng. Rules of 1883, R. 256.

Where there are several causes of action or different heads of claim money should not be paid in generally, without specifying the amounts applicable to the different causes of action or heads of the claim, where it can be done; otherwise particulars may be ordered. Thus, where plaintiff claimed (1) *mesne* profits and (2) damages for dilapidation and non-repair of premises leased; the defendant paying in generally was ordered to give particulars apportioning the money paid in to the different heads of claim: *Rowe* v. *Kelly*, 59 L. T. N. S. 139; W. N. 1888, 141. The Eng. Rule 203, respecting particulars (not adopted here) was referred to, but does not seem to provide for more than by the practice which has grown up in Ont., without special Rule, may be ordered.

In *Paraire* v. *Loibl*, 49 L. J. C. P. 481, 43 L. T. N. S. 427, (discussed in *Rowe* v. *Kelly*) where plaintiff claimed for distinct services as defendant's architect, viz.: in preparing plans, acting as arbitrator, and making surveys, it was held that payment into Court generally was sufficient in point of pleading, but the question whether particulars should be ordered was not passed upon, see *Bank of London* v. *Guarantee Co.*, 12 P. R. 499.

634. If a defendant pays money into Court before delivering his defence, he shall serve upon the plaintiff a notice specifying both the fact that he has paid in the money, and also the claim or cause of action in respect of which the payment has been made. The notice may be in the Form No. 21 in the Appendix, with such variations as circumstances may require. *New*. Or in notice.

Taken from the Eng. Rules 1883, R. 258.

635. If the plaintiff takes the money out of Court he shall take it in satisfaction of the very cause of action for which it was paid in, and shall upon applying therefor file and serve a memorandum acknowledging the cause for which he takes it out, which may be according to the Form No. 22 in the Appendix, and shall be equivalent to a satisfaction piece. *New*. How plaintiff may take money out.

See notes to *Rule* 632.

636. The plaintiff shall make his election to take the money out of Court within four days after the day on which Election.

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Rules 637-639.

he receives notice of payment in if the payment is made before defence, and if the money is paid in with the defence, he shall elect, either before replying or before the expiration of the time for replying, whichever first happens. *New.*

Taxing costs.

637. When the plaintiff takes out money in satisfaction of the entire cause of action he may tax his costs of the action and sign judgment therefor, unless the defendant pays them within forty-eight hours after taxation. *New.*

It has been held that though only sixpence is paid into Court the plaintiff, if he takes it in satisfaction, is entitled to his costs: *McSheffery* v. *Lanagan*, 20 L. R. Ir. 528.

See *Suckling* v. *Gabb* in note to *Rule* 641.

If the plaintiff does not accept the money in satisfaction, he may become liable to pay the whole costs: see *Bank of London* v. *Guarantee Co.*, 12 P. R. 499.

The costs may be taxed under this *Rule* without any judgment or order unless it becomes necessary to enforce payment, in which case the plaintiff may sign judgment after the expiration of 48 hours from the granting of the certificate of taxation.

If the plaintiff does not elect within the time given by *Rule* 636, probably his right to do so, and to tax costs, is gone: see *Spincer* v. *Watts*, 23 Q. B. D. 350. It was, however, held under original *Rule* 218, which gave the plaintiff 4 days after receipt of notice of payment within which to accept the money in satisfaction, that he might still apply under *Rule* 1170 for costs: *Greave* v. *Fleming*, 4 Q. B. D., 226; see also *Broadhurst* v. *Willey*, W. N. 1876, 21; but query, whether that will be so under the present *Rules*, by which the plaintiff has no right to the money by the mere payment of it into Court, but only in the event of his making an election under *Rule* 636.

This *Rule* only applies where the plaintiff takes out money in satisfaction of the entire cause of action which probably means in satisfaction of all the plaintiff's causes of action so as to end the action. Under the former Common Law practice where payment in was pleaded as to part only, the plaintiff could not proceed at once to tax costs as to that cause of action: *Cauty* v. *Gyll*, 5 Sc., N. R. 818.

Where the plaintiff's solicitor, by mistake, accepted money paid in and signed judgment for costs, the judgment, on application of the plaintiff, was set aside, upon payment of costs and the plaintiff was allowed to proceed with his action: *Emery* v. *Webster*, 9 Ex. 242.

Consolidated actions.

638. Where money is paid into Court in two or more actions which are consolidated, the money paid in and the costs in all the actions shall be dealt with in the same manner as in the action tried. *New.*

Taken from Eng. Rules 1883, R. 262.

When plaintiff may pay in.

639. A plaintiff may, in answer to a counter-claim, pay money into Court in satisfaction thereof, subject to the like conditions as to costs and otherwise as upon payment into Court by a defendant. *New.*

Taken from Eng. Rules 1883, R. 263.

640. With a defence setting up a tender before action, the sum of money alleged to have been tendered must be brought into Court. *New.* Rules 640, 641. Tender.

Taken from Eng. Rules 1883, R. 257.

This is similar to the former Common Law practice: see *Chapman* v. *Hicks*, 2 C. & M. 633, where it was held that if the sum tendered was not paid in the plaintiff might sign judgment for the sum to which the tender was pleaded. When paid in, however, the money will now be subject to the same rules as in other cases where money is paid in.

In an action for wrongful dismissal where the defendant tendered one month's salary, pleading that the plaintiff was only entitled to that, or in the alternative to three month's. The money was paid into Court and the plaintiff was found entitled to one month's salary. It was held that the action being for unliquidated damages these *Rules* did not apply and defendant was entitled to a return of part of the money: *Davys* v. *Richardson*, 20 Q. B. D. 722; but could not recover it from the plaintiff's solicitor, who had *bonâ fide* taken out the money and paid it over to the plaintiff: *S. C.* in appeal, 21 Q. B. D. 202.

16. Discontinuance.

641. The plaintiff may, at any time before receipt of any defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application) by notice in writing, [filed and served] wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint; and a defendant shall be entitled to the costs of the action, if wholly discontinued against him, or to the costs occasioned by the withdrawal of the matter withdrawn if not wholly discontinued. Discontinuance.

(*a*) Such costs may be taxed [upon production of the notice so served without any order, and if not paid within four days from taxation the defendant may, without any order, sign judgment therefor].

The language of this clause is now to make the procedure clear, which was not quite plain under the original *Rule*: see *Bolton* v. *Bolton*, 3 Ch. D. 276, under the original Eng. R.

A form of judgment is given in the Appendix, Form No. 178.

(*b*) Such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action.

(*c*) Save as in these Rules otherwise provided, it shall not be competent for the plaintiff to (*x*) discontinue the action without leave of the Court or a Judge, but the Court or a a Judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action against all or any of the defendants, and otherwise, as may seem fit, order the action to be discontinued, or any part of

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Rule 641. **the alleged cause of complaint to be struck out. J. A. Rules 170, 170*b*, 172.**

Substantially the same as the Eng. R. 1875, O. 23, r. 1, and June 1876, R. (1883 R. 290, 292), 10, except the words in brackets.

At (*x*) the original *Rule* 170 had the words "withdraw the record or." The omitted provision is made a part of *Rule* 670.

Former practice.

Under the former Chancery practice, the plaintiff might dismiss his bill against the defendant at any time before decree, on *præcipe*. The dismissal was with costs; but where no answer had been filed, no costs had been incurred, unless perhaps instructions to answer: see *Bisset* v. *Strachan*, 8 P. R. 211. On special application dismissal might be without costs; but after decree the bill could only be dismissed by consent: where, however, the decree was for the benefit of other persons besides the actual parties to the suit, (*e.g.*, creditors) it could not be dismissed even by consent of the parties: *Arnbery* v. *Thornton*, 6 P. R. 190.

In the Common Law Courts, the plaintiff might discontinue his action at any time before judgment upon payment of costs: 2 Arch. 12th ed. 1483; Harrison's C. L. P. Act, 634. By Reg. Gen. T. T. 1856, No. 24, the consent of the defendant was rendered unnecessary, whether before or after plea, but the discontinuing rule was required to contain an undertaking on the part of the plaintiff to pay the costs, and a consent that, if they were not paid within four days after taxation the defendant should be at liberty to sign judgment of *non pros.* Before that Rule consent was necessary in order to discontinue after plea. The rule was a side bar rule before verdict or argument of demurrer; in other cases a motion was necessary. The discontinuance was an abandonment of a pending action, but it left the plaintiff at liberty to commence another action for the same cause. Discontinuance was not effectual until payment of costs: *Edgington* v. *Proudman*, 1 Dowl. P. C. 152; and if the costs were not paid, the defendant's only remedy was to sign judgment of *non pros.*

Scope of present *Rule*.

The present *Rule* besides allowing the plaintiff as formerly to discontinue the whole action, authorizes the withdrawal of a part of his cause of complaint: formerly, the discontinuance could only be of the whole action: *Benton* v. *Polkinghorne*, 16 M. & W. 8.

The power to withdraw part is, however, only where the part is severable from the rest of the claim: *Bank of London* v. *Guarantee Co.*, 12 P. R. 499.

It has been held under the Irish Jud. Act, that in an action against several defendants a notice wholly discontinuing the action as against some defendants is irregular: and that the proper course in such case is to apply for leave to withdraw the cause of complaint as against such defendants, which will be granted where the causes of action against such defendants are alternative, and distinct from the causes of action against the remaining defendants: *Carlisle* v. *Belfast Board, etc.*, 10 L. R. Ir. 36.

And in Ont. it has been held that a plaintiff cannot serve notice of discontinuance against one of several defendants; and that his proper course is to obtain an order for leave to discontinue against such defendant: *Fox* v. *Hamilton Prov. & L. Soc.*, 9 C. L. T. 197.

The words "before taking any other proceeding in the action" mean "before taking any proceeding with any intention of continuing the action," and do not include a step such as taking money out of Court or bringing in money in satisfaction of a counter-claim: *Spincer* v. *Watts*, 23 Q. B. D. 350.

The plaintiff cannot serve notice under this *Rule* on an infant until a guardian is appointed, and so escape the costs of the action: *Ruth* v. *Taylor*, 79 L. T. Jour. 211.

On a motion to set aside a discontinuance as irregular, leave was granted to discontinue on proper terms on a cross-motion of the plaintiff: *Spiller* v. *Coghlan*, 20 L. R. Ir. 32.

The present *Rule* does not permit the plaintiff to discontinue his action after it has been entered for trial: *Matthews* v. *Antrobus*, 49 L. J. Chy. 80. Leave must in such case be obtained under clause (c) or *Rule* 670. **Rule 641.**

The discontinuance is only of right, either before defence put in; or, if defence is put in, before taking any step other than an interlocutory application.

If the statement of defence sets up matters arising after the issue of the writ, the truth of which the plaintiff cannot deny, and which afford a good answer in law, the plaintiff's proper course will be, not to discontinue, but to enter a confession of the defence under *Rule* 440.

The form of discontinuance will be found in the Appendix Form, No. 29. Form of notice.

Under the English Rule (which does not contain the words as to the notice being filed and served), it was held that a written notice by the plaintiff's solicitor as follows: "We are instructed to proceed no further in the action," was a sufficient notice: *The Pommerania*, 4 P. D. 195.

A discontinuance filed by a plaintiff has been held not to have the effect of discontinuing any counter-claim set up in the action: *McGowan* v. *Middleton*, 11 Q. B. D. 464, over-ruling *Vavasseur* v. *Krupp*, 15 Ch. D. 474; but an appeal by the plaintiff will be thereby discontinued: *Compbeare* v. *Lewis*, 13 Ch. D. 469. Where, however, a plaintiff who had given an undertaking as to damages discontinued his action, it was held that the Court would nevertheless direct a reference as to damages: *Newcomen* v. *Coulson*, 7 Ch. D. 764. Effect of discontinuance.

The defendant has an absolute right to all costs of the action, and they are not in the discretion of the Judge under *Rule* 1170; see *The St. Olaf*, 2 P. D. 113; *The J. H. Henkes*, 12 P. D. 106. The costs will include costs made costs in the cause on an application on which the plaintiff succeeded: *The St. Olaf*, *supra*. Costs.

Leave to discontinue is only granted on payment of the costs: *The J. H. Henkes*, 12 P. D. 106.

The defendant is entitled to costs though the plaintiff discontinues before appearance: *Moore* v. *S. Counties, etc., Bank*, W. N. 1889, 156.

Costs of work in preparing, briefing, or otherwise relating to affidavits, etc., properly and not prematurely done, down to the time of discontinuance, are taxable: *Harrison* v. *Leutner*, 16 Ch. D. 559.

An order of a Master which stayed an action on payment of costs, was varied by substituting the word "discontinued" for "stayed," to prevent the possibility of the action being again proceeded with: *Anon*, W. N. 1876, 40; 2 Charl. Ch. Ca. 38.

Where on a motion under the Eng. Rule corresponding to *Rule* 739 the defendant was ordered to pay money into Court as to part of the claim, and was given leave to defend as to the remainder, and the plaintiff afterwards discontinued, the costs were held to be not governed by this *Rule*, but were in the discretion of the Court under *Rule* 1170, and plaintiff was given costs up to the time of payment into Court: *Suckling* v. *Gabb*, 36 W. R. 175.

In a test action, the plaintiff asked for a postponement of the trial, or that an order for discontinuance might be made; the Court held that it could not regard the rights of the plaintiffs in the other actions, but must act as if the plaintiff had not appeared at the trial; and dismissed the action: *Robinson* v. *Chadwick*, 7 Ch. D. 878. Discontinuance by leave.

Where a case had been referred to arbitration, and the arbitrator found in favor of defendant as to all but a small part, the leave to discontinue was refused: *Stahlschmidt* v. *Walford*, 4 Q. B. D. 217; see also *Matthews* v. *Antrobus*, 49 L. J. Chy. 80.

On a motion for leave to discontinue, the Court has no jurisdiction to give the plaintiff any costs where the defence, if indisputed, or if it were established, would disentitle the plaintiff to maintain the action: *Lambton* v. *Parkinson*, 35 W. R. 545; see also *Dicks* v. *Yates*, 18 Ch. D. 76.

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Rules 642, 643. Withdrawal of defence.

642. A defendant may, with the leave of the Court or a Judge, but not otherwise, withdraw his defence or counterclaim, or both, or any part of either or both, upon such terms as may be imposed. J. A. Rule 170*c*.

Same in effect as the Eng. R. 1875, O. 23, r. 1 (1883, R. 290).

One of the defendants, in an action for the recovery of land, was allowed to withdraw his defence after the action had been in the paper for trial, but had been postponed till another action relating to the same property should be ready for trial, upon the terms of giving to the plaintiffs all the relief to which they could be entitled at the trial, and paying the costs occasioned by the defence, and the costs of a summons for leave to withdraw: *Real & Personal Advance Co.* v. *McCarthy*, 11 Ch. D. 188. The costs only which were occasioned exclusively by the defence were allowed: *Ib.*

A defence put in fraudulently and without authority was allowed to be withdrawn: *Williams* v. *Preston*, 20 Ch. D. 672.

As to withdrawal of defence of infants, see *Fitzwater* v. *Waterhouse*, 52 L. J. Chy. 83; *Gardner* v. *Tapling*, 33 W. R. 473.

17. Compounding Penal Actions.

Leave to compound penal actions.

643. Leave to compound a penal action shall not be given in cases where part of the penalty goes to the Crown, unless notice has been given to the proper officer, but in other cases it may. Rules T. T. 1856, 95.

By 18 Eliz., c. 5, s. 3, no penal action, by a common informer, can be compromised without the leave of the Court. This statute is in force in this Province: *Bleeker* v. *Meyers*, 6 U. C. Q. B. 134.

Leave when granted.

Where the Crown is concerned, the consent of the Attorney-General must be procured: *Howard* v. *Sowerby*, 1 Taunt. 103. Leave is not necessary in actions by the party aggrieved: *Kirkham* v. *Wheeley*, 1 Salk 30. It is entirely in the discretion of the Court to grant it, or not: *Maughan* v. *Walker*, 5 T. R. 98; *Sheldon* v. *Mumford*, 5 Taunt. 268. Where the sum offered is so small as to indicate collusion, leave will be refused: *Wood* v. *Cassin*, 2 W. Bl. 1157. Leave will not be granted until after the statement of defence: *Rex* v. *Collier*, 2 Dowl. 481; and see *Rex* v. *Crisp*, 1 B. & Al. 282.

Leave was given to compromise a penal action brought under 32 Hen. 8, c. 8, for buying pretended titles, on paying the Crown's share into Court: *May q. t.* v. *Dettrick*, 5 O. S. 77.

A promise founded on the compromise of a penal action without the leave of the Court is void: *Hart* v. *Meyers*, 7 U. C. Q. B. 416; and see *Bell* v. *Riddell*, 10 Ont. App. 544.

Where action by informer will lie.

An action for a penalty imposed by a statute cannot be brought by a common informer unless the statute imposing the penalty so provides either expressly, or by implication: *Bradlaugh* v. *Clarke*, 8 App. Cas. 637; 48 L. T. N. S. 681; 52 L. J. Q. B. 505.

Where the statute does not authorize an action by a common informer, the penalty can only be recovered in a proceeding at the suit of the Crown: *Ib.*; but see *Shrigley* v. *Taylor*, 4 Ont. 396.

An action to recover a penalty cannot be brought by an infant by his next friend, it must be brought by the informer in person or by his solicitor: *Garrett* v. *Roberts*, 10 Ont. App. 650.

The Court refused to set aside a judgment of *non pros* regularly signed in a penal action: *McClenigan* v. *McLeod*, 8 U. C. L. J. 233; 3 P. R. 13.

A plaintiff may be non-suited in a *qui tam* action: *Ramsay* v. *Jones*, 21 U. C. Q. B. 370.

The Court or a Judge, and the Lieutenant Governor in Council have now power to remit penalties imposed by any Act of the Province of Ontario, either wholly, or in part: see R. S. O. 1887, c. 90, ss. 1, 3. They have, however, no power to remit costs incurred up to the time of the remission: *Ib.*, s. 4. **Rules 644-646.**

644. The order for compounding any *qui tam* action shall express therein that the defendant thereby undertakes to pay the sum for which the Court has given him leave to compound such action. Rules T. T. 1856, 96. Order for compounding.

The payment of such sum might formerly be enforced by attachment: *Regina* v. *Clifton*, 5 T. R. 257; but see now R. S. O. c. 67, ss. 6, 8.

645. Where leave is given to compound a penal action, the Queen's proportion of the composition shall be paid into the Accountant's Office, for the use of Her Majesty. Rules T. T. 1856, 97. Queen's proportion of composition.

See *Brown* v. *Bailey*, 4 Burr. 1929. Presumably the money should be paid into the Accountant's office in the same manner as other moneys are paid into Court: see *Rules* 163 *et seq.* By the order authorizing the action to be compounded, or by some subsequent order, provision should be made for payment out of the money to the Provincial Treasurer, or other public officer entitled to to receive the same.

18. Dismissal of Actions.

646. If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of such time, apply to the Court or a Judge to dismiss the action with costs, for want of prosecution; and on the hearing of such application the Court or Judge may, if no statement of claim has been delivered, order the action to be dismissed accordingly, or may make such other order, on such terms as to the Court or Judge seems just. J. A. Rule 203. Dismissal of action on plaintiff's default.

Same as the Eng. R. 1875, O. 29, r. 1 (1883, R. 294).

Rule 369 regulates the time within which the defendant is bound to deliver his statement of claim, viz., three months after appearance. The time by the English Rule is six weeks.

The practice in this Province has been to make such application in Chambers. In England, it appears to be a matter for the option of parties whether they will move in Chambers or in Court; and, if the motion is made in Court, it is a question to be decided by the Court in each particular case, whether the motion was under the circumstances proper to be made in Court: *Evelyn* v. *Evelyn*, 13 Ch. D. 138. But moving in Court instead of Chambers is disapproved of: *Chesterfield* v. *Black*, 13 Ch. D. 138, note; *Freason* v. *Loe*, 26 W. R. 138. The application may be supported by an affidavit that a statement of claim has not been dispensed with and has not been delivered, and a certificate of the Clerk or Registrar in whose office the action is, that an appearance has been entered by the applicant, with the date of entry.

Where the plaintiff made default in delivering his claim, and had become bankrupt, it was held that notice of motion to dismiss under this *Rule* must be

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Rule 646. served upon the trustee in bankruptcy: *Wright* v. *Swindon Ry. Co.*, 4 Ch. D. 164. In *Higginbottom* v. *Aynsley*, 3 Ch. D. 288, on a motion to dismiss under this *Rule*, Hall, V.C., gave a week's time to take further proceedings, observing that each case was to depend upon its own merits. The plaintiff was ordered to pay the costs of the motion. Probably the plaintiff will in general be given a short further time upon payment of costs.

Some only of the defendants cannot have the action dismissed, if, for sufficient reasons, proceedings against other defendants have been delayed, and the applicant ought probably to apply to the plaintiff's solicitor for information as to the state of the cause against the defendants: *Foley* v. *Lee*, 12 P. R. 371; see *Ambroise* v. *Evelyn*, 11 Ch. D. 759.

A defendant can only have the action dismissed as against himself: *Ward* v. *Ward*, 11 Beav. 159.

It has been said that, if a plaintiff desires to avoid the cost of the hearing of the motion, he should tender to the defendant the costs of the notice, and give the usual undertaking to go on: *Evelyn* v. *Evelyn*, 13 Ch. D. 138; *Freason* v. *Loe*, 26 W. R. 138: but this is not the practice in Ontario, even where the motion to dismiss is merely for a default under this *Rule*: see note to *Rule* 647. The filing of a statement of claim is no answer to a motion to dismiss: *Napanee Tamworth, etc. Ry. Co.* v. *McDonell*, 10 P. R. 525. The filing would be irregular without leave: see *Rule* 369 (*c*).

Where before statement of claim an action was stayed until the plaintiff should give security for costs, and the time for delivery of a statement of claim expired without security having been given, it was held that the stay did not prevent the action from being dismissed under this *Rule*: *La Grange* v. *McAndrew*, 4 Q. B. D. 210.

Where an order had been made dismissing an action, unless a statement of claim should be delivered within a week, and this was not done, it was held that the action was at an end, the order having neither been complied with nor appealed against, and an order could not afterwards be made extending the time for delivering the statement: *Whistler* v. *Hancock*, 3 Q. B. D. 83; see also *King* v. *Davenport*, 4 Q. B. D. 402. But if an order to dismiss is made, further time may be given for appealing against that order: *Burke* v. *Rooney*, 4 C. P. D. 226; *Carter* v. *Stubbs*, 6 Q. B. D. 116; or if the time has not expired so that the action is not gone, there is jurisdiction to vary or rescind the order for dismissal on proper grounds: *Welply* v. *Buhl*, 3 Q. B. D. 80, 253; *Carter* v. *Stubbs*, *supra*. In *Newcombe* v. *McLuhan*, 11 P. R. 461, the above cases were considered, and it was held that after the action stood dismissed for failure to file a statement of claim by the time named, and judgment was signed dismissing the action, an order could be made under *Rule* 485 to vacate the judgment, and further extend the time for delivering the statement of claim. See also notes to *Rule* 485.

Where an order is made dismissing an action unless a statement of claim be delivered within a time named, it has hitherto been the practice in Ontario to obtain a further order *ex parte* dismissing the action, showing that the previous order has not been complied with: see *Burns* v. *Chisholm*, 2 Chy. Ch. 88.

It would seem that an order dismissing an action does not take effect until it is drawn up and served, and that the action under the English practice is not dead until that is done: *Metcalf* v. *British Tea Association*, 46 L. T. N. S. 31.

The dismissal of an action for want of prosecution is not a bar to a subsequent action in respect of the same matter: *Re Orrell Colliery & Firebrick Co.*, 12 Ch. D. 681; *Byrne* v *Frere*, 2 Moll. 180: *Roberts* v. *Lucas*, 11 P. R. 3; though made on consent, unless it proceed upon a compromise of the cause of action: *Magnus* v. *National Bank of Scotland*, 36 W. R. 603; 58 L. T. N. S. 617; but the second action is liable to be stayed until the costs of the first are paid: see note to *Rule* 1245.

See *Sutton* v. *Huggins*, W. N. 1875, 235.

The plaintiff sued the indorser of a bill of exchange. The debt was afterwards paid by the acceptor, and the indorser applied to dismiss the action for want of

prosecution. Lindley, J., said, "I shall certainly not let the action go on simply to determine who is to pay the costs. All further proceedings in the action to be stayed, the defendant to pay the costs of the writ": *Anon*, W. N. 1876, 37; see also *Elliott* v. *Gardner*, 8 P. R. 409; *Wallace* v. *Ford*, 1 Chy. Ch. 282. **Rule 647.**

Though no motion to dismiss is made, the plaintiff cannot regularly proceed without leave: see note to *Rule* 369; but the former practice requiring a Term's notice to be given, where a year has elapsed without a proceeding having been taken, is not continued under *The Judicature Act*: *Beaver* v. *Boardman*, 9 P. R. 239. For a similar restriction upon moving for judgment: see *Rule* 752.

In England a formal judgment for defendant's costs is signed upon the order for dismissal: Chitty Forms 189; but in this Province the costs may be recovered under the Judge's order. See *Rule* 866.

647. If the pleadings are closed six weeks before the commencement of any sittings of the High Court for which the plaintiff might give notice of trial, and he does not give notice of trial therefor, the action may be dismissed for want of prosecution. J. A. Rule 255. When plaintiff does not give notice of trial.

Not the same as R. Sup. C. June, 1876, R. 13, (1883, R. 36). This is somewhat analogous to the mode of proceeding under section 246 of the C. L. P. Act (R. S. O. 1877, c. 50), but simpler, and corresponds substantially with the former Chancery practice.

The six weeks is not a time limited for "doing any act" within *Rule* 485. It therefore cannot be abridged under that *Rule*, and the lapse of this period is an absolute condition precedent to the right of the defendant to give notice of trial: *Saunders* v. *Pawley*, 14 Q. B. D. 234.

There is a continuing duty on the plaintiff's part to give notice of trial until the case is tried; hence, although he has given a notice, but the trial for some reason is postponed, the defendant may move to dismiss under this *Rule* if the plaintiff makes default in giving notice of trial for any subsequent Assizes: *Chapman* v. *Smith*, 32 C. P. 555; *Hibernian Bank* v. *Hughes*, 10 L. R. Ir. 15.

Where the case had gone to trial twice but the verdicts had been set aside it was held, under the corresponding Irish Rule, which is same as the English Rule, that the defendant could not move to dismiss, and could not give notice of trial himself, but must resort to the old procedure of trial by proviso: *Foott* v. *Benn*, 16 L. R. Ir. 247. This case will not be applicable in Ont. in view of *Rules* 3, 654 and 647. See also *Crick* v. *Hewlett*, in note to *Rule* 661.

Where a case was made a *remanet*, formerly no notice of trial need be given. A case was held to be a *remanet* where, by verbal order at the trial, it was "postponed till the Autumn assizes": *Donovan* v. *Boultbee*, 10 P. R. 52. Notice is in such case now necessary under *Rule* 671*a*. Remanet.

On a motion to dismiss, some excuse must be given for the default, the sufficiency of which will depend upon the circumstances of each case. Chy. Gen. Order 276 was held to be applicable to such motions: *Bucke* v. *Murray*, 9 P. R. 495; and though that Order is not expressly continued in the *Rules* the practice originated under it and acted upon under the original *Rules* will probably be held to apply. That Gen. Order was as follows: Motions to dismiss.

"276. Where a defendant is entitled to give notice to dismiss, it is not to be sufficient answer to the motion for the plaintiff, after being served with the notice to take out and serve an order for amending the bill or to file a replication, or undertake to speed the cause; but it shall be necessary for the plaintiff to shew that he has prosecuted the suit with diligence, or that under all the circumstances the bill should not be dismissed." Chy. Order 276.

Though an undertaking to speed the cause is therefore not a sufficient answer to a motion to dismiss for want of prosecution, (though it is otherwise in England: *Evelyn* v *Evelyn*, 13 Ch. D. 138; *Freason* v. *Loe*, 26 W. R. 138) it is still

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Rules 648, 649.

discretionary with the Judge to say whether, under all the circumstances, the action should be dismissed: *Bucke* v. *Murray, supra.* See also *Napanee, Tamworth, etc., Ry.* v. *McDonell*, 10 P. R. 525; *Carter* v. *Barker*, 11 P. R. 1.

The former decisions under the Chancery practice will therefore probably serve as authorities as to what is a sufficient excuse: see cases in Robinson & Joseph's Digest, pp. 2922, *et seq.*; *Finnegan* v. *Keenan*, 7 P. R. 385; and as to what amounts to waiver of objection to the delay: *Cotton* v. *Rodgers*, 7 P. R. 423; see also *Miles* v. *Roe*, 20 C. L. J. 113; 10 P. R. 218.

Where an action was ordered to be dismissed unless notice of trial was given by a given time, and by mistake of the solicitor's clerk notice was not given, a Judge refused to extend the time and the Divisional Court refused to interfere: *Gilder* v. *Morrison*, 30 W. R. 815.

Where the action was brought on a ground for which no action lay, the plaintiff being in default under this *Rule*, indulgence was refused and the action dismissed: *Clarke* v. *Creighton*, 13 P. R. 113.

Where one of several defendants in an action has delivered his defence, and the time for the plaintiff to deliver his reply to such defence has expired, but the plaintiff has, without the knowledge of that defendant, agreed in writing with the other defendants to extend the time for delivering their defences, that defendant cannot move to dismiss the action as against him for want of prosecution, the pleadings not yet being "closed;" and it was said, that a defendant's proper course is to write to the plaintiff's solicitor, and inquire how the action stands as regards the other defendants: *Ambroise* v. *Evelyn*, 11 Ch. D. 759.

A motion to dismiss, or that the plaintiff give security for costs, was made in *Willmott* v. *Freehold, etc.*, 29 Sol. Jour. 385; 33 W. R. 554; 52 L. T. N. S. 743.

Refusal to be examined.

648. If a plaintiff refuses or neglects to attend at the time and place appointed for his examination, or fails to comply with any order for discovery or production or inspection of documents, the defendant, in addition to his other remedies, may move to dismiss the action. J. A. Rule 236; Chy. O. 145.

The other remedies referred to in this *Rule* are the exclusion of the documents which the plaintiff may have refused to produce, as evidence at the trial, and the committal of the plaintiff for contempt: see *Rules* 499, 520, and notes.

19. Transfer and Consolidation of Actions.

Transferring actions.

649. Actions may be transferred from one Division of the High Court to another Division by order of the Presidents of such Divisions. J. A. Rule 392.

The Eng. R. 1875, O. 51, r. 2 (1883, R. 649), gives this authority to the Lord Chancellor, with the consent of the Presidents of the Divisions from and to which the transfer is made. In England the order is made by the Chancellor on written consent of all parties, or on notice: *Humphreys* v. *Edwards*, 45 L. J. Chy. 112; W. N. 1875, 208; 1 Ch. D. 41. It applies to transfer of petitions, though actions alone are mentioned in the *Rule*: *Re Boyd's Trusts*, 1 Ch. D. 12; see also *Cannot* v. *Morgan*, 1 Ch. D. 1; *Warne* v. *Dell*, W. N. 1875, 259; *Johnson* v. *Moffatt*, *Ib.*, 21; *Anon*, *Ib.*, 22; *Hillman* v. *Mayhew*, 1 Ex. D. 132; *Holloway* v. *York*, 2 Ex. D. 333; *Gen. Steam Nav. Co.* v. *London & Edinburgh Shipping Co.*, W. N. 1876, 56; 2 Charl. Ch. Ca. 67; *Clements* v. *Norris*, W. N. 1878, 4; *Storey* v. *Waddle*, 4 Q. B. D. 289.

In Ontario the powers of transfer formerly possessed by the Courts under *The Ont. Jud. Act, 1881*, s. 26, are not preserved in the Revised Act or *Rules*. Trans-

fers will now be made under this *Rule*, or *Rules* 650, and 651. In practice transfers are not frequent, except for the purpose of equalizing business, or by reason of the existence of some cause of disqualification, in the Judges of the Division in which the action is. The machinery for disposing of all sorts of actions is now becoming, and is supposed to be, the same in all the Divisions, so that transfers to the Chancery Division for the taking of accounts are not made as they are in England: see *Ladd* v. *Puleston*, 31 W. R. 802; 48 L. T. N. S. 949; *Leslie* v. *Clifford*, 50 L. T. N. S. 590; *London Land Co., Limited*, v. *Harris*, 13 Q. B. D. 540; 51 L. T. N. S. 296; 33 W. R. 14. **Rules 650, 651.**

The former powers of transfer might be exercised by the Master in Chambers, but now by the Presidents of Divisions alone: see *Hilliard* v. *Thurston*, 18 C. L. J. 180; 2 C. L. T. 261, and 285, and *Rule* 650.

Where cross-actions with different venues are consolidated, the place of trial will be ordered as the balance of convenience requires: *Gonee* v. *Leitch*, 11 P. R. 255.

As to consolidation of actions in different Divisions, see *Rule* 652 and notes.

650. The Presidents of the Queen's Bench, Chancery and Common Pleas Divisions shall, from time to time as occasion may require, meet together and examine the list of motions and other matters set down for argument in each Divisional Court of the High Court, and direct the transfer of such and so many of the said motions, and other matters from one Divisional Court to another as shall, as nearly as possible in their judgment, equalize the amount of business to be done by the said Courts. J. A. Rule 393. Presidents of Divisions to make transfers necessary to equalize business.

This *Rule* does not require the consent of parties or previous notice to them.

(*a*) Where an order of transfer is made under the foregoing Rules, the proper officer of the Division to which the cause or matter was assigned, shall annex together all the pleadings and papers filed with him, and transmit the same, together with the order of transference or a copy thereof, to such other office of the High Court as the order directs. R. S. O. 1877, c. 49, s. 22; 44 V. c. 5, s. 26. Transmission of papers, etc., on order to transfer to law.

651. Where an order has been made for the administration of the assets of any testator or intestate, a Judge of any Division shall have power, without any further consent, to order the transfer to such Division of any action pending in any other Division by or against the executors or administrators of the testator or intestate whose assets are being so administered. J. A. Rule 394. Transfer after administration order.

The Eng. R. June, 1876, r. 18 (1883, R. 653), applies also to the winding up of any company under the Companies Act, 1862, and 1869, and confines to a Judge of the Chancery Division the power of making the transfer. The order was made *ex parte* in *Field* v. *Field*, W. N. 1877, 98, and *Masbach* v. *Anderson*, 26 W. R. 100; see also *Re Artistic Colour Co.*, 14 Ch. D. 502; *Re Madras Irrigation Co.*, 16 Ch. D. 702; *Re Stubbs*, 8 Ch. D. 154.

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Rule 652.

A transfer after an administration decree was ordered in *West* v. *Bowman*, W. N. 1879, 13, 84; and refused in *Chapman* v. *Mason*, W. N. 1879, 93; 40 L. T. N. S. 678, where the executor was sought to be made personally liable: but see *Re Timins*, or *Timms*, W. N. 1878, 141; 26 W. R. 692, where the action was transferred, but not stayed.

An order of transfer should only be made after the administration order has been made, and not by the administration order: *Re Poole, Poole* v. *Poole*, 55 L. T. N. S. 56; W. N. 1886, 150.

Consolidation of actions.

652. Actions in any Division or Divisions may be consolidated by order of the Court or a Judge in the manner prior to "*The Ontario Judicature Act, 1881*," in use in the Superior Courts of Common Law. J. A. Rule 395.

See Eng. R. 1875, O. 51, r. 4 (1883, R. 656).

Several actions against same defendant.

The expression, consolidation of actions, is used in two senses. First, if plaintiff brings two actions against the same defendant, for matters which might properly be combined in one action, and the double proceeding is held to be vexatious, a Court of Law, in the exercise of its ordinary power to prevent any abuse of its own process, might consolidate the actions; that is to say, stay proceedings absolutely in one action, and require the plaintiff to include the whole of his claims in the other; and this has been done with costs against the plaintiff: see *Cecil* v. *Briggs*, 2 T. R. 639; *Anon*, 1 Chitty's Rep. 709 [n.]; *Beardsall* v. *Cheetham*, E. B. & E. 243; 2 Chitty's Archbold, p. 1085, 13th ed. *et seq.*, Dan. Pr., 6th ed., 1888; Dan. Forms, 3rd ed., 816; 1 Seton, 322.

Several actions by same plaintiff against different defendants.

But the term consolidation is more frequently used in a different sense. Where actions are brought by the same plaintiff against different defendants, but the questions in dispute in all are substantially the same, the Court, if the defendants apply, will stay proceedings in all the actions except one, until that one action has been determined, upon the terms that the various defendants agree to be bound by the event of the action which proceeds. This practice has been applied to the case of actions against the several underwriters upon policies of insurance: *Hollingsworth* v. *Broderick*, 4 A. & E. 646; to the case of guarantees of separate parts of a debt by separate instruments: *Sharp* v. *Lethbridge*, 4 M. & G. 37; joint and several obligors of a bond conditioned for the good behaviour of another person: *Anderson* v. *Towgood*, 1 Q. B. 245; principal and sureties on a replevin bond: *Bartlett* v. *Bartlett*, 4 Scott, N. R. 779; the several members liable upon a mutual insurance policy: *Lewis* v. *Barkes*, 4 C. B. N. S. 330; and several actions inrespect of publishing the same libel in different newspapers: *Colledge* v. *Pike*, 56 L. T. N. S. 124; in which last case the plaintiff was given liberty, if dissatisfied with the verdict, to select another action for trial. So, where a number of actions against different defendants may be reduced to classes, those of each class raising the same questions, the Court may allow one action of each class to proceed, and stay the rest: *Syers* v. *Pickersgill*, 27 L. J. Ex. 5.

Cross actions.

A third kind of consolidation is where there are cross actions between the same parties, arising out of the same matter, and the Court stays one directing the plaintiff [illegible]t to bring forward his case by way of defence, set-off or counterclaim in the other action. In such case the party on whom the onus of proof lies is given the conduct of the proceedings, by being directed to proceed with his action: *Thomson* v. *S. E. Ry. Co.*, 9 Q. B. D. 320; see also *The Never Despair*, 9 P. D. 34.

There is no fixed rule that the action last begun is to be stayed: *Thomson* v. *S. E. Ry. Co.*, 30 W. R. 537; 46 L. T. N. S. 513; *Miller* v. *Confederation Life, etc.*, 11 P. R. 241.

Where an action is commenced that covers the same ground as one already existing, together with some further relief, it will be stayed as to the first part: *Morton* v. *Quick*, 26 W. R. 441.

Where the plaintiffs in a prior pending action, claimed $200,000, balance due upon a construction contract, and in another action begun some time afterwards

claimed £3000 for goods sold and delivered, and the cause of action arose before the commencement of the first action, it was held that the two claims should have been made in one action, and it was a proper exercise of discretion to refuse judgment and leave the question till the determination of the first action in which a large set-off was claimed, since in the result of both actions nothing might be due to the plaintiffs: *Commee* v. *C. P. R.*, No. 2, 11 P. R. 393. **Rule 652.**

The Master in Ordinary, has no jurisdiction to consolidate actions in which judgments are entered, and under which separate references are pending in his office: *Boswell* v. *Grant*, 11 P. R. 376.

Where the plaintiff brought an action for an account in one Division and the defendant brought an action for a balance due on such accounts in another, the latter action was stayed on the defendant's application: *Bethell* v. *United Stock Ex.*, W. N. 1886, 10.

In *Smith* v. *Whichcord*, 24 W. R. 900; separate actions between different parties relating to the same subject were consolidated.

Where plaintiffs brought an action for the same cause of action as was set up by them, in a counter-claim in an action in another Division, it was held that though the case was not strictly within this *Rule* because the plaintiffs had not brought two actions, yet there is inherent jurisdiction in the Court to prevent undue use of its process and the plaintiffs' action was stayed till their counter-claim should be disposed of: *Taylor* v. *Bradford*, 9 P. R. 350.

An action for breach of an agreement and fraud in the Ex. D. and a cross action for specific performance in the Ch. D. were ordered to be consolidated in the latter action: *Holmes* v. *Hervey*, 25 W. R. 80.

An application to consolidate two actions by the same plaintiff, one for malicious prosecution and the other for salary as a manager, was dismissed by Quain, J., with costs: 1 Charl. Ch. Ca. 127; 60 L. T. Jour. 86.

The application is usually made in Chambers: see *Smith* v. *Whichcord*, 24 W. R. 900, Chitty Arch. 13th ed. 1087.

The order, when made on the application of the defendant, does not require the plaintiff's consent: *Hollingsworth* v. *Brodrick*, 4 A. & E. 646. It binds the defendants in the actions which are stayed to abide the event of the one which proceeds; but it has been held not to bind the plaintiff to do so; and that, if the result of the first action is against him, he may proceed with another: ...gle v. *Anderson*, 1 A. & E. 635; *Doyle* v. *Douglas*, 4 B. & Ad. 544. But see *Amos* v. *Chadwick*, 9 Ch. D. 459; and *Bennett* v *Lord Bury*, 5 C. P. D. 339. A consolidation order may be obtained at any time after each action has become a *lis pendens*, *i.e.* when the writ has been served: *The Helenslea*, 30 W. R. 616; see *Hollingsworth* v. *Brodrick*, *supra*; *Ray* v. *Sherwood*, 1 Curt. 173, 193; 1 Moo. P. C. 353.

Where two actions commenced on the same day were consolidated, and a difference of opinion arose between the plaintiffs as to the conduct of the action, the plaintiffs who took the first steps towards severance were made defendants, and the conduct of the cause was given to the other plaintiffs, though their claim was the smaller in amount: *Holden* v. *Silkstone & Dodsworth Coal & Iron Co.*, 30 W. R. 98. **Conduct of consolidated action.**

The Court may re-open the consolidation order, and allow a second action to be defended, notwithstanding that the plaintiff has succeeded in the first action. But it will require a very strong case to induce it to do so. Probably a case must be shown at least as strong as would be required to procure a new trial: see *Foster* v. *Alvez*, 3 Bing. N. C. 896; *Cohen* v. *Bulkley*, 5 Taunt. 165. **Re-opening consolidation.**

Although consolidation, properly so called, is obtained at the instance of defendants, yet where several defendants are sued by the same plaintiffs, a somewhat analogous proceeding has been adopted in the converse case, where plaintiffs had brought their several actions against the same defendant, to recover similar relief in reference to the same transactions. Malins, V.C., at the instance of the plaintiffs, enlarged the time for taking any further steps in all the actions but one, until that one should be tried: *Amos* v. *Chadwick*, 4 Ch. D. 869; and his judgment was affirmed on appeal: 9 Ch. D. 459: see also **Test action.**

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Rule 653. *Hodson* v. *Richardson*, 3 Burr 1478. A like course was taken in *Bennett* v. *Lord Bury*, 5 C. P. D. 320, where thirty-eight actions had been brought, and, on the plaintiff's application, the proceedings of thirty-seven were stayed until the trial of the thirty-eighth as a test action, though it was said that the incidents would or might vary in each case, and there would be differences of proof in each, but the gist of the charge was the same in all.

This course of staying all but one of several actions, will only be allowed where the questions in dispute are substantially the same. Where questions, raised by defendants, of fraud and misrepresentation would necessarily be different and depend on different evidence a stay was refused: *Niagara Grape Co.* v. *Nelles*, 13 P. R. 179; and see *S. C.* in Appeal, 25 C. L. J. 606.

The judgment in the test action will not bind the parties in the other actions, unless the action has been tried out on its merits, upon evidence: *Amos* v. *Chadwick*, 9 Ch. D. 459. Where, therefore, the plaintiffs in the test action, when it came on for trial declined to proceed, and judgment was then given for defendants it was held that, notwithstanding the *Rule* corresponding to Ont. *Rule* 797, the Judge had jurisdiction to substitute another of the actions as a test action: *Ib.* In the absence of agreement, the plaintiff in an action thus constituted a test action has no right to be indemnified against costs by the other plaintiffs: *Ib.*

Where a test action came on for trial, the plaintiff was not prepared to proceed and applied for a postponement, to which, under the circumstances so far as his own interest was concerned, he was not entitled; it was held that the Court could not regard the rights of the plaintiffs in the other actions, and must dismiss the action with costs: *Robinson* v. *Chadwick*, 7 Ch. D. 878. See note to *Rules* 641, and 672.

20. Trial.

With respect to the trial of actions, there are important differences between the provisions of the English Judicature Acts and Rules, and the provisions of the Ontario Act and *Rules*. The latter preserve very nearly the modes of trial in use in this Province, under *The Administration of Justice Acts*, and otherwise. By the English Rules the trial of an action may be in any one of the following modes, viz., before a Judge or Judges sitting alone; or before a Judge sitting with assessors; or before a Judge and jury; or before an official or special referee with assessors; or before such referee without assessors; and the party giving notice of trial may (subject to certain conditions and provisions), choose any one of these modes of trial. If he chooses any mode other than a jury, the party served with the notice may require the trial to be by jury; but a Judge has power to order the trial without a jury, of any question or issue which might before the Act have been, without consent tried without a jury; in other words, of any case which, before the Act, would properly have been brought only in the Court of Chancery. The Judge has also power, where neither party requires a trial by a jury, to order the trial in any other mode than that of which notice has been given.

In this Province, sections 76-80 of the Act regulate the mode of trial. See the notes to those sections, pp. 84-86.

Both the English Rules, and the *Rules* in the Ontario Act, provide for a trial before referees in certain cases, at the instance of the Court or a Judge, and provide also for the Court or a Judge ordering the different questions of fact arising in an action to be tried by different modes; or one or more questions of fact to be tried before the others: see secs. 101, 102 of the Act, and *Rule* 655.

(i) *General Rules.*

Venue abolished.

653. There shall be no local venue for the trial of any action [except an action of ejectment,] but the plaintiff shall in his statement of claim name the county town in which he proposes that the action should be tried, and the

the action shall, unless a Judge otherwise orders, be tried in the place so named. Any order of a Judge, as to the place of trial, may be discharged or varied by a Divisional Court of the High Court. J. A. Rule 254. Rule 653.

See Eng. R. 1875, O. 36, r. 1. The Eng. R. 1883, R. 425, instead of the words in brackets, has "except where otherwise provided by statute," and also provides for the case of the indorsement on the writ becoming the only statement of claim, in which case the place of trial is named by a notice served six days after appearance. This case is not provided for by the Ont. *Rules*. Where no place is named, the Eng. R. provides that the trial shall be in Middlesex.

The effect of this *Rule* has been said to be to abolish all local venues as well those made so by statute, as at the Common Law, except actions of ejectment: *Legacy* v. *Pitcher*, 10 Ont. 620.

Local venues.

There are, however, certain kinds of actions which, under particular statutes, are directed to be tried in a particular place, and it was held that the original *Rule* 254 did not apply to such actions, *e.g.*, actions for infringement of patents under R. S. C. c. 61, s. 30: *Goldsmith* v. *Walton*, 9 P. R. 222; *Aitcheson* v. *Mann*, *Ib.*, 253, 473. Other instances are, actions under *The Customs Act* (R. S. C. c. 32) s. 47; actions for anything done in the administration of the criminal law: see R. S. C. c. 185, s. 1; c. 151, s. 24; actions against justices of the peace for not returning convictions: R. S. O. 1887, c. 76, s. 4.

In actions for recovery of land the trial must *primâ facie* take place in the county where the land lies, but the writ may issue from the proper office in any county: *Canada Permanent L. & S. Co.* v. *Foley*, 9 P. R. 273; so also an action for assignment of dower: *McCulloch* v. *McCulloch*, 4 C. L. T. 252.

The place of trial in actions of ejectment may be changed; see *Rule* 653 (*a*).

An action by a mortgagee for foreclosure payment and possession is not an action of ejectment within this *Rule*, and the venue therefore need not be in the county where the lands lie: *Seymour* v. *De Marsh*, 11 P. R. 472.

Changing place of trial.

In Chancery no actions were local, all were transitory. At Common Law some actions were local, and some transitory. In a local action the venue had to be laid in the county in which the cause of action arose, though the trial might be ordered to take place elsewhere. In a transitory action the plaintiff might lay his venue where he pleased, subject to the power of the Court or a Judge to order it to be changed. The practice as to changing the venue was, that either party might apply for an order for that purpose. The plaintiff, if the application was his, had to show reasonable ground for the change, and if the application was the defendant's, the defendant had to show distinctly a preponderance of convenience in favor of trying where he proposed, instead of where the venue was laid: *Church* v. *Barnett*, L. R. 6 C. P. 116.

On ground of balance of convenience.

The present *Rule*, like the similar one in England, applies in all Divisions: *Redmayne* v. *Vaughan*, 24 W. R. 983; *Clarke* v. *Cookson*, 2 Ch. D. 746. The question for decision on any application to change the place of trial is, where can the action most conveniently be tried? : *Greey* v. *Siddall*, 12 P. R. 557; *Taylor* v. *Grant*, 9 C. L. T. 140; and the matter is left in the discretion of the Judge, to be exercised according to the balance of convenience, and it is for the defendant to show a preponderance of convenience to oust the plaintiff's right to fix the place of trial: *Plum* v. *Normanton Iron, etc., Co.*, W. N. 1876, 105; *Wood* v. *Kay*, W. N. 1879, 206; *Schroder* v. *Myers*, 34 W. R. 261; approved and followed in *Ross* v. *C. P. Ry. Co.*, 12 P. R. 220; and *Nicholson* v. *Linton*, *ib.*, 223. This was in effect the practice in Chancery formerly: *Noad* v. *Noad*, 6 P. R. 48. There is not unanimity amongst the Judges in this Province as to the weight to be given to the place where cause of action arose, in determining the place which is most convenient. This had formerly little weight in Chancery: *Noad* v. *Noad*, *supra*; but was an important element at Common Law: *Harper* v. *Smith*, 6 P. R. 9; *Gilmour* v. *Strickland*, 6 P. R. 254; *Phippen* v. *McLeod*, 7 P. R. 377. The reported cases, and the opinions of the majority of the Judges, seem to be in favour of adopting the former Chancery practice, and

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Rule 653. of determining the convenience by a consideration of the expense and the witnesses' facilities of travelling: see *Davis* v. *Murray*, 9 P. R. 222; *Robertson* v. *Dagueau*, 3 C. L. T. 266; *Walton* v. *Wideman*, 10 P. R. 228; *Slater* v. *Purvis*, 10 P. R. 604; *Ross* v. *C. P. Ry. Co.*, *Nicholson* v. *Linton*, *supra*; *Taylor* v. *Grant*, 9 C. L. T. 140; but that the plaintiff's right to select the place of trial is not lightly to be interferred with, where it has not been vexatiously chosen by him. It is impossible, as a general rule, to enter into the investigation whether one class of witnesses will be more injured than another by absence from home: *Noad* v. *Noad*, and *Davis* v. *Murray*, *supra*; except in the case of a public officer: *Fisken* v. *Smith*, 2 Chy. Ch. 49; *Fogg* v. *Fogg*, 12 P. R. 249. The preponderance of convenience to be shewn by the defendant must be considerable. A change will not be made on account of a trifling difference in expense: see *Stewart* v. *Johnstone*, 4 U. C. L. J. 21; *Mooney* v. *Mooney*, 6 P. R. 267; and *Walton* v. *Wideman*, and other cases *supra*, especially if the plaintiff undertakes to pay the difference in expense: see *Brigham* v. *McKenzie*, 10 P. R. 406. But difference of expense is of more importance in an alimony action as the defendant has to bear in any event all the disbursements: *Fogg* v. *Fogg*, 12 P. R. 249.

The fact that the parties and their solicitors and witnesses reside at one place is a case of exceeding preponderance, though the additional expense of trial in a neighbouring county would not be large: *Servos* v. *Servos*, 11 P. R. 135. The fact that a change will delay the trial considerably is a circumstance to be considered: *Ib.* A direction to the parties to disclose the names and evidence of the witnesses in order to consider whether the witnesses are material is not proper: *Arpin* v. *Guinane*, 12 P. R. 364.

Where the plaintiffs resided at Montreal and the defendants' officers at Picton, and the plaintiffs had some witnesses resident at Toronto, the place of trial was changed from Ottawa to Toronto: *Cooper* v. *Central Ontario Ry. Co.*, 4 Ont. 280.

Delay in applying may, apart from all other considerations, be sufficient to justify the dismissal of a motion to change the venue; as where the action is just about to be tried, and application might sooner have been made: *Philips* v. *Beall*, 26 Ch. D. 621; 32 W. R. 665. The discretion of the Judge as to changing the place of trial is an appealable discretion: *Ib.*

An application is not necessarily premature because issue is joined, if the issues can be determined from the pleadings: *Powell* v. *Cobb*, 29 Ch. D. 488-9.

The plaintiff, having named a place of trial, cannot change his mind and name a new one by amendment of the statement of claim under *Rule* 424: *Bull* v. *North British, etc., Co.*, 10 P. R. 622. He must apply on motion, and on the ground of preponderance of convenience: *Powell* v. *Cobb*, 52 L. T. N. S. 183. As to whether the omission to name a place of trial in the statement of claim can be supplied by amendment, see note to *Rule* 424, p. 451.

Semble, this *Rule* does not give a Judge a right to interfere with the procedure in the action, (*e.g.*, to change the venue of his own motion) except at the instance of a party: *Bull* v. *North British, etc., Co.*, 11 P. R. 83. Such motions should not be made at the Assizes; it is too late then to consider the balance of convenience as the parties have to be prepared for trial: *Sarnia Agricultural Implement Co.* v. *Perdue*, 11 P. R. 224.

The plaintiff cannot have the place selected by him changed, if the defendant objects, except upon shewing some cogent reason. If the place chosen by him is manifestly an improper one, he may be ordered to pay the costs of the motion to change: *Martin* v. *Ross*, 6 P. R. 264. The plaintiff may probably, however, as formerly, obtain a change to hasten the trial where he is in danger of losing his debt, particularly if by some unforeseen circumstance he has been prevented from going to trial at the place originally named by him: see *Lucus* v. *Taylor*, 4 P. R. 99; *McDonell* v. *Prov. Ins. Co.*, 5 U. C. L. J. 186; or where the Judge appointed to take the Assizes refused to try the case, being interested in the defendant's Co.; and *Mercer* v. *Vogt*, 3 P. R. 94.

On ground that fair

On other extraordinary grounds the place of trial may be changed. For instance, the existence of circumstances which may render it impossible to

have a fair trial, such as political excitement: *Roche* v. *Patrick*, 5 P. R. 210; the interests of the locality being involved: *Municipal Council of Ontario* v. *Cumberland*, 3 U. C. L. J. 11; or its prejudices or sympathies enlisted on one side so as to render a fair trial impossible: *McDonagh* v. *Prov. Ins. Co.*, 2 C. L. J. 104; *Blackburn* v. *Cameron*, 5 P. R. 341; see also *Davis* v. *Murray*, 9 P. R. 229; *Shafto* v. *Bolckow*, 35 W. R. 686; 57 L. T. N. S. 17. *Quære* whether the pendency of other similar suits, and the fact that a large number of persons are interested in the county in the matters involved, and that in the opinion of number of residents a fair trial can not be had, will be sufficient: see *Abell* v. *Leadley*, *Abell* v. *Kirk*, 2 C. L. T. 555, 557; see also *Moor* v. *Boyd*, 3 P. R. 374. See also where the Sheriff is a party: *Brannen* v. *Jarvis*, 8 P. R. 322; or the County Judge, *Anon*, 4 P. R. 310. **Rule 654.** trial cannot be had.

The place of trial was changed in a collision suit in the Maritime Court, on the sole ground that the local Judge would be in a better position to try the case from his practical or easily obtainable knowledge of the locality in which the collision occurred: *The Wharton Belle*, 2 C. L. T. 360.

A reference to a Master is *prima facie* to the Master at the place where the proceedings were instituted: *Macara* v. *Gwynne*, 3 Gr. 310; *McNab* v. *McInnis*, 4 Chy. Ch. 53; but the place is subject to be changed, upon motion, applying the same principles as in the case of the place of trial: see *Jackson* v. *Harriman*, 9 C. L. J. 29; *McNab* v. *McInnis*, *supra*. The policy of *The Judicature Act* in decentralizing business introduces a further element, and as far as possible, local matters are to be sent to the local Masters; a reference was therefore changed and sent to the Master of the county in which a partnership business in question was carried on: *Aitken* v. *Wilson*, 9 P. R. 75. Changing place of reference.

A reference was also changed where it became necessary to add as a party the Master before whom the matter was pending: *Weldon* v. *Templeton*, 1 Chy. Ch. 360; and where the Master's illness unfitted him from attending to business: *Re Kirkpatrick*, 18 C. L. J. 121; 2 C. L. T. 204. See also notes to *Rule* 42, p. 149.

In administration matters, however, the reference should *primâ facie* be to the place where the person whose estate is to be administered resided; *Rule* 972 is in such matters applicable, not *Macara* v. *Gwynne*, 3 Gr. 310: *Thompson* v. *Fairbairn*, 10 P. R. 533. See also notes to *Rule* 42, p. 149.

(*a*) On the application of either party, and on grounds shown by affidavit, the Court or a Judge may order that the trial of an action of ejectment shall take place at any other place than that named in the statement of claim. R. S. O. 1877, c. 51, s. 23. Court may alter place of trial in ejectment actions.

See notes *supra*, and *C. P. Ry. Co.* v. *Manoir*, 11 P. R. 247.

654. After the close of the pleadings either party (*a*) may give notice of trial for the next sitting of the Court which shall be not less than ten days (*b*) thereafter for the place so named or ordered. J. A. Rule 255. Notice of trial.

(*a*) The Eng. R. June, 1876, 13, and 1875, O. 36, r. 4, and 5 (*a*) (1883, R. 435, and 436), permit the plaintiff to give notice of trial with his reply though it does not close the pleadings: *Asquith* v. *Molineaux*, 49 L. J. Q. B. 800; but he may not enter the case till the pleadings are closed: *Metropolitan Inner Circle Ry.* v. *Metropolitan Ry. Co.*, 5 Ex. D. 126; and they do not permit the defendant to give notice of trial, until the plaintiff has failed to do so for six weeks after the close of the pleadings, or such extended time as the Court or Judge may allow. The Ontario *Rule supra*, is in accordance with the former Chancery practice, Chy. G. O. No. 161.

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Rule 655.

Any one of the parties plaintiffs, or defendants, may give notice of trial: *Tinning* v. *G. T. Ry.*, 11 P. R. 438, and if one of several defendants does so he should serve his co-defendants as well as the plaintiff: *McLean* v. *Thompson*, 9 P. R. 553.

Either party has the right to give notice of trial for the next sittings, whether an Assize, or a Chancery sittings; and where defendant has given notice for the earlier of such two sittings, the plaintiff cannot take away that right by giving notice for the later sittings: *Shaw* v. *Crawford*, 9 C. L. T. 412; 25 C. L. J. 507.

(*b*) This is the period allowed under *Rule* 661 for the notice of trial. The words "not less than" do not require a notice of trial to be ten clear days; this *Rule* is to be read with *Rule* 661: see *Harper* v. *Marx*, in note to that *Rule*.

As to when the pleadings are closed, see *Hare* v. *Cawthrope*, 11 P. R. 353, and the notes to *Rule* 322. Notice of trial given before the pleadings are closed within the meaning of *Rule* 392, will be irregular: *Schneider* v. *Proctor*, 9 P. R. 11. An action of ejectment begun under the old practice was held to be at issue on appearance being put in, though after the coming into force of *The Judicature Act*: *Laidlaw* v. *Ashbaugh*, 9 P. R. 6.

Where notice of trial did not state the place where the trial was to take place, a motion to set aside the notice was refused in the absence of an affidavit stating that the party moving was thereby misled: *O'Brien* v. *Wells*, 20 C. L. J. 369; see also notes to *Rule* 660.

Where an overdue defence was filed on the last day for giving notice of trial, and a joinder of issue, and jury notice were filed on the same day, but after the filing of the defence, the service of notice of trial with the joinder of issue and jury notice on the same day, but after the filing of the defence, was held to be regular: *Broderick* v. *Broatch*, 12 P. R. 561.

Trial of different questions in different modes.

655. Subject to the provisions of the Judicature Act and of the preceding Rules, the Court or a Judge may in any action at any time or from time to time order that different questions of fact arising therein be tried by different modes, or that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials, and in all cases may order that one or more issues of fact be tried before any other or others. J. A. Rule 256.

Same substantially as the Eng. R. 1875, O. 36, r. 6, (1883, R. 432).

The present *Rule* enables the Court to direct one or more issues of fact, which may decide the case, to be tried before the others.

An order for the trial of a point of law first was made in *Corporation of Preston* v. *Fullwood*, 80 L. T. Jour. 41. See also *Irwin* v. *Sperry*, 11 P. R. 229; *Smith* v. *Hargrove*, 16 Q. B. D. 183; *Temperance Colonization Society* v. *Evans*, 12 P. R. 48, 380; *Elmore* v. *Pirrie*, 57 L. T. N. S. 333; *London C. & D.* v. *S. E. Ry.*, 53 L. T. N. S. 109.

Rule 555 enables the Court to direct a preliminary point of law, to be decided which may prevent the necessity for trial of issues of fact.

Rule 389 contains provision of a similar kind for enabling a point of law raised by demurrer to be decided at the same time as issues of fact, or at a different time.

In *The Emma Silver Mining Co.* v. *Grant*, 11 Ch. D. 918, Jessel, M.R., said (p. 930), that a "case to be brought within this *Rule* ought to be one of simple issues. I do not think it is convenient to travel through a long record, and to get a number of complicated issues, and except them, so to say, from the pleadings." He explained in what cases the *Rule* had heretofore been acted

upon. All had been cases in which the application was by the defendant. He said at page 926 :— Rule 555.

"The first case that came before me was a case in which a lady alleged that she was the legitimate child of somebody, and that as such she was entitled to take some very long and expensive and intricate accounts against some trustees. The trustees showed by affidavit that the lady was born before the marriage of her parents, and that there were very strong grounds indeed for supposing that she was not a legitimate child at all. I thought it a proper case, inasmuch as the expense of taking the accounts would have been enormous, and the whole suit would have ended in nothing but costs if the plaintiff did not establish her legitimacy, for the issue of legitimacy or illegitimacy to be tried first under this *Rule*. I so directed, and, as I am informed, the result was that the lady did not succeed in establishing her legitimacy, and there was an end of the action, which was exactly what I anticipated.

"In a case of this kind, my opinion is, that the Judge must have some evidence which will make it at least probable that the issue will put an end to the action. The plaintiff is not to be harassed at the instance of the defendant by a series of trials, each trial taking issue on every link of the plaintiff's case. That is not the meaning of the *Rule*, as I understand it, but it may properly be applied in such a case as that I have stated, where the Judge has serious reason to believe that the trial of the issue will put an end to the action.

"I have had a case in which the plaintiff alleged a very long title to, and claimed an estate. He alleged himself to be the heir-at-law of a person who was entitled to this estate. He wanted a great deal of discovery, and the possession of a large property. The defendant said that the plaintiff was a pauper, that it was a mere experimental action, and that there was not a shadow of ground for his claim. In that case I felt no hesitation in directing an issue whether the man was heir-at law. It turned out that he was not, and I believe, the case was abandoned and was never tried at all.

"There was a third case I remember before me at Chambers (I only give these instances as illustrations) in which a man brought an action on behalf of himself and all other tenants of a manor to restrain the inclosure of a common. The defendant said, 'This will be a very expensive action to try; it will involve the customs of the manor as to rights of common,' and that, as usual, they had put up a man, who although not technically, was really a pauper, to sue on behalf of himself and all others, the only result of which action could be that the defendants, if successful, would have to pay the costs out of their own pockets. They alleged, and proved by affidavit, that the person who was plaintiff, and who said he was tenant of the manor, was not so, and that his name, or the name of his ancestors, had never appeared on the court rolls of the manor. The only answer that I could get from the plaintiff was, that he believed that he was a tenant, but he could not show how. I thought before the defendants were put to the enormous expense of a trial of all the issues, it was right to put the plaintiff to the proof that he was a tenant at the time when the action was brought. . . .

"The defendant has of course a right to shape his own case and to say to the plaintiff: 'You must prove every part of your case; if I can put my finger on one part of your case and show that there is no foundation for it whatever, it is quite wrong to subject me to the whole expense of a protracted investigation, and especially when you, the plaintiff, cannot pay the costs of it.'"

In the subsequent case of *Piercy* v. *Young*, 15 Ch. D. 474, the learned Judge stated that the *Rule* was intended to be applied in exceptional cases only; that the object of the Judicature Act was to try all disputes together, and that it was considered a beneficial object. "Separate trials of separate issues are nearly as expensive as separate actions, and ought certainly not to be encouraged, and they should only be granted on special grounds." It was there held that a defendant in a partnership who had set up by counter-claim, an agreement by the plaintiff for sale of his interest in the partnership to the defendant at a stated price, was not entitled to have this issue tried before the plaintiff's issues in the action.

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Rules 656-659.

In the *Tasmanian Railway Company* v. *Clarke*, W. N. 1879, 106; 27 W. R. 677, the Court of Common Pleas refused leave to try the liability of a surety, before that of the principal; and the Court of Appeal declined to interfere with their discretion.

Where a reference would be ordered by the Judge as to a question of account, it is proper that the question of liability should be tried separately from the question to be so referred: *Liverpool, Brazil, etc. Navigation* v. *London & St. Katherine, etc., Co.*, W. N. 1875, 203; 1 Charl. Ch. Ca. 121.

In *Milissich* v. *Lloyds*, W. N. 1875, 200, an action for libel, an application by the defendant to have the question of libel tried before the question of damages was refused by Lush, J., who said: "I do not think that I could in this case separate the question of damages from the question of fact without injury to the plaintiff." In *Dent* v. *Sovereign Life Assurance Co.*, W. N. 1879, 33, the validity of a life policy being the matter in dispute, an application by the plaintiff that the issue, whether the deceased was a man of temperate or intemperate habits should be tried first, was refused by V.-C. Bacon, who said that "this particular issue could not be so severed from the rest of the case as to admit of its being heard separately by a jury."

The *Rule* applies not merely to questions of fact, but to mixed questions of law and fact: *Tasmanian Ry. Co.* v. *Clark*, *supra*.

See also *Tattersall* v. *National Steamship Co.*, in note to *Rule* 555, and *Pooley* v. *Driver*, 5 Ch. D. 458.

Trial by jury.

656. Every trial of any question or issue of fact by a jury shall be held before a single Judge, unless such trial is specially ordered to be held before two or more Judges. J. A. Rule 257.

Identical with the Eng. R. 1875, O. 36, r. 7, (1883, R. 433); see sec. 61 of the Act.

As to the cases in which a jury may be had: see notes to s. 78 *et seq.* of the Act.

Trials at bar on the part of suitors.

657. The plaintiff and the defendant respectively, in any action in the High Court, may, in the Divisional Court sittings of the High Court next after issue joined, apply to the Court for a trial at bar, and the Court may, in its discretion, upon hearing the parties, grant or refuse the same. R. S. O. 1877, c. 39, s. 33.

On the part of the Crown.

658. In all cases in which the Crown may be actually or immediately interested, a trial at bar may be had as of right upon, and shall be regulated and governed by, the same principles as in similar cases in England. R. S. O. 1877, c. 39, s. 34.

See *Dixon* v. *Farrer*, 18 Q. B. D. 43.

When trial to be had.

659. In case any trial at bar is directed, the Judges attached to the Division of the High Court in which the action has been brought, may appoint such day or days for the trial thereof as they may think fit. R. S. O. 1877, c. 39, s. 35.

Rules 660, 661.

660. Notice of trial shall state whether it is for the trial of the action or of issues therein; and the place and day for which it is to be entered for trial, and shall be given before entering the action for trial. It may be in the Form No. 27 in the Appendix, with such variations as circumstances may require. J. A. Rules 258, 260.

Form of notice of trial.

By the Eng. R. 1875, O. 36, r. 8; *Rule* 12, of Dec. 1875, (1883, R. 437, and 439), the notice of trial is to state the place and day in actions in the Q. B., C. P., and Exch. D. (now Q. B. D.) only. The *Rules* otherwise correspond: see *Redmayne* v. *Vaughan*, 24 W. R. 983.

Notice of trial of an action in the Chancery Division for the winter assizes at Hamilton, was held good where no Chancery spring sittings at Hamilton had been fixed: *Rymal* v. *McEachern*, 3 C. L. T. 106, approved in *McLean* v. *Thompson*, 9 P. R. 553.

Notice of trial was amended *nunc pro tunc* where given for trial at Belleville naming the day fixed for the Assizes at Picton, the Belleville Assizes being over and the party served not having been misled: *Walker* v. *Terry*, 7 P. R. 340; so where "September" was inserted instead of "October," as the mistake could not mislead: *Bank of Montreal* v. *Cameron*, 7 P. R. 188; see also *O'Brien* v. *Wells*, 20 C. L. J. 369.

Where after notice of trial given by plaintiff, the defendant obtained an order postponing the trial on payment of costs, this was held to be a conditional order not staying the plaintiff's proceedings and one which the defendant was at liberty to abandon without being liable to pay other than the costs of the application: *Allen* v. *Mathers*, 9 P. R. 477.

Ten days notice.

661. Ten days' notice of trial shall be given, unless the party to whom it is given has consented to take short notice of trial; and shall be sufficient in all cases, unless otherwise ordered by the Court or a Judge. Short notice of trial shall be five days' notice. J. A. Rule 259.

Short notice five days.

This *Rule* is identical with the Eng. R. 1875, O. 36, r. 9, (1883, R. 438), except that short notice of trial is there declared to be four days, instead of five.

The ten days are computed in the usual way, exclusively of the first day and inclusively of the last, under *Rule* 474; the words "not less than ten days" in *Rule* 654 have not the effect of making the ten days mentioned in this *Rule* clear days; *Harper* v. *Marx*, 3 C. L. T. 309.

A defendant is entitled to the full ten days' notice and there is no power to compel him to take less, unless he has consented to take short notice, or unless short notice can be imposed as a term of granting an indulgence to the defendant: *Hamilton Prov. & L. Soc.* v. *McKim*, 13 P. R. 125; *Whitney* v. *Stark*, *Ib.* 129.

Where notice of trial is served on the Toronto agent of a solicitor, he is not entitled to two days' additional time, as formerly under R. S. O. 1877, c. 50, s. 58: *Lumsden* v. *Davies*, 17 C. L. J. 363; 1 C. L. T. 615.

Where by arrangement papers were served by mail, notice of trial posted in time, but received one day short of the ten, was set aside: *McDonough* v. *Alison*, 9 P. R. 4.

On motion to set aside a notice of trial served a few minutes late, service having been admitted, but immediately afterwards repudiated, it was held that unless service of a good notice was negatived, the service should not be set aside: *Wright* v. *Way*, 8 P. R. 238.

This *Rule* applied in actions of replevin even under the original *Rule*: *Wallace* v. *Cowan*, 9 P. R. 144.

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Rules 662-665.

Eng. R. 1875, Order 36, Rule 13, (1883, R. 443), provides that no notice of trial shall be countermanded except by consent or leave of the Court or a Judge. This Rule has not been adopted in the Ontario *Rules*. By the former Common Law practice countermand was permitted, but not by the Chancery practice. Since *The Judicature Act*, notice of trial cannot be countermanded, by either party: *Friendly* v. *Carter*, 9 P. R. 41.

In the case of a *remanet* no notice of trial was formerly necessary: *Donovan* v. *Boultbee*, 10 P. R. 52; but must now be given under *Rule* 671*a*. A case postponed by order at the trial on defendants' application is a *remanet*: *Ib.*

Notice of trial at bar.

662. Notice of a trial at bar shall be given to the Registrar of the Court before giving notice of trial to the party. Rules T. T. 1856, 37.

Entry for trial.

663. After notice of trial is given, either party may enter the action for trial. If both parties enter the action for trial, it shall be tried in the order of the plaintiff's entry. J. A. Rule 261.

This *Rule* corresponds in effect with the Eng. R. 1875, O. 36, r. 15, so far as the latter relates to cases which are not to be tried in London, or Middlesex.

The effect of this *Rule*, and *Rule* 665, is to supersede the former Common Law practice, by which the defendant could obtain a side-bar rule for costs of the day where the plaintiff gave notice of trial but did not enter the case. The defendant can enter the action, or if the plaintiff fails to do so, the defendant may apply to the Judge under *Rule* 665. No officer has now power to issue a rule for costs, and the Master in Chambers has no jurisdiction to entertain an application for them: *Hopkins* v. *Smith*, 9 P. R. 285; see *Tonsley* v. *Hepper*, 57 L. T. N. S. 481, under the English practice.

Where, after the plaintiff has given notice of trial, neither party enters the case, *quære*, whether the defendant may move to dismiss the action for want of prosecution: *Crick* v. *Hewlett*, 27 Ch. D. 354. This case, in which the right to move to dismiss was affirmed was decided upon the terms of Rules 436 and 440, of the Eng. Rules of 1883. Rule 436, is not the same as Ont. *Rule* 647, though providing in respect of the same subject. Eng. R. 440 has not been adopted here, and provides expressly that the notice of trial ceases to have any force, where the plaintiff fails to enter the case.

Record.

664. On the day before the day for holding the Court at which the action is to be tried, the party entering the action for trial shall deliver to the proper officer one copy of the whole of the pleadings in the action for the use of the Judge at the trial, such copy to be certified as a true copy by the officer having charge of the pleadings filed, [and to be called the Record]. J. A. Rule 262.

Comp. Eng. R. 1875, O. 36, r. 17, (1883, R. 454), and Dec. 1875, R. 14.

The English Order provides for *two* copies of the pleadings being delivered to the officer; it does not require them to be certified, nor does it provide that they are to be called the Record: see notice W. N., 1877, Pt. 2, p. 219.

Time of entry for trial.

665. Actions shall be entered for trial not later than the third day next before the first day of the sittings; but the Judge may permit any action to be entered after the time

above limited, if upon facts disclosed on affidavit, or on the consent of both parties, he sees fit to do so. J. A. Rule 264. Rules 666-669.

By R. S. O. 1877, c. 50, s. 248, the record of *nisi prius* was to be entered at any time during the five days next before the commission day; and on the said commission day at any time before noon, unless the Judge should on affidavit permit it to be entered afterwards. In Chancery (Order 163) cases were set down, and notices served at least fourteen days before the sittings.

The present *Rule* follows neither practice; it forbids the entry on the day the Assizes, or Sittings begin; and requires it to be made not later than the third day next before such first day, unless with the Judge's permission. It may be made on any earlier day, after notice of trial is given: *Rule* 660.

Sunday is under *Rule* 473, to be excluded in computing "the third day": *Parr* v. *Lough*, 3 C. L. T. 312.

See *Hopkins* v. *Smith*, 9 P. R. 285, in note to *Rule* 663.

666. Any action which is not to be tried by a jury, may be entered for trial at any Sittings appointed for the place named for the trial of such action. *See* J. A. Rule 590. Non-jury actions.

The practice was different before this *Rule*: see *Grant* v. *Middleton*, 10 P. R. 585.

667. If both parties enter the action for trial at the same Sittings it shall be tried in the order of the plaintiff's entry. *See* J. A. Rule 591.

See also *Rule* 663.

The original *Rule* also provided that if both parties gave notice of trial, one for the Assizes and the other for the Chancery sittings, the plaintiff's notice should govern unless otherwise ordered. This provision being repealed it is presumed that the first notice served should determine the sittings for the trial.

668. All actions to be tried by a jury, shall be entered for trial at the Assizes holden at the place named for trial of such action without an order transferring such action to any other Division. J. A. Rule 592. Jury actions.

669. The party entering an action for trial shall indorse on the copy of the pleadings delivered as aforesaid, whether the matter for trial is an assessment of damages, or an undefended issue, or a defended issue; and the officer with whom the action is so entered shall make two lists and enter each action in one of the said lists, in the order in which the actions are entered with him; and in the first list he shall enter all the assessments and undefended issues, and in the second list all defended issues, and the Judge at the trial may call on the actions in the first list at such time and times as he finds most convenient for disposing of the business. J. A. Rule 267. Separate lists of defended and undefended issues.

Substantially the same as the enactment in R. S. O. 1877, c. 50 s. 249. There is no corresponding English Rule.

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Rules 670, 671.

Withdrawal of record by consent.

670. Where an action has been entered for trial, it may be withdrawn by either the plaintiff or the defendant, upon producing to the proper officer a consent in writing, signed by the parties, [but not otherwise except by order]. J. A. Rule 171.

Same as Eng. R. Dec. 1875, R. 9, which was framed to obviate the necessity of applying to the sitting Judge for leave under *Rules* 641 and 642.

The words in brackets were not in the original *Rule* 171, and are in substance what was provided in original *Rule* 170, viz., that the record cannot be withdrawn without leave: see *Rule* 641.

At Common Law, a plaintiff who had entered a cause for trial might withdraw the record at any time before the jury were sworn, this was often a hardship, where the defendant was ready with his witnesses and counsel. Under the present clause, leave is necessary for the withdrawal of a record, and in *Learnmouth* v. *Croll*. 1 Charl. Ca. (Court) 100, Huddleston, B., refused an application to postpone the trial fixed for a few days thereafter, though counsel for the plaintiff was not sufficiently instructed in the case; and he referred the plaintiff to the Judge who was to sit on the day appointed for trial, for leave to withdraw the record. Leave was given where the consent of the opposite party was produced, without any affidavit: *Anon*, 1 Charl. Ca. (Court) 99.

Any order made at the trial for withdrawal or postponement, and requiring to be issued, should be signed by the officer who acts as Registrar at the trial, no matter what Division the action is assigned to: *Waghorn* v. *Hawkins*, 12 P. R. 145.

Orders at the trial for amendment of pleadings do not require to be issued: *Rule* 446, and orders respecting postponements, not containing any special terms may not require to be issued.

In consequence of this *Rule* it has been decided that where a case has been made a *remanet* at the Assizes, it remains there for trial, and a party cannot, without consent or leave, interrupt the course of the trial and give notice of trial for the Chy. sittings: *Ward* v. *Jackson*, 12 P. R. 225. Con. *Rule* 671 was intended to obviate this difficulty and was as follows:—

Actions not tried.

"**671.** Actions not tried or disposed of after being once entered for trial may be set down, and notice thereof given for any subsequent Court without the payment of any further fee." *See* C. L. Rules 4th Dec. 1875, 2, 3.

This *Rule* has been abrogated and a new one substituted. See note to next *Rule*.

For effect of withdrawal of a juror, see *Thomas* v. *Exeter Flying Post*, 18 Q. B. D. 822.

Remanet.

671a. Ordered, that Rule 671 be and the same is hereby rescinded and the following substituted therefor, viz.:

Actions not tried or disposed of after being once entered for trial shall remain for trial subject to the provisions of Rule 670, but shall not be heard at any subsequent Sittings unless and until a fresh notice of trial be given for such Sittings by one of the parties. 15th Dec., 1888.

This *Rule* was published in the *Ontario Gazette* of 26 Jan., 1889, pursuant to *Rule* 6.

The original *Rule* 671 is given in the note to *Rule* 670.

The effect of the new *Rule* seems to be, that actions not reached at the Assizes may not be entered for trial at the Chy. sittings (and *vice versa*) without,

consent or leave: see *Ward* v. *Jackson*, 12 P. R. 225 in note to *Rule* 670, and that, if withdrawn, a further fee for entering at another sittings must be paid. **Rules 672, 673.**

See *Bunbury* v. *Manufacturers Ins. Co.*, 13 P. R. 52, decided under the repealed *Rule* 671.

It has been held that where a Judge has no time to try a case owing to his having to go to another circuit town, though he may make the case a *remanet*, he should not direct it to be tried at another place: *Fairbairn* v. *Household*, 53 L. T. N. S. 513. This case seems to have turned on the circumstance that the Judge had not power to change the venue, which power he would have in Ont.: see secs. 39 and 40 of the Act, p. 32.

672. If, when an action is called on for trial, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him. J. A. Rule 268. Non-appearance of defendant.

Same as Eng. R. 1875, O. 36, r. 18, (1883, R. 455).

Before the Jud. Act, 1881, in actions of ejectment, if the defendant did not appear at the trial, the plaintiff was entitled to a verdict without any proof: R. S. O. c. 51, s. 32. Now, ejectment suits are on the same footing in that respect as other suits: see *Guillet* v. *Clark*, referred to and discussed in 72 L. T. Jour. 398.

In the cases dealt with by this *Rule*, it has been held in England that the plaintiff need not prove service of the notice of trial: *Chorlton* v. *Dickie*, 13 Ch. D. 160. See, however, *The Avenir*, 9 P. D. 84. This is in accordance with the former practice at Law. There had been a previous decision by Fry, J., the other way: *Cockshott* v. *London General Cab Co.*, 26 W. R. 31; W. N. 1877, 214. See note to next *Rule*. But, in the absence of any decision to the contrary, it would seem proper that, where judgment has been pronounced in the absence of a defendant, the officer with whom the judgment is entered should require due proof of service of notice of trial, or of motion for judgment, to be filed with him before entering the judgment, unless the proof has been given at the trial: see *Glasgow* v. *Glasgow*, 9 Ont., 511 (*n*).

If the defendant has a counter-claim and does not appear at the trial the plaintiff is entitled to have judgment on his claim on proving it and to have the counter-claim dismissed with costs: *Lumley* v. *Brookes*, 41 Ch. D. 323.

673. If, when an action is called on for trial, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action, but if he has a counter-claim he may prove such claim so far as the burden of proof lies upon him. J. A. Rule 269. Non-appearance of plaintiff.

Same as the Eng. R. 1875, O. 36, r. 19, (1883, R. 456).

In such case the defendant is entitled to judgment dismissing the action with costs: *Farrell* v. *Wale*, 36 L. T. N. S. 95, and cases *infra*. It has been held in England that the defendant need not prove the service of notice of trial on him: *James* v. *Crow*, 7 Ch. D. 410; and *Re Palmer*, *Skipper* v. *Skipper*, 32 W. R. 83; 49 L. T. N. S. 553; following *Ex parte Lows*, 7 Ch. D. 160; not following *Cockle* v. *Joyce*, 7 Ch. D. 56; and see note to *Rule* 672. But where notice of trial had been given by the plaintiff, and he filed a liquidation petition, under which a trustee had been appointed, and no one appeared at the trial for the plaintiff or trustee, proof of service of notice on the trustee was held to be necessary: *Eldridge* v. *Burgess*, 7 Ch. D. 411.

The practice in England, where the plaintiff does not appear, is not to swear the jury, and any costs which the defendant may incur, by having the jury

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Rules 674, 675.

sworn in such case, the defendant may not be entitled to get taxed: *Lane* v. *Eve*, W. N. 1876, 86.

Where a test action came on for trial, the plaintiff was not prepared to proceed and applied for a postponement, to which, under the circumstances, so far as his own interest was concerned, he was not entitled; it was held that the Court could not regard the rights of the plaintiffs in the other actions, and must dismiss the action with costs: *Robinson* v. *Chadwick*, 7 Ch. D. 878. See note to *Rule* 641.

Witnesses may be put out of Court.

674. The Judge at the trial shall at the request of either party cause the witnesses to be removed from the Court during the trial, and also the parties to the suit tendering themselves as witnesses, if the Judge deems necessary; or he may instead require the party intending to give evidence for himself to be examined before his other witnesses; and any such witness who returns to the Court without leave, shall be liable to be punished in such manner as to the said Judge may seem proper; and the Judge may in his discretion exclude the testimony of any witness who returns to the Court without leave of the Judge. R. S. O. 1877, c. 50, s. 260.

See *Sievewright* v. *Sievewright*, 8 P. R. 81, and note *supra* p. 486.

A plaintiff calling defendant as a witness is not entitled as of right to re-examine in the nature of cross-examination. The Judge has a discretion to refuse to allow such cross-examination: *Price* v. *Manning*, 37 W. R. 785; W. N. 1889, 161.

A hearing *in camera* may be allowed in a proper case: *Mellor* v. *Thompson*, 31 Ch. D. 55, and 25 C. L. J. 597; 82 L. T. Jour. 297; 88 L. T. Jour. 40; and per Lord Fitzgerald, *Macdougall* v. *Sleight*, 14 App. Cas. 260-7.

How addresses of counsel to jury regulated.

675. At the trial, the addresses to the jury shall be regulated as follows:—the party who begins, or his counsel, in the event of his opponent not announcing at the close of the case of the party who begins, his intention to adduce evidence, shall be allowed to address the jury a second time at the close of the case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall then be allowed to open his case, and also to sum up the evidence (if any). The right to reply shall be the same as at present. R. S. O. 1877, c. 50, s. 261.

Usually the course of proceeding at a trial is as follows: The counsel having the right to begin opens the case by an address to the Court and jury, in which he states the facts of the case and the nature of the issue to be tried, and the evidence by which he proposes to prove his case. He then produces the evidence. If at the conclusion of his case, the opposite party desires to produce evidence, he is entitled to address the Court and jury stating the nature of his case and the evidence he proposes to produce in support of it: this right, however, is not generally exercised; but without any preliminary address, he adduces his evidence. Evidence in reply may be then adduced by the party beginning, and at the conclusion of the evidence, the counsel who did not begin addresses the Court and jury on the whole case, and the counsel who begins then replies. If, however, the party who does not begin adduces

no evidence, then the counsel who began addresses the Court and jury on the whole case at the conclusion of the evidence and the opposite party replies. In trials before a jury therefore there are usually but three addresses, viz.: the opening speech before any evidence is adduced, and the two addresses at the conclusion of the evidence. Where defendants are represented by different counsel, each defendant is entitled to be heard by his own counsel. Rule 676.

Where a trial takes place before a Judge without a jury, the opening speech is frequently dispensed with, the reading of the pleadings being considered a sufficient statement of the case.

The right to begin is not altered by this *Rule*. The party upon whom the burthen of proof lies is the party entitled to begin: Harr. C. L. P. Act, 2nd ed., 291. Generally the burthen of proof lies on the party who asserts the affirmative on the record, *i.e.*, the affirmative in substance and not merely in form. If there is a presumption of law in favour of the pleading of either party the *onus probandi* is cast upon his adversary, though he may thereby be called on to prove a negative. Where there are conflicting presumptions, the *onus probandi* lies on the party having in his favour the weaker presumption of the two. But where the case of a party rests on the proof of some particular fact, of the truth or falsehood of which he must from its very nature be peculiarly cognizant, the *onus* of proving the fact lies on him, even though there be a presumption of law in favor of his pleading; and where the plaintiff sues for damages and it is necessary for the plaintiff to show the amount of damages sustained, he is entitled to begin even though the affirmative of the issue be on the defendant, but if the affirmative of the issue is on the defendant, and plaintiff's counsel will not undertake to offer proof of substantial damage, the defendant is entitled to begin: *Ib.* 292, 293; Best on Right to Begin, 3, 5, 12, 21, 23.

An incorrect ruling as to the right to begin is no ground for a new trial unless the ruling "did clear and manifest wrong": Harr. C. L. P. Act, 2nd ed., 293.

The right to begin is important, as it also involves, as we have seen, in some measure the right to reply. The right of reply as far as the Attorney General is concerned when appearing for the Crown, or any counsel appearing for the Crown having written authority from the Atty.-General for that purpose, is unaffected by this *Rule*, as he has always the right to reply no matter who may have begun: see *Rule* 364.

676. Where, through accident or mistake or other cause, a party omits or fails to prove some fact material to his case, the Judge may proceed with the trial, subject to such fact being afterwards proved at such time, and subject to such terms and conditions as to costs and otherwise, as the Judge shall direct; and, if the case is being tried by a jury, the Judge may direct the jury to find a verdict as if such fact had been proved, and the verdict shall take effect on such fact being afterwards proved as directed; and if not so proved, judgment is to be entered for the opposite party unless the Court or a Judge otherwise directs. This Rule shall not apply to an action for libel. J. A. Rule 271. Evidence omitted by accident or mistake, how supplied.

No corresponding Eng. R.

The abstaining by a party from proof under an idea that his adversary had no real intention of putting him to such proof, and being thereby taken by surprise, is no ground for a new trial: *Andrews* v *Stuart*, 1 C. L. T. 724. See also *Heath* v. *Pugh*, Q. B. D. 355.

In applications to open up proceedings, by way of review, on the ground of newly discovered evidence, the party applying must shew (1) that the evidence

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Rules 677, 678.

is such that if it had been brought forward at the proper time, it might probably have changed the result; (2) that at the time he might have so used it, neither he nor his agent had knowledge of it; (3) that it could not, with reasonable diligence, have been discovered in time to have been so used; and (4) the applicant must have used reasonable diligence after the discovery of the new evidence: *Dumble* v. *Cobourg and Peterboro' Ry. Co.*, 29 Gr. 121; *Colonial Trusts* v. *Cameron*, 21 Gr. 70; see also *Caradice* v. *Currie*, 19 Gr. 108; *Waters* v. *Shade*, 2 Gr. 218; *Murray* v. *Canada Central Railway Co.*, 7 Ont. App. 646; *Synod* v. *De Blaquiere*, 10 P. R. 11; *Bank of B. N. A.* v. *Western Ass. Co.*, 11 P. R. 434.

The Court, on argument of a motion by the plaintiff for a new trial, allowed the plaintiff to give in evidence the proclamation bringing into force the Ontario Factory Act: *Dean* v. *Ontario Cotton Mills Co.*, 14 Ont. 119.

An application to put in further evidence, and for a new trial on fresh evidence or for leave to bring a new action upon a part of the original claim founded on such evidence, is properly made to the Judge who heard the original cause: *Bank of British North America* v. *Western Assurance Co.*, 11 P. R. 434; *Synod* v. *De Blaquiere*, 10 P. R. 11.

Where a party is taken by surprise by a point made against him at the hearing, the Judge may, if he thinks right, at any stage of the trial allow him to produce rebutting evidence; and if such permission is refused, the Court of Appeal will, in a proper case, permit the fresh evidence to be taken on the appeal: *Bigsby* v. *Dickinson*, 4 Ch. D. 24, and *Rule* 585.

In a suit for an injunction to restrain a nuisance caused by a chemical manufacturer, the plaintiff's counsel applied at the close of his speech for liberty to adduce evidence to explain (as the plaintiff's witnesses had had no opportunity of doing) certain evidence of the defendant's witnesses as to various vapours arising from a material (asphalt) stated to be used in the manufacture of varnish made by the plaintiff, and to show that the word asphalt had a double meaning; it was held that the evidence should be admitted: *Ib.*

A Judge, may at any period in a case, allow further evidence to be called, for his own satisfaction, by either party, even though it is doubtful whether the party is entitled to put in such evidence as of right: *Budd* v. *Davison*, 29 W. R. 192.

Trial of equitable issues.

677. Where in any action equitable issues are raised by the pleadings, they shall be heard and tried, and the assessment or inquiry of damages, if any, incidental thereto, shall be assessed and inquired of by the Court or a Judge, without the intervention of a jury; but it shall be competent for the Court or Judge, upon the application of either party, supported by sufficient reasons, to order such issues to be tried or damages assessed by a jury. R. S. O. 1877, c. 50, s. 257.

Where equitable issues are raised, a jury is not of right, but of grace, under this *Rule*: *Adamson* v. *Adamson*, 12 P. R. 469.

R. S. O. 1877, c. 50, s. 257, was formerly held to apply to an action of ejectment where equitable issues are raised: *Bryan* v. *Mitchell*, 8 P. R. 302. Under the Jud. Act and *Rules* the rule will of course be the same in ejectment as in other actions.

It is within the power of the Judge to direct equitable issues to be tried by a jury: *Rae* v. *McDonald*, 13 Ont. 364; see also *Wright* v. *Sun Mutual*, 29 C. P. 236.

Legal and equitable issues.

678. Where in any action or other proceeding at law both legal and equitable issues are raised, such issues shall

be tried at the same time, unless the Court or a Judge, or the Judge presiding at the trial, otherwise directs. R. S. O. 1877, c. 50, s. 258. Rules 679-682.

679. In an action brought to recover the amount of any bill, draft, order or promissory note, and the damages and interest, the expenses of noting and protesting, and all other charges and postage incurred thereon, it shall not be necessary to specially claim such damages, interest, expenses, and charges, but the same shall be allowed to the plaintiff at any trial, assessment of damages or reference, as if the same had been specially claimed. R. S. O. 1877, c. 50, s. 144. Costs of protest recoverable.

680. Damages in respect of any continuing cause of action shall be assessed down to the time of the assessment. *New.* Assessment of damages.

Taken from Eng. R. 1883, R. 482.

See *Fritz* v. *Hobson*, 14 Ch. D. 542.

681. The Judge if he thinks it expedient for the interest of justice, may postpone or adjourn the trial for such time, and upon such terms, if any, as he shall think fit. J. A. Rule 272. Adjournment of trial.

Identical with the Eng. R. 1875, O. 36, r. 21, (1883, R. 458). Where the hearing of an action was adjourned to allow the plaintiffs to add parties, the plaintiffs were ordered to pay all the costs incurred by the action having been in the paper for hearing; and not merely a fixed sum for costs of the day: *Ludall* v. *Martinson*, 5 Ch. D. 780.

Motions to postpone the trial may, of course, be made before the trial, and should be so made, where practicable, in Chambers, before expense in preparing for trial is incurred.

For terms imposed where defendant obtained an order for postponement on payment of costs, and then notified plaintiff's solicitor that defendant would not pay the costs and trial must go on, upon which plaintiff applied to postpone, see *Allen* v. *Mathers*, 19 C. L. J. 79.

The Master in Chambers on a motion to postpone the trial has under this *Rule* power to impose terms, *e.g.*, giving of security for the amount sued for: *Bank of Hamilton* v. *Stark*, 9 C. L. T. 410; 25 C. L. J. 508.

The costs of postponing trial on account of absence of a material witness will be costs in the cause, where diligent efforts have been made to secure attendance: *Brown* v. *Porter*, 11 P. R. 250; but where the application is not made promptly, the applicant may be ordered to pay the costs of the application and adjournment: *McDonald* v. *McMillan*, 22 Gr. 362.

See *Fairburn* v. *Household, etc.*, 53 L. T. N. S. 513, in note to *Rule* 671*a*.

682. Upon the trial of an action, the Judge may, at or after the trial, direct that judgment be signed and entered for any or either party, or adjourn the case for further consideration. J. A. Rule 273. Judge may direct entry of judgment; or reserve judgment

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Rule 682. The English Rule Dec. 1876, R. 3, (1883, R. 463) has the following additional words: "Or leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or Judge."

See notes to sec. 61 of the Act and *Rule* 749.

Where at the trial it appears, at the close of a plaintiff's case, that there is no evidence against one of the defendants, it is within the discretion of the Judge whether he will then direct a verdict in such defendant's favour, or wait till the whole evidence in the cause closes: *Parnell* v. *Great Western Railway Company*, 34 L. T. N. S. 126; see 1 Q. B. D. 636.

In such a case, the action being for negligence, one of the defendants called witnesses, the effect of whose evidence was to throw the blame on his co-defendant, and they were cross-examined by the latter's counsel, a verdict being found against this defendant and in favour of the other; it was held that these circumstances did not entitle the unsuccessful defendant to object to the verdict: *Ib.*

Where there are several distinct issues to be tried, the Judge may, without the consent of the parties, accept the verdict of the jury upon those issues on which they agree, and discharge them upon the others, leaving the parties if they think fit to take down the undecided issues to a new trial; and the Court will give judgment on the decided issues, and has power to send down the undecided issues to a new trial: *Marsh* v. *Isaacs*, 45 L. J. C. P. 505.

This *Rule* repealed in effect R. S. O. 1877, c. 51, s. 34, under which, judgment in ejectment, unless the Judge at the trial otherwise directed, could not be entered before the 5th day of the Term following. Under the present *Rules* judgment in actions to recover land, as in all others, (see *Rule* 767) may be entered at once unless the Judge otherwise directs: see *Rudd* v. *Frank*, 17 Ont. 758.

An application to stay the entry of judgment, or the issue of execution, is best made at the trial when all the facts are known to the Judge. If not made till later it may be necessary to show on affidavit circumstances making a stay just: see *Tuck* v. *Southern Counties, etc., Bank*, 61 L. T. N. S. 159.

After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement: *Attorney-General* v. *Tomline*, 7 Ch. D. 388. As to appeals in such cases, see s. 65 of the Act and notes.

When the Judge does not direct judgment to be entered, this *Rule* would seem to enable him, as formerly under R. S. O. 1877, c. 50, s. 262, to indorse on the record or copy of pleadings his judgment, upon which judgment may be entered as though the indorsement had been made at the trial; or he may, after the facts have been found by the jury or by the Judge at or after the trial, indorse the finding, and leave the parties to move for judgment before him. In such case the Judge, after a finding by the jury for the plaintiff, cannot on motion for judgment, direct a judgment for defendant to be entered on the ground that there was no evidence to go to the jury: *Perkins* v. *Dangerfield*, 51 L. T. N. S. 535. The power seems to have been assumed in *Davies* v. *Felix*, 4 Ex. D. 33, though the Judge on consideration could not say that there was no evidence to go to the jury. See also s. 61 of the Act and *Daun* v. *Simmins*, 48 L. T. N. S. 343, and *Hamilton* v. *Johnson*, 5 Q. B. D. 263.

When the jury disagree and are discharged, a motion for judgment and nonsuit may be made: *Rule* 799; and see *Bank of B. N. A.* v. *Eddy*, Patterson, J.A., Nov. 1883. In that case the action was upon promissory notes: the defence relied on was the insolvency of the defendant, and his discharge under a deed of composition and discharge duly confirmed. In reply the plaintiffs attacked the discharge on the grounds of fraud, and fraudulent preference. Objections were taken to the validity of the discharge upon facts which were undisputed, and as to certain other matters of fact which were disputed, evidence was gone into, to show that the discharge had been obtained by fraudulent preference of a creditor, and by giving to that creditor a valuable security. At the trial the defendant objected that there was no evidence to go to the jury. Without deciding whether there was, or was not evidence, the question was left to the jury by the Judge, and this and all other questions were reserved for discussion on motion for judgment. The jury disagreed and therefore left the

question unanswered. Nevertheless both parties moved for judgment, the plaintiffs contending that on the undisputed facts, objections fatal to the discharge were established: the defendant contending that the discharge was good as against such objections, and that there was no evidence proper to go to the jury on the issue of fraud, or fraudulent preference. Both motions were refused though apparently considered proper in point of form, the Judge being of the opinion that the issue as to the validity of the discharge could not properly have been withdrawn from the jury, and that the undisputed facts were not, without the matters left to the jury for consideration, sufficient to decide the question as to the validity of the discharge. Rules 683-686.

As to the effect of the withdrawal of a juror, see *Thomas* v. *Exeter, etc. Co.*, 18 Q. B. D. 822.

683. Exhibits put in at the trial are to be marked thus: "In the High Court of Justice—Div. [*short title*]. This exhibit (the property of ,) is produced by the plaintiff (*or* defendant C., *as the case may be*,) this day of 18 A. B.," (*Registrar, Deputy Clerk, Deputy or Local Registrar.*) Chy. O. 177. Exhibits at trial, how to be marked.

684. Where a party or witness is examined at the trial or a document is put in as evidence and marked by the Registrar, Deputy Clerk, Deputy or Local Registrar, the deposition of the party, or witness so examined, or the document so put in, is not to be withdrawn as evidence without the leave of the Court. Chy. O. 178. Evidence oral or documentary cannot be withdrawn without leave.

See *Vanatto* v. *Mitchell*, 13 Gr. 665.

685. Where judgment is reserved, the exhibits used at the trial shall be deposited with the Registrar, Deputy Clerk, Deputy or Local Registrar, for the use of the Court, and shall not be delivered out without order or consent of parties. *See* Chy. O. 179. Where judgment reserved; exhibits to be left with Registrar, etc.

686. Where, upon the trial of an action, it appears that the same cannot conveniently proceed by reason of the solicitor for any party having neglected to attend personally or by some person in his behalf, or having omitted to deliver any paper necessary for the use of the Court, and which according to its practice ought to have been delivered, such solicitor shall personally pay to the parties such costs as the Court thinks fit to award. Chy. O. 182. When action cannot proceed in consequence of absence of solicitor, he may be ordered to pay costs.

A solicitor who neglected to appear for a defendant for whom he had undertaken to appear, was ordered to pay all costs occasioned by his neglect: *Cook* v. *Broomhead*, 16 Ves. 133; and see *Courtney* v. *Stock*, 2 Dr. & War. 251. The Common Law Courts exercised a similar jurisdiction: *Townley* v. *Jones*, 29 L. J. C. P. 299.

Where no papers were delivered, and the plaintiff did not appear, the action was dismissed, with costs: *Farrell* v. *Wade*, 36 L. T. N. S. 95; *Eldridge* v. Plaintiff not appearing, action

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Rules 687-689. may be dismissed.

Burgess, 7 Ch. D. 411. But where the defendant has a counter-claim he is bound to prove it so far as the onus is on him, even though the plaintiff does not appear: *Rule* 673. If the defendant does not appear the plaintiff must prove his claim so far as the onus is on him; *Rule* 672.

Proof of counter claim.

Where the action is dismissed in consequence of the plaintiff not being ready to proceed, owing to the illness of his solicitor, it may be restored on payment of the costs of the day and of the application to restore: *Birch* v. *Williams*, W. N. 1876, 168; 34 W. R. 700.

Restoring action.

As to restoring causes struck out on account of the absence of counsel, see *Harvey* v. *Renon*, 12 Jur. 445; and as to costs so occasioned, *Godson* v. *Hall*, 7 Cl. & Fin. 549.

By whom entries of findings to be made.

687. The Registrar, Clerk of Assize, or other officer present at the trial shall enter all such findings of fact as the Judge may at the trial direct to be entered, and the directions, if any, of the Judge as to judgment, and the certificates, if any, granted by the Judge, such entry to be made in a book to be kept for the purpose, and also to be indorsed on the Record. J. A. Rule 274.

See Eng. R. 1875, O. 36, r. 23, (1883, R. 465).

The practice under the English Rule is substantially the same as that which this *Rule* provides, except that the certificate is not required to be indorsed on the copy of the pleadings.

Certificate of Judge or officer.

688. The said indorsement, or the certificate of the said officer or the certificate of the Judge, shall be a sufficient authority to the proper officer for signing judgments to sign judgment accordingly. The certificate may be in the Form No. 213 in the Appendix. J. A. Rule 275.

The Eng. R. 1875, O. 36, r. 24, (1883, R. 466), is the same in substance.

Formerly, in the Courts of Common Law, when a cause was entered for trial, a copy of the record showing the issue to be tried, called the *nisi prius* record, was deposited with the officer. After the trial the *nisi prius* record was indorsed with the postea showing the result of the trial, and delivered to the successful party as soon as he was entitled to sign judgment. The possession of the postea proved his right to judgment and was the warrant to the proper officer to enter the judgment. A certified copy of the pleadings for the use of the Judge, is now the record under *Rule* 664; and the certificate provided by the present *Rules* 687, and 688, takes the place of the postea.

In Chancery, there was no *nisi prius* record, and no copy of the pleadings was provided for the use of the Judge. He referred to the originals at the trial or hearing; and in case of reserving judgment Counsel's briefs were left with him.

When and how Deputy Clerks shall deliver record or exhibits to solicitor or parties.

689. The Registrar, Clerk of Assize or other officer present at the trial shall, after judgment has been given, or, in jury cases, after the time for the moving for a new trial has expired, deliver to the solicitor of the party entitled thereto any Record in their custody, upon getting a receipt for the same. R. S. O. 1877, c. 50, s. 280.

(ii) *Trial of High Court cases in County Court and Vice Versâ.*

Notice of trial, etc., in such cases.

690. In any of the cases in sections 96 and 97 of *The Judicature Act* the notice of trial or assessment of damages shall state that the cause will be tried, or the damages assessed at the Sittings of the High Court or County Court, according to the fact. R. S. O. 1877, c. 49, s. 33.

Trials may be postponed.

691. Nothing herein contained shall prevent a Judge of the Court in which the action is brought, or, after the action is entered for trial or assessment, the Judge before whom the trial or assessment is intended to be had, from entertaining applications to postpone the trial or assessment. R. S. O. 1877, c. 49, s. 34.

In a County Court case directed to be tried at the High Court, a motion to set aside notice of trial must be made in the County Court: *Clark* v. *Clifford*, 7 P. R. 329.

Immediate judgment.

692. Where judgment is not reserved, and subject in that case to Rules made, and subject in all cases to Rules to be made, judgment in any of the said cases may be entered immediately, unless the Judge who tried the cause certifies on the record, under his hand, that the case is one which, in his opinion, should stand to abide the result of a motion that may be made therein in the Divisional Court, or unless a Judge of the High Court otherwise orders. R. S. O. 1877, c. 49, s. 35.

Motions against verdict in High Court cases tried in County Courts.

693. Any motion to be made, in respect to the trial, judgment, verdict or assessment of damages in a High Court case tried or assessed at the Sittings of any County Court shall be made in the High Court. R. S. O. 1877, c. 49, s. 36.

Motion against verdict, etc., in County Court cases tried at High Court Sittings.

694. Any motion to be made in respect to the trial, judgment, verdict or assessment of damages in any County Court case had, tried or assessed at any Sittings of the High Court, shall be made, heard and determined at the sitting of such Divisional Court of the High Court, as the party moving or applying elects, and according to the practice of the High Court; and any order made in such cause by such Court shall be final, and shall not be subject to appeal to the Court of Appeal. R. S. O. 1877, c. 49, s. 37.

See *Edmunds* v. *Hoey*, 35 U. C. Q. B. 495.

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Rules 695-698.

Powers of Judge as to County Court causes tried before him.

695. In any action in a County Court entered for trial at any Sittings of the High Court, the Judge presiding at the Sittings shall have the same powers as to amendment of the pleadings and proceedings, putting off the trial, reference, making the cause a *remanet*, and otherwise dealing with the cause and proceedings therein, as if the action had been commenced in the High Court. R. S. O. 1877, c. 49, s. 38.

The Judge of a County Court may allow amendments in High Court cases coming on before him for trial: *Ring* v. *Glassford*, 11 C. P. 490.

When such Judge marks record as a remanet, etc., it may be tried at subsequent sitting or Assizes.

696. Whenever the said Judge indorses on the certified copy of pleading in any such action the word "*Remanet*," and adds any words to the effect following: "*And the within cause may be entered and tried at any County Court, or sittings of the High Court*," such cause may without payment of any further fee for entering the case be entered at any subsequent Sittings of the County Court, or Sittings of the High Court, for which notice of trial may be given, and the case may be tried and disposed of in the same way as any other case entered at such Sittings. R. S. O. 1877, c. 49, s. 39.

Certified copy of notes of cases.

697. On the application of any party, the County Court Clerk shall, at the cost of the party, forward to the Registrar at Toronto, of such Division of the High Court as the party designates, a certified copy of the Judge's notes of the trial, or assessment, together with the Record and the exhibits, to enable the High Court properly to dispose of any application made, or to be made, in or respecting such cases. R. S. O. 1877, c. 49, s. 42.

(iii) *Vexatious Defences in Actions to Recover Land.*

Vexatious defence without merits.

698. It being desirable, in actions to recover land brought against persons who are merely intruders, not to prevent plaintiffs from recovering land of which they have just claim on account of some want of technical form in their title, or some imperfection not affecting the merits of the case, and of which mere strangers to the title, having no claim or colour of legal claim to the possession, should not be permitted to take advantage; the plaintiff or his solicitor, in any action to recover land, may serve a notice upon the defendant or his solicitor in words or to the effect following: "Take notice that I claim the

premises for which this action is brought as the *bonâ fide* purchaser thereof, from *A. B.*, (*or as the case may be*), and that you will be required to show upon the trial of this cause what legal right you have to the possession of the premises." R. S. O. 1877, c. 51, s. 26. Rules 699-701.

See *Doe d. Lyons* v. *Crawford*, 6 O. S. 344; *Armstrong* v. *Little*, 20 U. C. Q. B. 425; *Davis* v. *Van Norman*, 30 U. C. Q. B. 437; *Thompson* v. *Hall*, 31 U. C. Q. B. 367; *Booth* v. *Girdwood*, 32 U. C. Q. B. 23; *Thompson* v. *Bennett*, 22 C. P. 393.

699. If, upon the trial of such action, the evidence of title given by the plaintiff satisfies the Court (and the Jury, if the case is tried by a jury) that he is entitled in justice to be regarded as the proprietor of the land or is entitled to the immediate possession thereof for any term of years, but that he cannot show a perfect legal title by reason of some want of legal form in some instrument produced, or by reason of the defective registration of some will or instrument produced, or from any cause not within the power of the plaintiff to remedy by using due diligence, the Judge, or the jury, under the direction of the Court, may find a verdict for the plaintiff, unless the defendant or his counsel, upon being required by the other party so to do, gives such evidence of title as shows that he is the person legally entitled, or that he *bona fide* claims to be the person legally entitled to the land, by reason of the defect in the title of the plaintiff, or that he holds, or *bona fide* claims to hold, under the person so entitled. R. S. O. 1877, c. 51, s. 27. Formal defects in plaintiff's title.

700. Where a verdict or judgment is rendered or given under the authority of the foregoing provision, it shall be indorsed as rendered or given under Rules 698 and 699, and it shall be stated in the judgment to have been so given, and in any action thereafter brought for the *mesne* profits, such judgment shall not be evidence to entitle the plaintiff to recover. R. S. O. 1877, c. 51, s. 28. Verdict to be indorsed as rendered under *Rules*.

(iv) *Inspection of Property.*

701. It shall be lawful for any Judge, by whom any cause or matter may be heard or tried with or without a jury, or before whom any cause or matter may be brought by way of appeal, to inspect any property or thing concerning which any question may arise therein. Eng. R. 1883, 660. Judge may inspect.

Taken from Eng. R. 1883, 660.

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Rules 702, 703.

Inspection of real or personal property by jury, parties or witnesses.

702. Either party in an action may apply to the Court or a Judge for an order for the inspection by the jury or by himself or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute, and the Court or a Judge may make such order upon such terms as to costs and otherwise, as the Court or Judge may think fit. R. S. O. 1877, c. 50, s. 168.

Liberty was given under the similar Irish Rule to inspect a ship lying in harbour on which it was alleged that certain timber, part of the subject matter of the action, had been placed by defendant for removal: *Morris* v. *Howell*, 22 L. R. Ir. 77.

Party requiring view, to deposit with Sheriff sum to pay expenses.

703. Upon any application for a view by a jury, there shall be an affidavit stating the place at which the view is to be made, and the distance thereof from the Sheriff's office. Unless the Court or Judge otherwise orders, the party obtaining the order for the view shall deposit with the Sheriff the sum of $25 in case of a common jury, and $34 in case of a special jury, if such distance does not exceed 5 miles; and $31 in case of a common jury, and $43 in case of a special jury, if the distance be above 5 miles; and if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the party who obtained the view, or his solicitor, and if such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such party or his solicitor to the Sheriff. Rules T. T. 1856, 39.

CHAPTER VII.

JUDGMENTS—MOTIONS FOR JUDGMENT, Etc.

1. Default of Appearance, 704-718.
   (i) *Generally*, 704-712.
   (ii) *Dower*, 713.
   (iii) *Recovery of Land*, 714-716.
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2. Default of Pleading, 719-729.
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4. Leave to Sign Judgment, 739-744.
5. Application for Account, 745-747.
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8. Entry of Judgment, 764-775.
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10. Variation of Judgment, 780-786.
11. Satisfaction, 787, 788.
12. Motions against Judgments, 789-802.

1. Default of Appearance.

(i) *Generally.*

Proceedings in default of appearance.

704. Where any defendant fails to appear to a writ of summons and the plaintiff is desirous of proceeding upon default of appearance he shall, before taking such proceeding upon default, file an affidavit of service, or of notice in lieu of service, [or the undertaking of the defendant's solicitor accepting service and agreeing to enter an appearance, with an affidavit verifying the undertaking file,] as the case may be. J. A. Rule 71.

This *Rule* corresponds with the Eng. R. 1875, O. 13, r. 2 (1883 R. 102), except that the clause in brackets is not in the latter. *Rule* 225 provides for a solicitor's undertaking to accept service. *Rule* 745 prescribes the procedure in case of default of appearance to a writ indorsed under *Rule*, 247 with a claim for an account.

The substitution of notice in lieu of service of the writ is authorized in cases where the Court sees fit to allow that mode of service, in any case where the plaintiff is unable to effect prompt personal service: *Rule* 253.

Where a notice was served in lieu of a writ, an affidavit stating that defendant had been served with "a notice in writing, a true copy of which is hereto annexed," was held sufficient: *Bustros* v. *Bustros*, 14 Ch. D. 849. In cases, however, in which *Rule* 256 applies, the affidavit of service should state the day on which the indorsement of the time of service was made.

The writ should be annexed to the affidavit of service in accordance with the former practice: *The Eppos*, 32 W. R. 154; 49 L. T. N. S. 604.

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Rule 705. As this *Rule* requires an affidavit it has been held that the Court will not accept a certificate, though British Consuls, in the country to which the defendant belonged, had instructions not to administer oaths to subjects of that country: *Ford* v. *Miescke*, 16 Q. B. D. 57.

Where writ specially indorsed.

705. In case of non-appearance by the defendant where the writ of summons is specially indorsed under Rule 245, the plaintiff may sign final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs, and the plaintiff may [forthwith] issue execution upon such judgment; but it shall be lawful for the Court or a Judge to set aside or vary such judgment upon such terms as may seem just. J.A. Rule 72.

See Eng. R. 1875, O. 13, r. 3 (1883, R. 103).

The original *Rule* had a provision that execution should not issue until 8 days from the last day for appearance. That was taken from R. S. O. c. 50, s. 54 (with which, in that respect, the English C. L. P. Act of 1852, s. 27, corresponds). Execution may now in all cases be issued forthwith, unless otherwise ordered. See *Rule* 863.

Cornish v. *Manning*, 18 C. L. J. 143; 2 C. L. T. 105, and *Macdonald* v. *Crombie*, 2 Ont. 243, decided under the former practice, are no longer applicable.

In an action on a promissory note, the plaintiff may sign judgment by default of appearance to a specially indorsed writ, without production of the note: *Oliver* v. *Fryer*, 7 P. R. 325.

Where an action is commenced in a local office, a judgment by default should be entered in the local office: *Chamberlain* v *Armstrong*, 18 C. L. J. 99.

Where the copy of writ served was not an accurate copy, the *teste* being 1880 instead of 1882, this was held to be an imperfection only and not a fatal error, and a motion to set aside a judgment signed was refused: *Wesson* v. *Stalker*, 47 L. T. N. S. 444.

Judgment can only be signed for the amount due at the time the writ was issued, not for claims which had not then matured: *Park* v. *Patton*, 2 C. L. T. 264.

In an action for foreclosure and on the covenant for payment, judgment was signed on a claim on the covenant under this *Rule*: *Bisset* v. *Jones*, 32 Ch D. 635. But the practice in Ontario is not to sign a separate judgment on the covenant, but to sign one judgment, which awards relief on the covenant, and also provides for redemption or sale, or foreclosure.

Forms of the judgment will be found in the App. Nos. 160 and 161.

Setting aside judgment.

Under R. S. O. c. 50, s. 64, it was provided that an application to set aside a judgment must be based upon affidavits "accounting for the non-appearance and disclosing a defence upon the merits." By the present *Rule* the matter is left at large to the discretion of the Court or Judge; but, no doubt, in practice it will be required to have the non-appearance explained and a defence shown. The terms commonly imposed have been the payment by the defendant of the costs of the application, pleading without delay, and sometimes bringing money into Court: see Harrison C. L. P. Act, (R. S. O. 1877, c. 50, s. 64,); Arch. Pr. 13th ed., 790, and 800; and *Smith* v. *Dobbin*, 3 Ex. D. 340. In *Hillyard* v. *Swan*, 12 P. R. 226, the judgment and execution were directed to stand as security.

Substituted service, when regularly effected, is for all purposes equivalent to personal service, and even though it has in reality never come to the knowledge of the defendant he will not be let in to defend as of right: *Watt* v. *Barnett*, 3 Q. B. D. 183, 363. Lapse of time is no bar to an application to set aside a

judgment obtained by default, where no irreparable mischief will be done to the plaintiff, and the injury caused by the delay may be compensated for by payment of costs: *Atwood* v. *Chichester*, 3 Q. B. D. 722. See also *Davis* v. *Ballenden*, W. N. 1882, 92; 46 L. T. N. S. 797, and notes to *Rules* 795, and 796. **Rules 706, 707.**

The application will not be granted to give the defendant the advantage of a technical defence: *Forbes* v. *Middleton*, 2 Str. 1242.

The following have been considered meritorious defences: The Statute of Limitations; *Maddocks* v. *Holmes*, 1 B. & P. 228; *McIntyre* v. *The Canada Co.*, 18 Gr. 367; *Seaton* v. *Fenwick*, 7 P. R. 146; Usury: *Trust & Loan Co. of Canada* v. *Boulton*, 18 Gr. 234; Infancy: *Delafield* v. *Tanner*, 5 Taunt. 856; *Cavallier* v. *Michael*, 17 L T. N. S. 290; that the claim is not one that can be specially indorsed: *Rogers* v. *Hunt*, 10 Ex. 474; Want of jurisdiction: *Hamelyn* v. *White*, 6 P. R. 120. As to want of stamps: see *Caughill* v. *Clark*, 9 P. R. 471.

Where several defendants.

706. Where there are several defendants to a writ specially indorsed for a debt or liquidated demand in money under Rule 245, and one or more of the defendants appear to the writ and others of them do not appear, the plaintiff may enter final judgment against such as have not appeared, and may issue execution upon such judgment, without prejudice to his right to proceed with his action against such as have appeared. J. A. Rule 73.

This *Rule* is to the same effect as the Eng. R. 1875, O. 13 r. 4 (1883 R. 104). Before the Jud. Act, in such a case, the plaintiff might sign judgment against the defendants who did not appear, and might issue execution against them; but, if he did so, he abandoned his right to proceed against the other defendants. Or he might, before levying execution against the defaulters, declare, and proceed with the action, against the other defendants. But in this case the judgment already signed became a mere interlocutory one; the plaintiff could never put it in force, unless and until he succeeded in obtaining judgment in the action against the other defendants. See R. S. O. 1877, c. 50, s. 69.

See *Montgomery* v. *Ferris*, 20 L. R. Ir. 282.

Where writ not specially indorsed.

707. Where the defendant fails to appear to the writ of summons and the writ is not specially indorsed, but the plaintiff's claim is for a debt or liquidated demand only, no statement of claim need afterwards be delivered, but the plaintiff may file an affidavit of service of the summons, or of notice in lieu of service as the case may be, and [file and serve] a statement of the particulars of his claim in respect of the causes of action stated in the indorsement upon the writ, and may, after the expiration of eight days, enter final judgment for the amount shewn thereby, and costs to be taxed, provided that the amount shall not be more than the sum indorsed upon the writ, besides costs. J. A. Rule 74.

This is the same as the Eng. R. 1875, O, 13, r 5, except that the words in brackets are not in English Rule.

Under the old practice, the plaintiff filed and served a declaration, and if no plea were pleaded he could, if the amount claimed were indorsed on the writ,

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Rule 708.

sign final judgment for default of a plea for the amount so shewn and costs. The filing or serving of a declaration is now dispensed with, and the filing and serving of a statement of the particulars of the claim is substituted.

A claim for a specified sum for work, labour and attendance as a medical man has been held to be a liquidated demand and capable of being made the subject of a special indorsement, or, though the writ be not specially indorsed, to entitle the plaintiff to obtain final judgment under the Rule in the Irish Judicature Act corresponding *Rule* to the present : *Kilgariff* v. *McGrane*, 8 L. R. Ir. 354.

The case of some defendants only making default is not specially provided for as it is in the case of a specially indorsed writ. Probably a statement of claim must then be delivered to the solicitor of those defendants who have appeared.

Forms of judgment will be found in the App. Nos. 160, 161.

It is provided by *Rule* 1175 that the plaintiff is not to be entitled to the costs of the statement of particulars of his claim, unless the taxing officer is satisfied that there was good reason for not specially indorsing the writ, so as to render unnecessary the filing and serving such statements.

Where claim for detention of goods and pecuniary damages or either of them.

708. Where the defendant fails to appear to the writ of summons and the plaintiff's claim is not for a debt or liquidated demand only, but for detention of goods and pecuniary damages, or either of them, no statement of claim need be delivered, but interlocutory judgment may be entered, and the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons shall be assessed [at a sitting of the High Court for trials, or at the County Court of the County in which the action is brought]. J. A. Rule 75.

This corresponds with the Eng. R. 1875, O. 13, r. 6, (1883, R. 105), except that the latter provides for a writ of inquiry to assess the damages, or such other mode as the Court or Judge may direct, instead of the clause above in brackets. The latter provision is adopted by *Rule* 710 below. The practice in actions at law formerly was, that the plaintiff, in the case provided for by this *Rule*, filed and served a declaration, indorsed with a notice to plead in eight days, and then, if no plea were pleaded, signed interlocutory judgment for want of a plea. Then damages were assessed. Under the present *Rule*, interlocutory judgment may be entered immediately upon default of appearance; and the indorsement on the writ will govern the inquiry as to damages without any pleading.

The old learning on the subject of "conversion" need not be imported into the system introduced by the Judicature Act, which provides for redress in case the plaintiff's goods are wrongfully detained, or in case he is wrongfully deprived of them : *Stimson* v. *Block*, 11 Ont. 103.

Where the writ besides damages claimed an injunction, an interlocutory judgment was held not properly signed under this *Rule* : *McCallum* v. *McCallum*, 11 P. R. 16.

A form of interlocutory judgment will be found in the Appendix Form No. 166, and of judgment in default of appearance after assessment of damages, No. 168.

It would seem that, under this *Rule*, where the action is brought for the specific recovery of chattels, the plaintiff may, upon default of appearance, have judgment for the delivery of the chattels; and may then enforce that judgment under *Rule* 873 : *Ivory* v. *Cruickshank*, W. N. 1875, 249 ; *per* Quain, J., at Chambers.

The former mode of assessment of damages was prescribed by R. S. O. 1877, c. 50, s. 152, which was as follows:— **Rules 709-711.**

"152. No writ of inquiry shall issue to a sheriff in cases of judgment by default, but, except in cases where the judgment is final as aforesaid, the damages, when to be assessed by a judge or jury, shall be ascertained at the same time, and in like manner as if the parties had pleaded to issue, and the entries shall be made in the roll accordingly."

Probably under R. S. O. 1887, c. 53, sec. 9, there may be a reference to compute. The Court will not, however, refer to arbitration: *Rule* 550.

Where a final instead of an interlocutory judgment was signed, and was therefore set aside, it was held under the former practice, that the plaintiff was not forthwith entitled to take out and file the order, and sign an interlocutory judgment. The final judgment was held to be not set aside without an entry on the roll, and the defendant without laches could not be deprived of the carriage of the order: *Cavanagh* v. *Hastings Mutual*, 7 P. R. 111.

An inquiry was directed before a Master on affidavit evidence in *Macdonald* v. *Antelme*, W. N. 1884, 72.

709. Where there are several defendants, of whom one or more appear to the writ, and another, or others of them fail to appear, the plaintiff may sign interlocutory judgment against the defendant or defendants so failing to appear, and the value of the goods and the damages, or either of them, as the case may be, may be assessed, as against the defendant or defendants suffering judgment by default, at the same time as the trial of the action or issue therein against the other defendant or defendants, unless the Court or a Judge shall otherwise direct. *New.* Several defendants in action for damages.

Taken from Eng. R. 1883, 106.

710. The Court or a Judge may order that instead of a trial or assessment the value and amount of damages, or either of them, shall be ascertained in any way which the Court or a Judge may direct. *New.* Assessment of damages.

Taken from Eng. R. 1883, 106.

711. When the writ is indorsed with a claim for detention of goods and pecuniary damages, or either of them, and is further specially indorsed for a liquidated demand under Rule 245 and any defendant fails to appear to the writ, the plaintiff may enter final judgment for the debt or liquidated demand, interest and costs against the defendant or defendants failing to appear, and interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in such of the preceding Rules as may be applicable. *New.* Damages and liquidated demand.

Taken from Eng. R. 1883, 107.

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Rules 712, 713.

Provisions of the Imperial Act 8 & 9 W. 3. c. 11, to remain in force.

712. Notwithstanding anything in the Rules contained, the provisions of the Act of the Parliament of Great Britain passed in the Session held in the eighth and ninth year of the reign of King William the Third, entitled *An Act for the better preventing frivolous and vexatious suits*, as to the assignment or suggestion of breaches, or as to judgment, shall continue in force in Ontario. R. S. O. 1877, c. 50, s. 151.

The 8th section of 8 & 9 W. 3, c. 11, provides that in actions in any Court of Record on a bond or on any penal sum for non-performance of any covenant or agreement in any indenture, deed or writing, the plaintiff may assign as many breaches as he thinks fit, and damages may be assessed upon any of such breaches that may be proved to have been broken, and judgment may be entered and execution issued; that execution may be stayed upon payment of the amounts; that the judgment shall stand as security to the plaintiff and his personal representatives for further breaches; that the plaintiff, upon the happening of further breaches may have a *scire facias* on the judgment against the defendant, his heirs, executors, etc., and may summon him or them to shew cause why execution should not be awarded on the judgment, upon which there shall be the like proceedings as in an action of debt on the bond or obligation for assessing damages upon the trial of issues joined upon such breaches; and so *toties quoties*.

Instead of a *scire facias* query whether a petition under *Rule* 782 would not now be a proper mode of proceeding.

This statute was held to be confined to actions of debt, as in covenant and assumpsit there was no penalty that could stand as continuing security for future breaches: 1 Williams Saunders 58 *b*, *c*, *d*: *Lowe* v. *Peers*, 4 Burr. 2225. A bond conditioned for payment of a sum certain is not within the statute: *Murray* v. *Lord Stair*, 2 B. & C. 90, nor is a bail bond: *Moody* v. *Pheasant*, 2 B. & P. 446. A replevin bond was not formerly: *Bletcher* v. *Burn*, 24 U. C. Q. B. 259, but now is (*Rule* 1103*a*) within the statute.

(ii) *Dower.*

Action for dower. Judgment of seisin. Execution. Costs.

713. In case of non-appearance by the defendant in an action for dower, the plaintiff may enter judgment of seisin forthwith, and sue out a writ of assignment of dower, but she shall not be entitled to tax or recover the costs of suit or of entering such judgment against the defendant, unless the Court or a Judge so orders. R. S. O. 1877, c. 55, s. 15.

On motion for judgment on the pleadings where detention and demand were denied, and defendants alleged that they always had been and were ready to assign dower, judgment of seisin was granted, but no damages (or apparently costs): *Malone* v. *Malone*, 17 Ont. 101.

(*a*) In case the plaintiff claims arrears of dower or damages for detention of her dower, neither the entry of a judgment of seisin nor the taking of proceedings for the assignment of her dower thereunder, shall prevent her from proceeding with the action for the recovery of such arrears or damages. *New.*

See notes to *Rule* 290.

(iii) *Recovery of Land.*

Rules 714-716.

Action for land.

714. In case no appearance is entered in an action for the recovery of land, other than an action for dower, within the time limited for appearance, or if an appearance is entered but the defence is limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply. J. A. Rule 76.

This corresponds with the Eng. R. 1875, O. 13, r. 7, (1883, R. 108), and is in substance the same as the former practice. A form of judgment which may be adapted to meet such cases will be found in the Appx. No. 162.

This judgment does not carry costs without an affidavit being filed to the effect mentioned in *Rule* 716, or an order obtained under *Rule* 716.

Assessment of damages in action for land.

715. Where the plaintiff has indorsed a claim for mesne profits, arrears of rent, (*a*) or damages for breach of contract, (*b*) upon a writ for the recovery of land, he may enter judgment as in the last preceding Rule mentioned, for the land; and may proceed as in the other preceding Rules as to such other claim so indorsed. J. A. Rule 77.

This is the same as the Eng. R. 1875, O. 13, r. 8; that of 1883, R. 109 has at *(a)* the words "double value," and at *(b)* "or wrong or injury to the premises claimed." The former practice confined this right to the suit of a landlord against a tenant.

The claims mentioned in the *Rule* are claims which without leave may be joined with a claim for the recovery of land: see *Rule* 341.

A form of judgment which may be adapted to meet such cases will be found in the Appendix, Form No. 165.

Costs where adverse possession.

716. In case no appearance is entered in an action for recovery of land, [other than an action of dower,] and in case the plaintiff files the writ, and an affidavit showing that the writ has been properly served, and an affidavit that the party so served was at the time of the issue of the writ in actual adverse possession of the land, or instead of such affidavits obtains and files an order of the Court or a Judge allowing him to sign judgment as well for his costs as for recovery of possession of the land, the plaintiff may at once sign judgment that the person whose title is asserted in the writ shall recover and have possession of the land, and also his costs (to be taxed in the ordinary way), and the plaintiff may forthwith issue execution thereupon; and the judgment may be in the words or to the effect of Form No. 162 in the Appendix, with the words following or words to the same effect added thereto, namely: "*and do also*

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Rule 717. *recover against the said C. D* (the defendant) $ *for his cost of suit.*" R. S. O. 1877, c. 51, s. 20 (2).

The express exception of actions for dower was not contained in the section referred to, but was contained in effect in R. S. O. 1877, c. 55, s. 15, (now *Rule* 713).

(iv) *Mortgage Actions.*

Judgment for foreclosure, or sale, where infants are defendants may be made in Chambers.

717. In an ordinary action for redemption, foreclosure or sale where the defendants, or some of the defendants are infants and no defence is set up the action is not to be set down to be heard in Court by way of motion for judgment; but after the statements of defence are filed, or after the time for filing the same has expired, the plaintiff is to file affidavits of the due execution of the mortgage, and of such other facts and circumstances as entitle him to a judgment and is to apply for the judgment in Chambers, upon notice to the guardian *ad litem* of the infants and the other defendants' solicitor, if any. Chy. O. 434, 645, 646.

This *Rule* enables judgment to be pronounced in Chambers, as against infants and adult defendants who are *sui juris*, but where any of the adult defendants is a lunatic or person of unsound mind not so found, it is necessary that the motion for judgment should be made in Court: *Warnock* v. *Price*, 12 P. R. 264.

When anything beyond the ordinary relief is required, as for example an injunction, it would seem the motion for judgment should be made in Court: see *King* v. *Freeman*, 1 Chy. Ch. 350; *Kirkpatrick* v. *Howell*, 22 Gr. 94. *Rules* 348-50, under which defendants in an action for foreclosure may obtain a sale will not, even where infants are concerned, be extended to an action by a mortgagee for possession merely: *Western Canada L. & S. S.* v. *Dunn*, 19 C. L. J. 211.

Day to show cause, when to be reserved.

In judgments for foreclosure against infants, a day to show cause must still be inserted: *Mellor* v. *Porter*, 25 Ch. D. 158; *Gray* v. *Bell*, 46 L. T. N. S. 52; *London & C. L. & A. Co.* v. *Everitt*, 8 P. R. 489; *Mair* v. *Kerr*, 2 Gr. 223; and the final order must also reserve a day to show cause. The formal words usually inserted in Ontario are "and this judgment [*or* order] is to be binding upon [*name of infants*] unless being served with a copy thereof on obtaining the age of twenty-one years, they do, within six months after such service, shew unto this Court good cause to the contrary": see Seton 711. Since *The Devolution of Estates' Act*, (R. S. O. c. 108), the estate of a mortgagor descends to his personal representative, and his infant next of kin are not necessary parties: see *Malone* v. *Malone*, 17 Ont. 101.

When unnecessary.

No day to shew cause is reserved in judgments for sale; nor in judgments against infant trustees of real estate: *Foster* v. *Parker*, 8 Ch. D. 223, and see *Wolverhampton* v. *George*, 24 Ch. D. 707. Thus, in a redemption suit against an infant for redemption of land conveyed to the infant's ancestor by deed absolute in form, it was held that no day to shew cause should be reserved in the decree directing a re-conveyance: *Lake* v. *McIntosh*, 7 Gr. 532. As to defences open to an infant shewing cause: see Seton 712, 1114, and 1115.

Where a decree for foreclosure was made against the ancestor, who died before a final order was obtained, it was unnecessary to reserve a day to shew cause in favour of infant heirs of the mortgagor, as to whom the proceedings were revived: *Sutherland* v. *Dickson*, 2 Chy. Ch. 25; *Younge* v. *Cocker*, 76 L. T. Jour. 247; and infant parties under such circumstances could not set up a defence which their ancestor had not set up, unless he had been prevented, by fraud, or mistake, from pleading it: *Burke* v. *Pyne*, 2 Chy. Ch. 193; but

now under such circumstances the estate of the mortgagor descends to his personal representative; R. S. O. c. 108, s. 4. **Rule 718.**

Formerly where infants were defendants in an action for foreclosure before judgment, the Court would direct a reference to the Master, as of course, to inquire whether a sale, or foreclosure, would be the more beneficial for the infants, and direct a sale, or foreclosure, accordingly, or it would determine the question, on the motion for judgment, if affidavits were produced or the Official Guardian consented to dispense with the reference on that point: *Dudley* v. *Berczy*, 13 Gr. 141; but see *Graham* v. *Davis*, 2 Chy. Ch. 24; and if a sale was directed on the application of infant defendants, no deposit was required from the infants: *Bank of Upper Canada* v. *Scott*, 6 Gr. 451; *Lawrason* v. *Fitzgerald*, 9 Gr. 371; but see *Western Canada Loan Co.*, v. *Dunne*, 9 P. R. 587. Whether a personal representative of a deceased mortgagor would be entitled to this relief, where infants are beneficially interested in the equity of redemption, has not been thus far determined. Inquiry whether sale or foreclosure more beneficial for infant, directed as of course.

Where the judgment directs an inquiry whether a sale, or foreclosure, would be more beneficial for infant defendants, if the Master omits to report on that point, no final order can be granted: *Edwards* v. *Burling*, 2 Chy. Ch. 48.

718. Where the defendant does not appear, or by his statement of defence admits the execution of the mortgage and other facts, if any, entitling the plaintiff to a judgment, or where the defendant disclaims any interest in the mortgaged premises, or where no statement of defence ~~or demurrer~~ is delivered, the plaintiff is, on *præcipe* to the Registrar, or Deputy or Local Registrar, or Deputy Clerk of the Crown in whose office the appearance of the defendant was required to be entered, to be entitled to judgment including, where prayed for, the relief for which a claim may be indorsed upon the writ under Rule 248. Judgment, when to be granted on *præcipe*.

(*a*) The reference in such cases, when required by the practice, shall be to the Master in Ordinary or a Local Master.

(*b*) Such a judgment may be granted, notwithstanding that the defendant has been served by publication, or otherwise, or is a corporation: provided always that where the writ has not been personally served, the claim of the plaintiff shall be duly verified by affidavit.

(*c*) This Rule shall apply to actions for redemption as well as to actions for foreclosure or sale. Chy. O. 435, 646, 648. J. A. Rules 78, 79, 502, 520.

A motion for judgment was held to be necessary, where costs of proceeding under power of sale and moneys expended for repairs were claimed: *Hannaford* v. *Neeley*, 9 C. L. T. 48; or immediate foreclosure: *Gibson* v. *McCrimmon*, 9 C. L. T. 40.

It will be seen that this *Rule* covers four classes of cases.

(*a*) Where defendant does not appear:

(*b*) Where the defendant by his defence admits the mortgage and other facts entitling the plaintiff to judgment:

(*c*) Where the defendant disclaims any interest in the mortgaged premises:

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Rule 718.

(*d*) Where no defence is filed.

It is not necessary that all the defendants should be in the same position, in order to entitle the plaintiff to judgment under this *Rule*, it is sufficient if they all come within one or other of the four classes of cases above mentioned.

In the Chancery Division in Toronto, appearances are required to be entered with the Clerk of Records and Writs; judgments under that *Rule* are, however, entered by the Registrar.

Where the writ is issued from a local office the judgment should be entered in that local office: *Chamberlain* v. *Armstrong*, 9 P. R. 212.

Where any of the defendants are infants, or lunatics, or persons of unsound mind not so found, judgment cannot be obtained under this *Rule*, but in the case of infants it may be obtained on motion in Chambers: see *Rule* 717, and in the case of lunatics, etc., a motion in Court is necessary: *Warnock* v. *Prieur*, 12 P. R. 264.

Where a dispute note is filed, judgment must be obtained on motion: see *Rule* 299; the provisions of the former *Rule* 78 under which the judgment might, in such cases, be obtained on *præcipe*: *Trust & Loan Co.* v. *McCarthy*, 19 C. L. J. 188; 3 C. L. T. 266; *Peel* v. *White*, 11 P. R. 177; have not been embodied in the Consolidated *Rules*.

For forms of judgment, see Appendix Forms Nos. 182, 183, 184. These forms require modification according to the nature of relief claimed in the writ.

Where the writ has not been sufficiently indorsed with a statement of the relief claimed, according to the form prescribed by *Rule* 248, it would seem that the officer may properly refuse to enter judgment on *præcipe*: *Pherill* v. *Forbes*, 8 P. R. 408.

Where a plaintiff claims a personal order for payment against the defendant under a covenant, and a reference as to incumbrancers is necessary, the account of the amount payable by the defendant under the covenant should not be taken by the officer entering the judgment, but should be left to be ascertained by the Master to whom the reference is directed, and the defendant be ordered to pay the amount so found due, forthwith after the making of the Master's report: *North of Scotland* v. *Beard*, 9 P. R. 546; see App. Form No. 182; the practice in England is to direct payment one month after the date of the Chief Clerk's certificate: *Lees* v. *Fisher*, W. N. 1880, 12; *Farrer* v. *Lacey*, 32 W. R. 384; 25 Ch. D. 636.

Præcipe judgment, form of.

Under Chy. Ord. 435, on which this *Rule* is mainly founded, it was held that the Registrar was bound to issue on *præcipe* the decree which the Court would itself make upon a hearing of the cause *pro confesso*: *Kirkpatrick* v. *Howell*, 22 Gr. 94; *Buell* v. *Towns*, *Ib.*, 95; but extraordinary relief cannot be granted by judgment on *præcipe*, *e.g.*, an immediate sale, or foreclosure, without appointing a day for redemption, cannot be granted, even though the relief be claimed by the writ or statement of claim: *Patey* v. *Flint*, 48 L. J. Chy. 696. To obtain such relief, a motion for judgment in Court under *Rule* 748 is necessary. On such a motion, however, special grounds for immediate foreclosure or other special relief must be shewn though the defendant has not appeared, otherwise only the usual judgment will be given: *Meredith* v. *McCabe*, 19th January, 1881, Boyd, C.; see also *North of Scotland, etc.*, v. *Beard*, 9 P. R. 546.

Extraordinary relief not granted.

But where no appearance has been entered the plaintiff cannot, unless he serves the statement of claim on the defendant, enlarge by it the scope of the claim. On motion for judgment according to the terms of relief claimed in the statement of claim, in default of appearance, the usual foreclosure judgment only was given when that was the only relief claimed by the writ, notwithstanding that by the statement of claim additional relief was obtained. *Law* v. *Philby*, 56 L. T. N. S. 522; 35 W. R. 450. See also *Gee* v. *Bell*, 35 Ch. D. 160.

Interlocutory injunction cannot be continued by.

Where the plaintiff had obtained an interlocutory injunction, it was held that the Registrar could not issue on *præcipe* a decree continuing it: *King* v. *Freeman*, 1 Chy. Ch. 350, the Registrar's power to issue decrees being confined to simple cases, where the ordinary decrees for foreclosure, or sale, with order for payment and delivery of possession, was all that was required. Thus, where

the defendant answered admitting the mortgage, but denying an alleged agree- Rule 719.
ment to pay an increased rate of interest, and setting up a tender, and claiming costs, it was held a decree could not be granted on *præcipe*. Nor could a decree issued on *præcipe* in such a case be amended in Chambers, by inserting a direction to the Master to inquire as to the alleged tender: *Ross* v. *Vader*, 3 Chy. Ch. 236.

The plaintiff must determine for himself whether he takes a judgment with a reference to the Master as to incumbrancers. If he takes a reference, unnecessarily, he will not be entitled to the costs of it: *Hamilton* v. *Howard*, 4 Gr. 581; *Purdy* v. *Parks*, 9 P. R. 424.

But where a plaintiff had taken judgment without a reference, and after the mortgagor was foreclosed, discovered there was an incumbrancer, on an interlocutory application the judgment was amended by directing the usual reference as to incumbrancers: *Willgress* v. *Crawford*, 12 P. R. 658.

A decree pronounced *pro confesso*, or on *præcipe*, might be varied, or set aside, on motion in Chambers, without rehearing the cause: see *Kline* v. *Kline*, 3 Chy. Ch. 79; *Nelles* v. *Vandyke*, 17 Gr. 14; and the same rule applies to judgments on *præcipe* under this *Rule*: *Trust & Loan Co.* v. *McCarthy*, 19 C. L. J. 188; 3 C. L. T. 266.

2. Default of Pleading.

719. If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, deliver a defence or demurrer, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed, with costs. J. A. Rule 204. Judgment on defendant's default in claim for debt.

Identical with the Eng. R. 1875 O. 29, r. 2 (1883 R. 295), and in accordance with the C. L. P. Act, R. S. O. 1877, c. 50, s. 159.

A defendant must "deliver his defence, counter-claim or demurrer within eight days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a Judge": *Rule* 371.

As to the effect of delivering a defence after the time for doing so has elapsed: see notes to *Rule* 371.

It is held in England that if in an action on a replevin bond, the plaintiff, instead of claiming damages, claims the amount for which the bond was given, and becomes entitled to judgment by default, his proper course is to enter final judgment under this *Rule*, and not interlocutory judgment under *Rule* 721: *Dix* v. *Groom*, 5 Ex. D. 91. But this will probably not be so in this Province, as he is not entitled in such case to claim the whole amount of the bond, it being provided by *Rule* 1111 that "In case the plaintiff becomes entitled to sign judgment by default, he shall be at liberty to sign final judgment for the sum of five dollars, and costs according to the proper scale, but shall not be entitled to recover a larger sum, except upon an assessment before a Judge or jury, or upon filing the written consent of the defendant or his solicitor, and an affidavit verifying the signature to such consent."

Shortly after the Jud. Act 1881 came into force, it was laid down by the Judges of the Chancery Division that where a writ is specially indorsed and there is also a claim for an equitable demand, or a demand in respect of which a motion for judgment is necessary, the plaintiff cannot obtain judgment by default on the claim specially indorsed, but must set the case down on motion for judgment as to all the claims. This would not now appear to be the practice in all cases: see *Bissett* v. *Jones*, 32 Ch. D. 635; *Hay* v. *Johnston*, 12 P. R. 596; but see *Standard Bank* v. *Wills*, 10 P. R. 159.

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Rule 720. Where a demurrer to a claim is overruled, and no leave to plead is given, final judgment may be signed under this *Rule* if the time for delivery of defence has expired.

The same course will be pursued where a demurrer to a defence is allowed, and leave to amend refused.

Where a defence has been struck out, for instance for disobedience to an order for discovery, judgment may be signed under these *Rules*: see *Fisher* v. *Hughes*, 25 W. R. 528.

If the defendant does not appear the plaintiff cannot enlarge in the statement of claim his claim indorsed on the writ: *Law* v. *Philby*, 35 W. R. 450; 56 L. T. N. S. 522; *Gee* v. *Bell*, 35 Ch. D. 160; see *Stone* v. *Smith*, 35 Ch. D. 188.

Where the plaintiff claimed interest at seven per cent., showing no ground for more than six, it was held the duty of the officer signing judgment to allow only six per cent: *Bank of Hamilton* v. *Harvey*, 11 P. R. 145.

In *Hooper* v. *Giles*, W. N. 1876, 10, Lindley, J., in Chambers, held that a defendant is not bound to deliver any defence where he has given notice that he does not require a statement of claim, and no statement of claim has been delivered: see Wilson's Jud. Act, 2nd ed., p. 208; Baxter's Jud. Act, 4th ed., p. 227. Some support to this view is given by *Willmott* v. *Young*, 44 L. T. N. S. 331, a foreclosure action, in which the defendant had appeared and dispensed with a statement of claim, and on motion for judgment the defendant objected that the case should go to trial as there had been no default in delivery of defence or demurrer. Jessel, M.R., in placing the case in the witness list said "I see no *Rule* applicable to the case as it stands. If I could make the defendant pay the costs of the day I should do so." Attention does not seem to have been called in that case to *Harrison* v. *Surrey Masonic Hall Company*, cited in Chitty's Forms 116, and *Grimshaw, etc.*, v. *McDowell*, 66 L. T. Jour. 277, which over-ruled *Hooper* v. *Giles*, *supra*, and decided that judgment may be signed within 8 days from the time of appearance. See note to *Rule* 372.

Where several defendants.

720. Where in any such action as in the last preceding Rule mentioned there are several defendants, if one of them makes default as mentioned in the last preceding Rule, the plaintiff may enter final judgment against the defendant so making default and issue execution upon such judgment without prejudice to his right to proceed with his action against the other defendants. J. A. Rule 205.

This *Rule* is the same as the Eng. R. 1875, O. 29, r. 3, (1883, R. 296).

See *Jenkins* v. *Davies*, 1 Ch. D. 695.

In *Rikel* v. *Livingstone*, 4 C. L. T. 135, an action on a promissory note against K. & L., two joint makers, final judgment was signed under this *Rule* against L., and costs of the action up to judgment, taxed. The plaintiff afterwards at the trial recovered judgment against K., and in taxing costs against K. the Taxing Officer held that by taxing the general costs against L., the plaintiff had waived the right to recover those costs from K. To remedy this an order was made in Chambers *ex parte* setting aside the judgment as to costs against L., upon shewing that he was worthless and no steps had been taken to enforce the judgment against him.

In *Wilkinson* v. *Garrett*, 7 C. L. T. 22, judgment was obtained against defendants at different stages; against defendant R. by default of appearance, and afterwards against G. who had defended. The whole costs were ordered to be taxed against G. including the costs of judgment against R.; costs up to and including judgment against R. to be also taxed against him, and if recovered from either, to be credited on the judgment against both.

Rules 721-723.

Interlocutory judgment on default in claim for damages.

721. If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant makes default as mentioned in Rule 719, the plaintiff may enter an interlocutory judgment against the defendant, and the value of the goods, and the damages, or the damages only, as the case may be, shall be assessed as hitherto. But the Court or a Judge may order that the value and amount of damages, or either of them, shall be ascertained in any other way in which any question arising in an action may be tried. J. A. Rule 206.

This *Rule* is substantially the same as the Eng. R. 1875, O. 29, r. 4, (1883, R. 297), except that the latter provides in the first part of the *Rule* for a writ of inquiry issuing to assess the value of the goods, instead of providing "that the same shall be assessed as hitherto."

As to the mode of assessing damages, see *Rule* 708.

In *Ivory* v. *Cruikshank*, W. N. 1875, 249, the action was for rent, and for the return of certain chattels; the defendant had failed to appear; it was held that the plaintiff was entitled, under this *Rule*, to have judgment for the rent, and for the return of the goods.

See *Dic* v. *Groom*, in note to *Rule* 719.

Where several defendants.

722. Where in any such action as in Rule 721 mentioned there are several defendants, if one of them makes default as mentioned in Rule 719, the plaintiff may enter an interlocutory judgment against the defendant so making default, and proceed with his action against the others. And in such case, damages against the defendant making default shall be assessed at the same time with the trial of the action or issues therein against the other defendants, unless the Court or a Judge otherwise directs. J. A. Rule 207.

This *Rule* is the same as the Eng. R. 1875, O. 29, r. 5, (1883, R. 298), and is in accordance with the former practice in the Common Law Courts.

See notes to *Rule* 719.

Where debt and damages claimed.

723. If the plaintiff's claim be for a debt or liquidated demand, and also for detention of goods and pecuniary damages, or pecuniary damages only, and the defendant makes default as mentioned in Rule 719, the plaintiff may enter final judgment for the debt or liquidated demand, and also enter interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in Rule 217. J. A. Rule 208.

Same as the Eng. R. 1875, O. 29, r. 6, (1883, R. 299).

See notes to *Rule* 719.

If there are several defendants, and some only make default, the plaintiff should proceed against them under *Rule* 728.

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Rules 724-727.

Default by defendant in action for land.

724. In an action for the recovery of land, if the defendant makes default as mentioned in Rule 719, the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land, with his costs. J. A. Rule 209.

Identical with the Eng. R. 1875, O. 29, r. 7 (1883, R. 300).

Where claim for land and damages.

725. Where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or double value in respect of the premises claimed, or any part of them, or damages for breach of contract, or wrong or injury to the premises claimed, upon a writ for the recovery of land, if the defendant makes default as mentioned in Rule 719, or if there be more than one defendant, and some or one of the defendants make such default, the plaintiff may enter judgment against the defaulting defendant or defendants, and proceed as mentioned in Rules 721 and 722. J. A. Rule 210.

Same as Eng. R. 1875, O. 29, r. 8 (1883, R. 301).

The judgment where it is for a liquidated sum for arrears of rent, may, it would seem, be final in the first instance and not interlocutory as under *Rules* 721, and 722.

Where some only of the defendants make default, it is not quite clear whether the plaintiff can enter judgment against them for recovery of the land, but it would seem that at any rate he may proceed as to that part of the claim under *Rule* 728; see *Gosset* v. *Campbell*, W. N. 1877, 134.

Judgment in mortgage actions.

726. Where the action is in respect of a mortgage, and the plaintiff claims foreclosure, or sale, or redemption, and an appearance has been entered, but default has been made in delivering a defence or demurrer, the plaintiff shall be entitled to a judgment or order on *præcipe*, as provided in Rule 718. J. A. Rule 520.

In a foreclosure action, where the mortgagee applies for judgment in default of appearance, not only for foreclosure, but also for a personal order for payment, the statement of claim ought, however shortly, to contain an express statement of the covenant upon which the order is claimed: *Law* v. *Philby*, 56 L. T. N. S. 230; 35 W. R. 401.

Other actions.

727. In all other actions than those in the ~~six~~ preceding Rules mentioned, if the defendant makes default in delivering a defence ~~or demurrer~~, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff to be entitled to. J. A. Rule 211.

Identical with Eng. R. 1875, R. 10 (1883, R. 304). The motion for judgment is provided for by *Rule* 748.

As to where a defence is put in after the time allowed, see notes to *Rule* 371.

Rule 728.

By his statement of claim the plaintiff asked for specific performance and ancillary relief, but not for any declaration of lien. Upon motion for judgment as in default of appearance, is was held that the plaintiff could not have a declaration of lien: *Tacon* v. *National Standard Land Co.*, 56 L. T. N. S. 165.

Where plaintiff's claim was dismissed by interlocutory order, defendant was held to be entitled to properly proceed under this *Rule* for judgment on his counter-claim: *Higgins* v. *Scott*, 21 Q. B. D. 10.

In an action for specific performance if the defendant does not appear, the plaintiff is only entitled to judgment as prayed for, not for rescission: *Stone* v. *Smith* 56 L. J. Chy. 871; 35 Ch. D. 188; see also *Tacon* v. *National Standard Land Co.*, 56 L. T. N. S. 165; 56 L. J. Chy. 529.

Where, by the statement of claim, in an action for specific performance, the plaintiff craved leave to refer to the agreement, and the property did not appear except by reference to the agreement, it was held that the allegations were insufficient, as nothing beyond the statement of claim could be looked at: *Smith* v. *Buchan*, 36 W. R. 631; 58 L. T. N. S. 710.

If a statement of claim against a married woman on a contract does not allege the possession of separate estate, no judgment can be given: *Tetley* v. *Griffith*, 36 W. R. 96; 57 L. T. N. S. 673; see notes to *Rule* 314.

Notice of motion was held by the Master of Rolls not to be necessary in *Gillott* v. *Ker*, cited, 6 Ch. D. 695, and by V.-C. Malins in *Williams* v. *Cardwell*, W. N. 1877, 140. The contrary was afterwards held by Hall, V.-C., in *Parsons* v. *Harris*, 6 Ch. D. 694, which has been followed in this Province in *Burritt* v. *Murdock*, 9 P. R. 191. See note to *Rule* 748.

Two clear days' notice seems all that is necessary: see *Parsons* v. *Harris*, 6 Ch. D. 694; *Daubney* v. *Shuttleworth*, 1 Ex. D. 53, and note to *Rules* 748 and 479.

Where a defence is struck out for non-compliance with *Rules* as to examination, or with an order to produce under *Rules* 499, 520, the defendant is in default under this *Rule*: *Fisher* v. *Hughes*, 25 W. R. 528.

Proof by affidavit of the allegations contained in the statement of claim is unnecessary: *Williams* v. *Brisco*, 29 W. R. 713; 17 C. L. J. 478; *Ripley* v. *Sawyer*, 31 Ch. D. 494; *Jones* v. *Harris*, 55 L. T. N. S. 884; see *Wilmott* v. *Young*, 44 L. T. N. S. 331; *Montague* v. *The Land Corporation of England*, 56 L. T. N. S. 730; *Holmes* v. *Shaw*, 79 L. T. Jour. 170; 52 L. T. N. S. 797; 29 Sol Jour. 573, is to the contrary, an affidavit being there required to prove a claim in an action for specific performance; but this decision was doubted in *De Jongh* v. *Newman*, 56 L. T. N. S. 180; 35 W. R. 403; see also *Bayley* v. *Searle*, 35 W. R. 404; 56 L. T. N. S. 306; and *Gray* v. *Roberts*, 32 Sol Jour. 322.

The words "upon the statement of claim" seem to indicate that no affidavit is necessary, and it has not been the practice in Ont. to require one. Notwithstanding those words in the corresponding Irish Rule, it has been held in Ireland that the plaintiff, where his title depends on documents, must produce and prove them: *Crisford* v. *Dodd*, 15 L. R. Ir. 83.

Where several defendants, and one makes default.

728. Where, in any such action as mentioned in the last preceding Rule, there are several defendants, then, if one of the defendants makes such default as aforesaid, the plaintiff may either set down the action at once on motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants. J. A. Rule 212.

This is identical with the Eng. R. 1875, O. 29, r. 11 (1883, R. 305).

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Rules 729, 730.

See the *Rule* applied in *Re Smith*, *Bridson* v. *Smith*, W. N. 1876, 103, where one defendant made default, and the others admitted the plaintiff's claim by their defence.

See *National Provincial Bank* v. *Evans*, 51 L. J. Chy. 97; 30 W. R. 177, where defaulting defendant was an infant, and the action was set down under Eng. R. 1875, O. 19, r. 17 (not adopted in Ontario), for trial as against him, and motion for judgment against other defendants. The practice in Ontario is without express provision the same. See also *Re Fitzwater*, 52 L. J. Chy. 83; *Gardner* v. *Tapling*, 33 W. R. 473.

Where a defence is put in before the motion under this *Rule* is made, though irregular, it cannot be treated as a nullity: *Gill* v. *Woodfin*, 25 Ch. D. 707; *Graves* v. *Terry*, 9 Q. B. D. 170; *quære*, where notice of motion has been served. See notes to *Rules* 369, 371 and 381.

In a case where several persons joined as plaintiffs to restrain the infringement of rights of pasture to which they were severally entitled, and the defendant counter-claimed against the plaintiffs and seven third parties, to restrain the erection of fences on the land in question, judgment by default of appearance against the seven third parties was refused before trial, because, assuming them to have been properly made parties, the cause of action against them was not severable from that against the plaintiffs: *Verney* v. *Thomas*, 36 W. R. 398; 58 L. T. N. S. 20.

Under the former Chancery Practice, where a bill was filed against a patentee and his vendee impeaching the patent, and the vendee allowed the bill to be taken *pro confesso*, the plaintiff failing to establish his case against the patentee who defended, the bill was dismissed as against both defendants, though without costs as to the vendee: *McDermott* v. *McDermott*, 3 Chy. Ch. 38.

In case of issues between parties other than plaintiff and defendant.

729. In any case in which issues arise (*a*) other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the opposite party may apply to the Court or a Judge for such judgment, if any, as upon the pleadings he may appear to be entitled to. And the Court may order judgment to be entered accordingly, or may make such other order as may be necessary to do complete justice between the parties. J. A. Rule 213.

(*a*) The Eng. R. 1875, O. 29, r. 13 (1883, R. 307), has here the words "in any action." The Rules are otherwise the same.

The *Rules* apply to enable the plaintiff in a counter-claim to obtain judgment against any defendant thereto who makes default: *Street* v. *Crump*, 25 Ch. D. 68.

3. Confession of Action or Judgment.

(i) *Generally.*

Defendants may confess action to recover land as to the whole or part of the property.

730. A sole defendant or all the defendants in an action for the recovery of land, may confess the action as to the whole or a part of the property by giving to the plaintiff a notice entitled in the Court and cause, signed by the defendant or defendants, and the signature attested by his or their solicitor and thereupon the plaintiff may forthwith sign judgment and issue execution, for the recovery of pos-

session and costs, in the words or to the effect of Form No. 164 in the Appendix. R. S. O. 1877, c. 51, s. 52. Rules 731-734.

731. In case one of several defendants who defends separately for a portion of the property for which the other defendant or defendants do not defend, desires to confess the plaintiff's title to such portion, he may give a like notice to the plaintiff, and thereupon the plaintiff may forthwith sign judgment and issue execution for the recovery of possession of such portion of the property, and for the costs occasioned by the defence relating to the same and the action may proceed as to the residue. R. S. O. 1877, c. 51, s. 53. And so may one of several defendants defending for a part for which others do not defend.

732. In case one of several defendants who defends separately in respect of property for which other defendants also defend, desires to confess the plaintiff's title, he may give a like notice thereof, and thereupon the plaintiff may sign judgment against such defendant for the costs occasioned by his defence, and may proceed in the action against the other defendants to judgment and execution. R. S. O. 1877, c. 51, s. 54. And if others defend as to the same part.

733. Final judgment upon a *cognovit actionem* or warrant of attorney to confess judgment given or executed before the suing out of any process, may be entered in any Division of the High Court, and in like manner and under like circumstances, final judgment may be entered on a *cognovit actionem* or warrant of attorney to confess judgment for an amount not exceeding $400, in any County Court, unless some particular office or some particular County Court for that purpose is expressly stated in the *cognovit* or warrant. R. S. O. 1877, c. 50, s. 296. As to judgment on *cognovits*.

734. Leave to enter up judgment upon any *cognovit* or warrant of attorney above 1, and under 10 years old, is to be obtained by order of a Judge, made *ex parte*, and if 10 years old or more, by motion upon notice. T. T. Rules 1856, 27. Leave to enter judgment on *cognovit*, when to be obtained.

See note to *Rule* 736; and see *Rules* 479, 525-529.

A motion under this *Rule* would seem to be proper to be made in Chambers: *Handley* v. *Roberts*, 17 Jur. 440. Leave to enter judgment was granted where the witness to the *cognovit* had left the Province: *King* v. *Robins*, Tay. 299; *Cleal* v. *Latham*, 1 U. C. Q. B. 412; and also in a case where the *cognovit* was seven years old, upon affidavit of the plaintiff, that the whole amount was still due, and that having received a letter from the defendant he believed him

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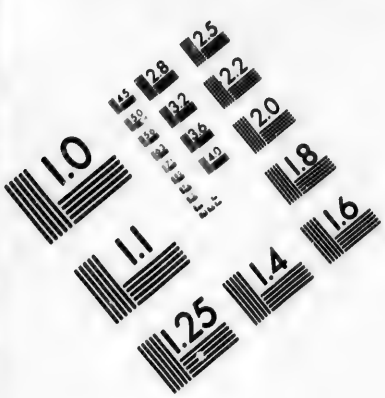
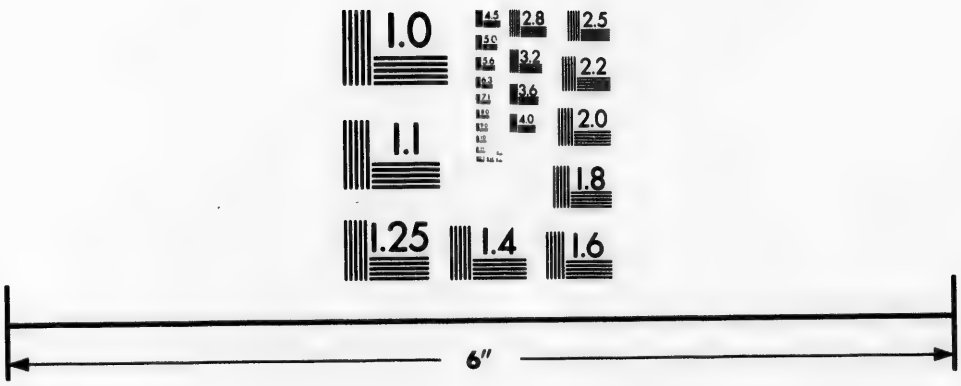
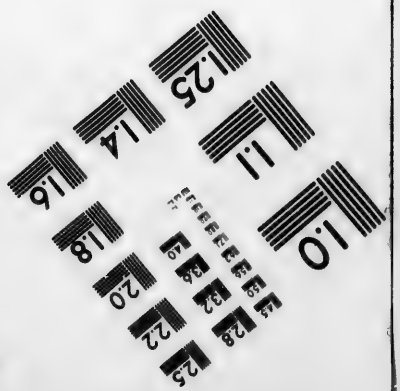




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Rules 735, 736.

to be still alive, though the affidavit failed to state that the defendant either wrote or signed the letter: *Oliphant* v. *McGinn*, 4 U. C. Q. B. 170; but it was refused when the *cognovit* was fifteen years old, and it appeared that the plaintiff had once accepted property from the defendant, and discharged the action, though the property proved unproductive: *Grant* v. *McIntosh*, 4 O. S. 184.

Confessions and *cognovits* to be registered

735. No confession of judgment or *cognovit actionem* shall be valid or effectual to support any judgment or writ of execution, unless within 1 month after the same has been given, the same, or a sworn copy thereof, is filed of record in the proper office of the Court in the County in which the person giving such confession of judgment or *cognovit actionem* resides: and a book shall be kept in every such office, to be called the Cognovit Book, in which shall be entered the names of the plaintiff and defendant in every such confession or cognovit, the amount of the true debt or arrangement secured thereby, the time when judgment may be entered and execution issued thereon, and the day when such confession or cognovit, or copy thereof, is filed in the said office; and such book shall be open to inspection by any person during office hours, on the payment of a fee of 20 cents. R. S. O. 1877, c. 50, s. 297.

When judgment has been signed on the *cognovit* before the time limited by this *Rule* for filing it has elapsed, it need not be filed, or entered in the *cognovit* book, as required by this *Rule*: *Commercial Bank* v. *Fletcher*, 8 C. P. 181; *Armour* v. *Carruthers*, 2 P. R. 217; *McLean* v. *Stuart*, 2 P. R. 367.

Immaterial discrepancies between the copy filed and the original, do not invalidate the *cognovit*: *Irwin* v. *Ham*, 9 U. C. L. J. 80; and see *Sharp* v. *McHenry*, 38 Ch. D. 427.

Cognovit to be executed in presence of solicitor.

736. No warrant of attorney to confess judgment in any action, or *cognovit actionem*, given by any person, shall be of any force, unless there shall be present some solicitor on behalf of such person expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or *cognovit*, before the same is executed, which solicitor shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be solicitor for the person executing the same, and state that he subscribes as such solicitor, and in the affidavit of execution, the attendance of such solicitor, and the fact of his being a subscribing witness, shall be plainly stated, which affidavit and the warrant of attorney, or *cognovit*, shall be filed at the time of entering judgment thereon. Rules T. T. 1856, 26.

A partner cannot give a *cognovit* so as to bind his firm without special authority: *Holme* v. *Allan*, Tay. 148; *Huff* v. *Cameron*, 1 P. R. 255; *Joyce* v.

Murray, M. T. 6 Vict.; but when there is evidence of assent on the part of the other partners, the *cognovit* will bind the firm: *Brown* v. *Cinqmars*, 2 P. R. 205. **Rule 736.**

One of several executors cannot, without express authority, give a *cognovit* binding his co-executor; and a judgment entered on such a confession will be set aside as to all: *Commercial Bank* v. *Woodruff*, 21 U. C. Q. B. 602.

A *relicta verificatione* is not within this *Rule*, and does not require to be verified by affidavit: *Eakins* v. *Fraser*, 6 P. R. 297. A *cognovit* may be executed by the attorney of the party giving it: *Richmond* v. *Proctor*, 3 U. C. L. J. 202.

Who may attest *cognovit*.

An uncertificated attorney may attest: *Holgate* v. *Slight*, 2 L. M. & P. 662, but not an attorney's clerk: *Barnes* v. *Ward*, Barnes 42; *Paul* v. *Cleaver*, 2 Taunt. 360, nor a person not actually an attorney, though believed to be one: *Wallace* v. *Brockley*, 5 Dowl. 695, but where the defendant wrongfully misrepresented a person to be an attorney, the Court refused to set aside the judgment: *Cox* v. *Cannon*, 6 Dowl. P. C. 625; *Jeyes* v. *Booth*, 1 B. & P. 97; the plaintiffs attorney cannot properly act for the defendant: *Mason* v. *Kiddle*, 5 M. & W. 513; *Rice* v. *Linsted*, 7 Dowl. P. C. 153; *Durrant* v. *Blurton*, 9 Dowl. P. C. 1015; even though the latter consent: *Hutson* v. *Hutson*, 7 T. R. 7; *Pryor* v. *Swaine*, 2 D. & L. 37; *Joel* v. *Dicker*, 5 D. & L. 1; *Mason* v. *Riddle*, 8 Dowl. P. C. 207; *Cooper* v. *Grant*, 21 L. J. C. P. 197; *Hirst* v. *Hannah*, 17 Q. B. 383. The attorney must, in general, attend at the request of the defendant: *Gripper* v. *Bristow*, 6 M. & W. 807; *Rice* v. *Linsted*, 7 Dowl. P. C. 153, but the adoption by the defendant of an attorney present, not being the plaintiff's attorney, no matter how procured, is sufficient: *Taylor* v. *Nicholls*, 6 M. & W. 91; *Walton* v. *Chandler*, 2 D. & L. 802; *Oliver* v. *Woodroffe*, 4 M. & W. 650; *Case* v. *Benson*, 3 U. C. L. J. 132; *Levinson* v. *Syer*, 2 L. M. & P. 557; and see *Meriden* v. *Lee*, 2 Ont. 451.

Cognovit need not be read, if explained.

It is not necessary that the *cognovit* should be read over to the defendant, it is sufficient if its nature and effect be explained to him: *Oliver* v. *Woodroffe*, 4 M. & W. 650, but the neglect of an attorney chosen by the defendant to explain the instrument, will not vitiate it: *Haigh* v. *Frost*, 7 Dowl. P. C. 743; *Case* v. *Benson*, 3 U. C. L. J. 132, unless there be fraud or collusion; *Taylor* v. *Nicholls*, 6 M. & W. 91; and see *Gorrie* v. *Beard*, 5 U. C. Q. B. 626.

Attestation clause, form of.

It is advisable to state in the attestation clause that the requirements of the *Rule* have been complied with, but the attestation has been held sufficient, though omitting to state that the attorney was appointed by the defendant: *Oliver* v. *Woodroffe*, 7 Dowl. P. C. 168, or was named by him, or attended at his request: *Gay* v. *Hall*, 5 Dowl. & L. 422, and did not declare him to subscribe as defendant's attorney: *Knight* v. *Hasty*, 12 L. J. Q. B. 293; *Holt* v. *Kershaw*, 5 D. & L. 419; *Phillips* v. *Gibbs*, 16 M. & W. 208; but see *Everard* v. *Poppleton*, 5 Q. B. 181; *Hibbert* v. *Barton*, 2 Dowl. N. S. 434. The following form of attestation has been held sufficient: "Signed by the above named A. B. in my presence, and I declare myself to be attorney for the said A. B., and I subscribe my name as such his attorney": see *Gay* v. *Hall*, 18 L. J. Q. B 12; *Ledyard* v. *Thompson*, 11 M. & W. 40. The provision respecting attestation is for the benefit of the defendant, a third party cannot object to a judgment on the ground that the *cognovit* on which it is entered was not formally executed: *Chipp* v. *Harris*, 5 M. & W. 430; *Cocks* v. *Edwards*, 2 Dowl. N. S. 55; nor to the want of an affidavit of execution: *Potter* v. *Pickle*, 2 P. R. 391.

Cognovit may be given though no process issued.

A *cognovit* may be given in an action though no process has issued: *Walton* v. *Hayward*, 2 O. S. 468; *Rule* 733. The practice of taking *cognovits* is not now very often resorted to since R. S. O. c. 124, s. 1, which avoids judgments recovered on *cognovits* given by insolvents, for the purpose of giving a preference, or to defeat or delay creditors: see *Meriden* v. *Lee*, 2 Ont. 451; *Martin* v. *McAlpine*, 8 Ont. App. 675. The same result, however, is arrived at, by a defendant appearing and delivering a defence and then consenting to an immediate judgment: *Turner* v. *Lucas*, 1 Ont. 623, affirmed in appeal, 10th September, 1884.

Leave to enter judgment may be obtained

The application for leave to enter judgment must be made in Chambers: *Handley* v. *Roberts*, 17 Jur. 440. The motion can now be made to the Master in Chambers. It is irregular to enter judgment without leave, when leave is

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Rules 737-739. In Chambers.

necessary : *Jones* v. *Jones*, 1 D. & R. 558. When the *cognovit* is ten years' old, notice to defendant of the motion cannot be dispensed with : *Nicholas* v. *Merit*, 9 Dowl. P. C. 101 ; *Fletcher* v. *Everard*, 13 L. J. Q. B. 44 ; but see *Croft* v. *Lord Egmont*, 8 Dowl. P. C. 95 ; *Wortham* v. *Tuck*, 9 Dowl. P. C. 335.

Defeasance to which any *cognovit* is subject to be written on same paper.

737. Every person who prepares any *cognovit* or warrant of attorney to confess judgment, which is to be subject to any defeasance, shall cause such defeasance to be written on the same paper or parchment on which the *cognovit* or warrant is written, or cause a memorandum in writing to be made on such *cognovit* or warrant containing the substance or effect of such defeasance. Rules T. T. 1856, 28.

Omission of solicitor to comply with *Rule* 737, effect of.

The omission of a solicitor to comply with *Rule* 737, does not invalidate the instrument, but subjects the solicitor to punishment, on application to the Court : see *Shaw* v. *Evans*, 14 East. 576 ; *Partridge* v. *Fraser*, 7 Taunt. 307 ; *Sansom* v. *Goode*, 2 B. & Al. 568 ; *Barber* v. *Barber*, 3 Taunt. 465 ; *Burdekin* v. *Potter*, 1 Dowl. N. S. 134.

(ii) *Interim Alimony.*

Defendant may notify plaintiff that he submits to pay interim alimony claimed.

738. In an alimony action, the defendant may, at any time before the statement of defence is due, give notice in writing that he submits to pay the interim alimony, and costs, as demanded by the plaintiff in the indorsement on the writ ; and in that case no order is to be taken out until there has been a default in payment ; and in case of default, affidavits being filed verifying the indorsement and notice and the default, the order is to be issued on *præcipe*. Chy. O. 490. See J. A. App. (A.) 8.

Where the order is authorized to be issued on *præcipe*, the officer with whom the pleadings in the action are filed may issue it : see *Rule* 25.

No application for payment of interim alimony, or interim costs, in an alimony action can be made until after the time for delivering a defence has expired : *Rules* 530, 1185, and see notes to *Rule* 530.

4. Leave to Sign Judgment.

Leave to sign final judgment.

739. Where the defendant appears to a writ of summons specially indorsed, under Rule 245, [(*a*) and the plaintiff is not entitled to a judgment or order, under the preceding Rules] he may, [(*b*) on an affidavit made by himself, or by any other person who can swear positively to the debt or cause of action,] verifying the cause of action, and stating that in his belief there is no defence to the action, serve the defendant with a notice of motion to shew cause before the Court or a Judge why the plaintiff should not be at liberty to sign, final judgment for the amount

so indorsed, together with interest, if any, or for the recovery of the land with or without rent or *mesne* profits, as the case may be, and costs. (*c*) A copy of the affidavit shall accompany the notice of motion. The Court or a Judge may thereupon, unless the defendant, by affidavit or otherwise, (*d*) satisfies the Court or a Judge that he has a good defence to the action on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend the action, make an order empowering the plaintiff to sign judgment accordingly. J. A. Rule 80. Rule 739.

Comp. Eng. R. 1875, O. 14, r. 1 (1883, R. 115).

(*a*) These words in brackets are not in the English Rule. (*b*) Instead of the words in brackets here the English Rule has the words "apply to a Judge for liberty to enter." (*c*) The English Rule 116 provides for this, and that the application be by summons. The Rules are otherwise to the same effect.

The words in brackets (*b*) have been introduced in consequence of the decision in *Bank of Montreal* v. *Cameron* 2 Q. B. D. 536, where it was held that since, under the original *Rule*, the affidavit was required to be made by plaintiff himself, the *Rule* could not apply where a corporation was plaintiff.

(*c*) As to this provision: see *Litchfield* v. *Jones*, 25 Ch. D. 64.

(*d*) By reason of the words "or otherwise," it was held that the reasoning in *Bank of Montreal* v. *Cameron*, *supra*, did not apply, and that therefore a plaintiff may apply for judgment under this *Rule* where the defendant is a corporation: *Shelford* v. *Louth & E. C. Ry Co.*, 4 Ex. D. 317.

Leave to sign final judgment was granted against a corporation having its head office in England, incorporated there and in process of liquidation there, but doing business and having assets and liabilities in Ontario: *Plummer* v. *Lake Superior Native Copper Co.*, 5 C. L. T. 95; 21 C. L. J. 80.

A power analogous to that conferred by this *Rule* was formerly exercised in the Common Law Courts in Ontario, after *The Administration of Justice Act*, in cases where pleas were put in for time; and that practice may in such cases still be applied. In such a case, if by an examination of a defendant his pleas were shewn to be untrue, an order might be obtained in Chambers striking out the pleas, so that the plaintiff could sign judgment in default of plea; see *McMaster* v. *Beattie*, 6 P. R. 162; *Davis* v. *Code*, 7 P. R. 2; *Johnson* v. *Johnson*, *Ib.*, 288; *Imperial Bank* v. *Summerfelt*, *Ib.*, 320. The Courts would not however strike out a plea upon the plaintiff's affidavit, but required a clear admission by the defendant that there was no real defence: see Arch. Pr. 12th ed. 292; *Turner* v. *Neill*, 6 P. R. 295; *Post* v. *Leys*, 7 P. R. 357; *The Queen Ins. Co.* v. *Boyd*, *Ib.*, 379. In an ejectment suit brought by mortgagees, though the defendant admitted that he appeared and defended for time, it was nevertheless held that the appearance and defence could not be struck out, as the defendant was entitled to possession until the plaintiff should prove his case: see *Metropolitan B. & S. Soc.* v. *Rodden*, 6 P. R. 294. Leave to sign judgment.

Under the present *Rule* the onus is thrown upon the defendant of shewing that he has a defence, where it is sworn on the part of the plaintiff that there is none.

In England it has been said that the power given by this *Rule* is intended to be exercised where it is shewn from an acknowledgement by the defendant of the debt, or from other circumstances, that the defence is only for time: *Lloyd's Banking Co.* v. *Ogle*, 1 Ex. D. 262; *Thompson* v. *Marshall*, 28 W. R. 220. When *Rule* applies.

Where the nature of the claim involves the taking of accounts between the parties the *Rule* is not applicable: *Wallingford* v. *Mutual Society*, 5 App. Cas. 685. So where something beyond the recovery of money is sought; *Fell* v. *Williams*, 3 C. L. T. 358; *Standard Bank* v. *Wells*, 10 P. R. 159; *De Rojas* v.

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Rule 739.

Michael, 79 L. T. Jour. 99, where besides claiming money the plaintiff asked restoration of a steamship and injunction to restrain the defendant from parting with it.

But in a proper case there may be two judgments in an action, and where one claim is in respect of a money demand, leave may be given under this *Rule* to sign judgment for the amount and allowing the action to proceed upon other claims: *Hay* v. *Johnston*, 12 P. R. 596, (where the claim was on a bill of exchange, and to set aside a conveyance as fraudulent) not following in that respect *Standard Bank* v. *Wills*, 10 P. R. 159.

Though an order under this *Rule* is for an admitted amount or one seen clearly to be due, and the *Rule* does not contemplate an order for a sum to be ascertained by a reference or inquiry; still in the case of an action on a solicitor's bill, where it is clear that something will be due to the plaintiff, the usual order for taxation may be made, combined with an order under this *Rule* for payment of the amount which, as the result of the taxation, shall be payable: *Smith* v. *Edwardes*, 22 Q. B. D. 10. For the proper form of order in such case: see *Ib.*, p. 16.

Where writ specially indorsed under Rule 245.

An application under this *Rule* can only be made where the writ has been specially indorsed under *Rule* 245, *i.e.*, where the claim is in respect of a debt or liquidated demand, etc., and in certain simple claims for the recovery of land: see *Rule* 245. Where, therefore, the claim was upon a covenant in a chattel mortgage given as a continuous security for future advances, and the writ was indorsed for the amount mentioned in the mortgage, and not for the various advances, and the Master in Chambers had directed judgment to be signed for a sum less that $2,500 which upon affidavits and the depositions of defendant appeared to him to be due, it was held on appeal that the plaintiff's claim was not a debt, or liquidated demand. Mr. Justice Cameron in giving judgment said, "I think the power to authorize a plaintiff to sign judgment against the defendant, where the defendant makes an affidavit of merits, and disputes the claim, should be most carefully and sparingly exercised, and never unless it can be shewn that the plaintiff may be seriously prejudiced by the delay that may occur in awaiting the ordinary modes of trial, and that it should not be exercised in any case in which, under the old practice, final judgment could not have been properly signed for want of appearance": *Barber* v. *Russell*, 9 P. R. 433, 442.

An action upon a foreign judgment is within the *Rule*: *Grant* v. *Easton*, 13 Q. B. D. 302.

In *Hood* v. *Martin*, 9 P. R. 313, where a writ was indorsed to recover the price of land bargained and sold but not conveyed, it was held that the plaintiff's claim was for damages, and not the subject of a special indorsement, so that the case was not within the *Rule*.

In actions where the writ is indorsed, not under *Rule* 245, but under *Rule* 248, for foreclosure and immediate payment of the amount due under a covenant in a mortgage, this *Rule* has been held not to apply: *Canadian Bank of Commerce* v. *Bricker*, 1 C. L. T. 729; *Hill* v. *Sidebottom*, 47 L. T. N. S. 224; *Imbert Terry* v. *Carver*, 34 Ch. D. 506; *Clarke* v. *Berger*, 36 W. R. 809.

The plaintiff was held not entitled to judgment under this *Rule* where the writ was indorsed as follows: "The plaintiff's claim is for the price of goods supplied. The following are the particulars:—$621.06 for money payable by the defendant to the plaintiff for goods bargained and sold and delivered by the plaintiff to the defendant, and interest thereon from 25th July, 1882": *Lucas* v. *Ross*, 9 P. R. 251; so also where the claim indorsed was "the plaintiff's claim is for $213.90 balance due for sawing wood by the plaintiff for the defendant": *Villeneuve* v. *Wait*, 12 P. R. 505.

For other instances of insufficient special indorsements, see notes to *Rule* 245, p. 282.

Where a writ is indorsed for liquidated and unliquidated demands, the writ may be amended by striking out the unliquidated claims, and judgment may be signed for the remainder: *Robinson* v. *Ralston*, 8 L. R. Ir. 26.

A formal error in the indorsement of the writ, such as the misplacing of a date, is no answer to an application under this *Rule*: *Anon*, W. N. 1876, 53; 2 Charl. Ch. Ca. 20. Neither is a mistake in the teste in the copy of writ served: *Wasson* v. *Stalker*, 47 L. T. N. S. 444; where the year was given in the copy as "eighty" instead of "eighty-two": see also *Re Johnson*, 25 Ch. D. 112. **Rule 739.**

It was at first considered doubtful whether the *Rule* refers to anything but a monetary demand, and whether, therefore, in an action in which it was sought to charge a wife's separate estate on a guarantee, an order under the present *Rule* could be made by any amendment of the writ: *Butterworth* v. *Tee and wife*, W. N. 1876, 9; 1 Charl. Ch. Ca. 50; see also *Scott* v. *Wye*, 11 P. R. 93. The *Rule* was held not to be applicable, in the case of an action against a widow in respect of bills of exchange given by her during coverture: *Ortner* v. *Fitzgibbon*, 43 L. T. N. S. 60; 50 L. J. Chy. 17; in England, even after the Married Women's Act of 1882: *Moore* v. *Mulligan*, W. N. 1884, 34, though the contrary was held in Ireland: *Brown* v. *Morgan*, 12 L. R. Ir. 122; *Johnstone* v. *Browne*, 18 L. R. Ir. 429; and also in England: *Gunston* v. *Maynard*, 75 L. T. Jour. 102; *Perks* v. *Mylrea*, W. N. 1884, 64. In cases of money demand only.

In Ontario, since 45 V. c. 19, it has been held that the *Rule* may be applied, and judgment entered in a plain case against a married woman, with execution against her separate estate not subject to restraint or anticipation: *Kinnear* v. *Blue*, 10 P. R. 465; *Quebec Bank* v. *Radford*, 10 P. R. 619; *Cameron* v. *Rutherford*, 10 P. R. 620; and the later English cases seem to have established the same right in England: see *Bursill* v. *Tanner*, 13 Q. B. D. 691; and other cases referred to in the notes to *Rule* 314. Married women.

The plaintiff must, however, shew that the married woman was capable of contracting by shewing the possession of separate estate at the date of the contract: see notes to *Rule* 314, p. 338, and *Canadian Bank of Commerce* v. *Woodcock*, 13 P. R. 242.

Before the Eng. M. W. Act of 1882, (Ont. Act of 1884), in an action against a married woman for the price of goods supplied during coverture, orders were made directing an inquiry as to the existence of any separate estate chargeable with the sum claimed, and declaring the same to be charged therewith: *Darrant* v. *Ricketts*, 8 Q. B. D. 177; 18 C. L. J. 160, and see *Pike* v. *Fitzgibbon*, 17 Ch. D. 454.

For the form of order now, see notes to *Rule* 314, pp. 338-9, and *Quebec Bank* v. *Radford*, 10 P. R. 619.

Judgment may be obtained against an Indian, as, since the repeal of C. S. C. c. 9, an Indian may sue and be sued, though by the Indian Act of 1880, s. 77 (*d*), the judgment will not bind any property of the Indian except that described in sec. 75: *Bryce, etc., Salt*, 11 P. R. 112. Indians.

As to the cases of actions to recover land to which the present *Rule* has now been made applicable: see notes to *Rule* 245, *supra* p. 284. Actions to recover land.

Where the plaintiff is liable to give security for costs and an order for that purpose has been obtained but the plaintiff has a case for setting it aside, it was held under the original *Rules* that he might move *uno flatu* and upon the same materials to vacate the order for security and to sign judgment: *Anglo-American Casings Co.* v. *Rowlin*, 10 P. R. 394. This course cannot be taken now; but it is open to a plaintiff, under *Rule* 1251, to pay $50 into Court as a partial compliance with the order for security, and proceed with the motion for judgment: *Payne* v. *Newberry*, 13 P. R. 354. Security for costs.

The Master in Chambers and the Local Judges under *Rules* 30, 41, and 138, have jurisdiction to entertain applications under the present *Rule*.

No time is limited within which an application may be made, and it has therefore been held to be regular after statement of claim delivered: *Hope* v. *Neill*, 12th Sep., 1881, (Mr. Dalton); and see *Hanmer* v. *Flight*, 36 L. T. N. S. 279. It is held in Ireland under a similar *Rule* that, after issue joined on a statement of defence, a plaintiff cannot resort to this summary procedure, as he has adopted the defendant's mode of procedure: *Hackett* v. *Lalor*, 12 L. R. Ir. 45; also that where the plaintiff after appearance takes any deliberate step Time for moving.

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Rule 739. to have the action tried by a jury by serving a statement of claim, he cannot move under this *Rule*: *Stewartstown Loan Co.* v. *Daly*, 12 L. R. Ir. 418.

In Ontario the rule is that motions after the statement of claim is delivered, are not to be encouraged, though in cases of necessity, allowable: *Woodruff* v. *McLennan*, 11 P. R. 22; but see *McLardy* v. *Slateum*, 24 Q. B. D. 504.

If the time for delivering defence is running pending the motion, the Judge or Master will by his order give further time if necessary: *Hobson* v. *Monk*, W. N. 1884, 8.

Affidavit. In *Begg* v. *Cooper*, 40 L. T. N. S. 29; 27 W. R. 224, it was held that the making of the plaintiff's affidavit was not a condition precedent to the issue of a summons, and therefore where the plaintiff made a defective affidavit, then obtained his summons, and afterwards made a fresh and good affidavit it was held that the issue of the summons was good.

Under the practice in Ireland where a motion was refused, because no affidavit was filed at the time of service of the summons, the Court refused to entertain a renewal of the motion: *Trench* v. *Mulcahy*, 8 L. R. Ir. 146; but in England the dismissal of the motion has been held no bar to a fresh application on fresh materials: *Wagstaff* v. *Jacobowitz*, W. N. 1884, 17; and see *Payne* v. *Newberry*, 26 C. L. J. 155.

Form of affidavit of plaintiff. The plaintiff's affidavit should not only verify the cause of action, but also pledge the deponent's belief that there is no answer to the plaintiff's demand: *Kiely* v. *Massey*, 6 L. R. Ir. 445. An affidavit of plaintiff which stated that he was "advised and believed defendant had no defence on the merits to the action" was held sufficient: *Manning v. Moriarty*, 12 L. R. Ir. 372.

An affidavit by the plaintiff's solicitor not stating his means of knowledge is not sufficient: *Edwards* v. *Davis*, W. N. 1888, 59.

The following is the form of affidavit required, in money cases, taken from Chitty's Forms, 11th ed. 100: see *Runnacles* v. *Mesquita*, 1 Q. B. D. 416.

In the High Court of Justice.
Division.

Between *A. B.*, Plaintiff, and
C. D., Defendant.

I, *A. B.*, of , the above-named plaintiff, make oath and say as follows:

1. This action was commenced on the day of , 18 , by a writ of summons specially indorsed with my claim herein, in pursuance of the Rules of the Supreme Court, *Rule* 245.

2. My said claim so indorsed is for [*here state the claim as in the indorsement*].

3. The defendant appeared in this action on the day of , 18 .

4. The defendant at the commencement of this action was, and still is, justly and truly indebted to me in $, in respect of the matters in the said indorsement mentioned.

5. That [*here state, as concisely as is consistent with clearness, the facts upon which the plaintiff's claim is founded. Mere matters of evidence need not necessarily be stated, but a good cause of action must be disclosed, and the plaintiff's claim in respect of it verified, and in some cases it may be advisable to state the evidence by which it is supported. The form of the affidavit must necessarily vary according to the facts of each particular case. The statement of facts may be confined to one paragraph or divided into several, as may be found most convenient. Each paragraph should contain, as far as possible, a separate allegation of fact. The affidavit should be made as strong as possible, and any facts tending to show an admission of the claim by the defendant should be distinctly stated*].

6. In my belief there is no defence to this action, and the appearance has been entered for purposes of delay only.

Sworn [etc., *as usual*].

This affidavit is filed [etc., *as usual*].

"The defendant is indebted to the plaintiff in the sum of £24 16*s.* 0*d.* as *per* particulars specially indorsed on the writ of summons," was held to be a sufficient verification of the special indorsement to entitle the plaintiff to judgment: *Murphy* v. *Nolan*, 18 L. R. Ir. 468. **Rule 739.**

On such a motion the only question to be determined is whether the Judge is satisfied that there is a good defence on the merits: *per* Jessel, M.R., *Ex. p. Marshall*, 5 Ch. D. 877. What defendant must show.

The Judge or Master does not pretend to try the action: *Andrews* v. *Stewart*, 2 Charl. Ch. Ca. 50; W. N. 1876, 7; though to a certain extent the question of liability must be entertained in scrutinizing the defence to ascertain if it is fair and reasonable: *Phillips* v. *Harris*, W. N. 1876, 54; 2 Charl. Ch. Ca. 20; *Anglo-Italian Bank* v. *Wells*, W. N. 1877, 263; 1878, 10; 38 L. T. N. S. 197.

What must be shewn to entitle the defendant to defend has been variously expressed. It has been said, for instance, that he is only required to show a "*bonâ fide*" defence: *Andrews* v. *Stewart*, *supra*; to suggest a defence and show some probability of getting it from the plaintiff, or proving it himself: *Harrison* v. *Bottenheim*, 26 W. R. 362; or reasonable ground for supposing that there is a "plausible" defence; *Beckingham* v. *Owen* and *Thorne* v. *Seel*, W. N. 1878, 215; or grounds for fairly disputing the claim: *Runnacles* v. *Mesquita*, 1 Q. B. D. 416; or that the matter is so doubtful that it ought to be allowed to go to a jury: *Andrews* v. *Stewart*, and *Beckingham* v. *Owen*, *supra*; *Anon*, W. N. 1876, 64; *Berridge* v. *Roberts*, W. N. 1876, 86; 2 Charl. Ch. Ca. 21. The facts disclosed in defendant's affidavit must justify a reasonable belief that he has a defence: *London, etc.*, v. *Willis*, 28 Sol. Jour. 478; see also *Hughson* v. *Gordon*, 10 P. R. 565.

In *Fell* v. *Williams*, 3 C. L. T. 358, it was held that the plaintiff's case must appear to a demonstration, and where the defendant set up matter which might possibly afford a defence, the Court refused to criticize or enter into the probabilities of the defence: see also *Thompson* v. *Marshall*, 28 W. R. 220, and *Lowden* v. *Martin*, 12 P. R. 496.

In answer to the motion a simple affidavit of merits is not sufficient, the affidavit must disclose a good defence, *i.e.* shew its nature, and give some reason for thinking that it exists in fact: *Collins* v. *Hickok*, 11 Ont. App. 620; *Pascal* v. *Stone*, 9th Sept., 1881, (Mr. Dalton); see also *Anno*, 1 Char. Ch. Ca. 48; W. N. 1875, 249, 250. In the words of Lord Blackburn in *Wallingford* v. *Mutual Soc.*, 5 App. Cas. 704: "It is not enough for defendant to swear 'I say I owe the man nothing.' Doubtless if it were true that you owed the man nothing, as you swear, that would be a good defence; but that is not enough. You must satisfy the Judge that there is reasonable ground for saying so. So again if you swear there was a fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the Judge that those are facts which make it reasonable that you should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned." Affidavit of defendant must disclose defence.

The fact that there is a valid counter-claim is not necessarily sufficient, as the admission of a counter-claim is not of right but in the discretion of the Judge: *Anglo-Italian Bank* v. *Wells*, W. N. 1877, 263; 1878, 10; 38 L. T. N. S. 197; *Fowler* v. *Lee*, W. N. 1876, 86; *Rotheram* v. *Priest*, 49 L. J. C. P. 104; *Anon*, 1 Charl. Ch. Ca. 45; *Bank of Ottawa* v. *Johnston*, 9 C. L. J. 251. When counter-claim sufficient.

Where a counter-claim is, however, proper, the defendant will generally be allowed to set it up: *Anon*, 60 L. T. Jour. 85; 1 Charl. Ch. Ca. 45; *Morin* v. *Calcock*, 26 Oct. 1881, (Mr. Dalton in Chambers); and, if sufficiently connected with the same transaction as that which is the subject of the plaintiff's claim, the counter-claim may be sufficient to entitle the defendant to defend, even where set up as a defence to a liquidated claim, as on a bill of exchange: *per* L. J. Thesiger in *Anglo-Italian Bank* v. *Wells*, 38 L. T. N. S. 197. So where the defendant has a valid set-off greater than the plaintiff's claim: *Groom* v. *Rathbone*, 41 L. T. N. S. 591; and see *Bowyear* v. *Pawson*, 6 Q. B. D. 540; *Government Co.* v. *Dempsey*, 50 L. J. Q. B. 199.

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Rule 739. Claim for indemnity not a defence.

A claim for indemnity against a third party will not suffice: *Thorne* v. *Seel*, W. N. 1878, 215; *German Bank* v. *Schmidt*, W. N. 1876, 10; 1 Charl. Ch. Ca. 53; nor a promise to give time without consideration: *Woolston* v. *Baines*, W. N. 1876, 74; 2 Charl. Ch. Ca. 21.

As to what are meritorious defences, see note to *Rule* 705.

Judgment was ordered to be signed where it was stated that the defendant was at sea on his way to join his regiment, and that he had been served with the writ the day before leaving England: *Anon*, W. N. 1875, 260; 1 Charl. Ch. Ca. 49. That defendant was served in New York, and had not time to instruct his solicitors, was considered sufficient reason for refusing an order: *Anon*, 60 L. T. Jour. 213; 2 Charl. Ch. Ca. 18.

The orders which may be made upon the application are:

Leave to sign judgment.

(1) *Leave to the plaintiff to enter final judgment*:—This order ought not to be made save where the case is free from doubt: *Ray* v. *Barker*, 48 L. J., Ex. 569; 4 Ex. D. 279; *Thompson* v. *Marshall*, 28 W. R. 220. It will be made if defendant does not appear, or files no affidavit: W. N. 1876, 12; or only an affidavit stating that there is a good defence, without stating what it is: *Wallingford* v. *Mutual Society*, *supra*; though an opportunity of filing a better affidavit may be given: *Pascal* v. *Stone*, *supra*; or if no fairly arguable defence be shewn: *Anglo-Italian Bank* v. *Wells*, 38 L. T. N. S. 197; *Thorne* v. *Seel*, W. N. 1878, 215; *Anon*, W. N. 1876, 23; 2 Charl. Ch. Ca. 18; *East Assam, etc.*, v. *Roche*, W. N. 1875, 238; 1 Charl. Ch. Ca. 46. Judgment was ordered to be signed where the only defence was that the defendant had commenced proceedings in Bankruptcy: *Anon*, W. N. 1875, 220: W. N. 1876, 23; *Clifford* v. *Budds*, W. N. 1884, 40. So where in an action against two defendants, one admitted the debt and let judgment go by default, and the other only deposed that he was willing to pay his share, and that his co-defendant was acting in collusion with the plaintiff: *East Assam Company* v. *Roche*, W. N. 1875, 238. Execution was stayed to enable defendant to appeal, in *Anglo-Italian Bank* v. *Wells*, 38 L. T. N. S. 197. An order directing payment by a day named, otherwise judgment to be signed, need not be served before signing judgment on default of payment: *Hopton* v. *Robertson*, 23 Q. B. D. 126; W. N. 1884, 77; 28 Sol. Jour. 375.

Where the action was on an untaxed bill of costs delivered within a year, the order made was for taxation and judgment for the amount certified: *Larkin & Co.* v. *McInerney*, 16 L. R. Ir. 246; see also *Smith* v. *Edwardes*, 22 Q. B. D. 10.

Leave to defend unconditionally.

(2) *Leave to defend unconditionally*:—This will be the order where the affidavit shows what the defence is, and gives reason for thinking that it is substantial, and may be sustained by evidence: *Runnacles* v. *Mesquita*, 1 Q. B. D. 416. Where the defendant was a surety, and had not acknowledged his indebtedness, and there was nothing to show that the defence was merely for delay, he was held entitled to put the plaintiff to proof of his claim, and was admitted to defend: *Lloyd's Banking Co.* v. *Ogle*, 1 Ex. D. 262.

So also where a set-off was shewn exceeding the plaintiff's claim: *Groom* v. *Rathbone*, 41 L. T. N. S. 591; *Conmee* v. *C. P. R.*, No. 2, under *Rule* 652; but see *Branwhite's case*, 40 L. T. N. S. 652; and where it was alleged that the plaintiff's affidavit was untrue, and the defence was stated to be that the services for which the plaintiff claimed remuneration had never been performed: *Ameuny* v. *Nawab Nazim of Bengal*, W. N. 1875, 239; 1 Charl. Ch. Ca. 47; and where the plaintiff in an action on a promissory note alleged, but did not state in his affidavit, that he was a *bonâ fide* holder for value, and the defendant swore to the defence that the bill was drawn in fraud of him, the defendant was held entitled to defend unconditionally as the onus of proof was on the plaintiff that he was a *bona fide* holder for value: *Fuller* v. *Alexander*, 47 L. T. N. S. 443; 52 L. J. Q. B. 103; *Millard* v. *Baddeley*, W. N. 1884, 96; 28 Sol. Jour. 412, 427.

Indorsers who denied receipt of notice of dishonour, although the protest was produced, were held entitled to have the matter tried: *Ontario Bank* v. *Burk*, 10 P. R. 561; see also *Hughson* v. *Gordon*, 10 P. R. 565.

(3) *Leave to defend on payment of money into Court within a reasonable time, or on other terms:*—Where it is not clear that there is a defence, but the defendant shews such a state of facts as leads to the inference that at the trial he may be able to establish a good defence: *Ray* v. *Barker*, 4 Ex. D. 279. **Rule 739. On terms.**

In *Anon*, 60 L. T. Jour., 85; 1 Charl. Ch. Ca. 45, Quain, J., gave leave to defend where a proper counter-claim was the defence, but confined the defence to the counter-claim.

In *Roberts* v. *Guest*, W. N. 1876, 10; 1 Charl. Ch. Ca. 53, judgment was ordered to be signed, unless the defendant paid the money into Court, where the defence was a counter-claim for costs in a suit in Chancery, in which an order for costs had not been obtained.

See also *German Bank* v. *Schmidt*, W. N. 1876, 10, and as to the amount to be paid: *Oriental Bank* v. *Fitzgerald*, W. N. 1880, 119.

Where the defence to an action by the holder of a bill of exchange was sworn to be that the acceptance was obtained by fraud, to which the plaintiff replied that he took the bill for value without notice of any fraud, it was held reasonable to give defendant leave to defend upon payment into Court of the amount of the bill: *Brooks* v. *Aylmer*, 73 L. T. Jour. 80.

In an action by a company on a call, a clerk of the company swore that notice of allotment was duly posted to defendant. Defendant swore that the letter was never received, it was held that this constituted no defence: see *Household Fire Insurance Company* v. *Grant*, 4 Ex. D. 216; but the defendant was entitled to cross-examine the clerk who swore to the posting, and leave was therefore given to defend on payment into Court: *Carta Para Gold Mining Company* v. *Fastnedge*, 30 W. R. 880.

Where a *primâ facie* case is made out on notes signed by a married woman, and the Judge not being satisfied that there was ground for a defence that the business was her husband's, and she only acted as his agent, and the defendant declined to pay money into Court, leave to sign judgment was granted: *Nelson* v. *Thorner*, 11 Ont. App. 616.

Where the defendant shews what his defence is, and his reasons for thinking it substantial, and it appears to be fairly in dispute, he ought not to be ordered to bring money into Court: *Runnacles* v. *Mesquita*, 1 Q. B. D. 416; *Dobie* v. *Lemon*, 12 P. R. 64.

Where in a claim for payment of sums of money, the defence set up is a denial and contradiction of the accounts on which the claim is founded, it is erroneous to make an order under this *Rule* refusing leave to defend, except upon the condition of the defendant paying into Court a definite sum within a certain time, and that, unless he does so, judgment shall be signed against him. This is especially the case where there are mortgages, and the creditor has been in possession as mortgagee: *Wallingford* v. *Mutual Society*, 5 App. Cas. 685.

A defendant is not entitled as of right to defend upon paying money into Court, without an affidavit of merits: *Crump* v. *Cavendish*, 5 Ex. D. 211.

A defendant who has paid money into Court has been held entitled to have it paid out to him if successful in the action, notwithstanding that a notice of appeal has been given: *Yorkshire Banking Co.* v. *Beatson*, 4 C. P. D. 213.

(4) *Leave to defend as to part on terms, and as to the residue unconditionally*—where the defendant's affidavit admits part of the claim to be due and discloses a defence upon the merits as to the residue. There is no power to grant leave to defend as to part of the claim only, on condition of payment of the amount as to which there is no defence. The proper judgment is, that the plaintiff have judgment for the amount admitted; the defendant to be at liberty to defend as to the residue: *Dennis* v. *Seymour*, 4 Ex. D. 80, and see *Rule* 741.

(5) *Dismissal of the motion.*—The simple dismissal of the plaintiff's motion will be equivalent to leave to defend: *Margate Pier, etc., Co.* v. *Perry*, W. N. 1876, 52; 2 Charl. Ch. Ca. 19; and, if the order giving him leave to defend did not name a time, the defendant was obliged to deliver his defence within eight **Effect of dismissal of motion.**

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Rule 740. days, under original *Rule* 162, otherwise judgment might be obtained by default, even though no statement of claim was delivered: *Atkins* v. *Taylor*, W. N. 1876, 11; *Margate Pier, etc., Co.* v. *Perry*, *supra*; *Rae* v. *Langford*, 10 L. R. Ir. 108; *Egerton* v. *Anderson*, W. N. 1884, 95; 28 Sol. Jour. 95. This is not now the practice in Ontario, as original *Rule* 162 has been abrogated; and where the motion is dismissed the plaintiff must proceed with the action in the usual way, by delivering a statement of claim.

The dismissal of a motion is held in England to be no bar to a fresh application on fresh materials: *Waystaff* v. *Jacobowitz*, W. N. 1884, 17. But see *Trench* v. *Mulcahy*, *supra*, p. 628.

Judgment for part. Where a good defence is not shewn to the whole of the plaintiff's claim, judgment may be signed under this *Rule* for so much of the claim as is not answered; see *Anon*, W. N. 1876, 53; 2 Charl. Ch. Ca. 22; *Hammer* v. *Flight*, 35 L. T. N. S. 127; W. N. 1876, 54; 2 Charl. Ch. Ca. 23. On appeal, however, in the last case, 36 L. T. N. S. 279, it was considered that the facts set out in the pleadings did not support the claim in respect of which the plaintiff sought to sign judgment, and the order was therefore refused.

Forms of orders, etc. For forms of orders under this *Rule*: see Appendix, Forms, Nos. 126-129. For forms of judgment after order and default in complying with the conditions imposed, see App. Forms, Nos. 175, 176; and where leave to defend refused, App. Form, No. 167.

Appeal. Where leave to defend has been given, an appeal against the discretion thus exercised will hardly ever be entertained: *Papayanni* v. *Coutpas*, W. N. 1880, 109.

How defendant to show cause.

740. The defendant may shew cause against such application by affidavit, or (*a*) by offering to bring into Court the sum indorsed on the writ. In such affidavit he shall state whether the defence he alleges goes to the whole or to part only, and if so, to what part, of the plaintiff's claim. And the Judge may, if he thinks fit, order the defendant (*b*) to attend and be examined upon oath; or to produce any books or documents or copies of or extracts therefrom. J. A. Rule 82.

Identical with the Eng. R. 1875, O. 14, r. 3 (1883, R. 117) except that the latter expressly provides at (*a*) "except in actions for the recovery of land." The effect of the Ont. *Rule* must be the same; at (*b*) the Eng. R. has "or in the case of a corporation, any officer thereof."

A defendant is not entitled as of right to defend upon paying money into Court without an affidavit of merits: *Crump* v. *Cavendish*, 5 Ex. D. 211.

The affidavit must be made by the defendant himself, where he is a person who can make an affidavit: *Muirhead* v. *Direct U. S. Cable Co.*, 27 W. R. 708; *Shelford* v. *Louth, etc., Ry. Co.*, 4 Ex. D. 317. Although a defendant, a corporation cannot make an affidavit, the *Rule* nevertheless applies, and the corporation must show cause under the words "or otherwise" in *Rule* 739, *i.e.*, by some other means than the affidavit of the defendant: *Ib.* The defendant's affidavit must disclose the defence: *Pascal* v. *Stone*, p. 629. A mere affidavit that he has a good defence is not sufficient: *per* Quain, J., *Anon*, 1 Charl. Ch. Ca. 48; W. N. 1875, 249, 250. The affidavit will not be insufficient merely because it contains only hearsay evidence: *Harrison* v. *Bottenheim*, 26 W. R. 362.

The application may be adjourned, if necessary, for better particulars of the plaintiff's claim: *Aston* v. *Hurwitz*, W. N. 1879, 194. In *Anon*, 60 L. T. Jour. 176; 1 Charl. Ch. Ca. 52, on an appeal from a Master who had ordered money into Court, a fresh affidavit not used before the Master being read, leave to defend unconditionally was given.

The Judge may, in his discretion, allow the plaintiff to file affidavits in reply to the defendant's affidavit: *Davis* v. *Spence*, 1 C. P. D. 719; this case was not approved in *North Central Waggon Co.* v. *The N. Wales Waggon Co.*, 39 L. T. N. S. 628, but has been followed in *Girvin* v. *Grepe*, 13 Ch. D. 174. The filing of an affidavit in reply, under this *Rule*, is however not a matter of right: *Rotheram* v. *Priest*, 49 L. J. C. P. 104; W. N. 1879, 190. **Rules 741-744.**

741. In any case if it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted to be due, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to, or as is admitted to be due, subject to such terms, if any, as to suspending execution, or the payment of any amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise as the Judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim. J. A. Rule 83. Defence as to part.

The Eng. R. 1875, O. 14, r. 4 (1883, R. 118), has not the words "in any case" at the beginning, and has the words "the amount" instead of the words "any amount." The two Rules otherwise correspond. See the Rule applied in *Hammer* v. *Flight*, 24 W. R. 346; 36 L. T. N. S. 279.

See notes to *Rule* 739.

742. If it appears to the Judge that any defendant has a good defence to the action, or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former. J. A. Rule 84. Where several defendants.

This *Rule* corresponds with the Eng. R. 1875, O. 14, r. 5 (1883, R. 119).

See notes to *Rule* 739.

743. Leave to defend may be given unconditionally, or subject to such terms as to giving security, (*a*) or otherwise, as the Court or Judge may think fit. J. A. Rule 85. Leave to defend may be absolute or conditional.

Identical with the Eng. R. 1875, O. 14, r. 6. That of 1883, R. 120, inserts at (*a*) "or time or mode of trial (in cases which under these Rules may be tried without a jury)."

See notes to *Rule* 739.

744. Where at any time after the writ of summons has been issued it is made to appear to the Court or a Judge on an *ex parte* application that it will be conducive to the ends of justice to permit a notice of motion for a judgment to be forthwith served, the Court or Judge may order the same Motion for judgment by leave after service of writ.

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Rule 744. accordingly; and when such permission is granted, the Court or Judge is to give directions, as to the service of the notice of motion and filing of the affidavits, as may be expedient. J. A. Rule 324.

Chy. G. O. 271 was to the same effect. There is no corresponding English Rule.

The Master or a Judge in Chambers may grant leave under this clause to make the motion, but under the next clause the motion itself must be made in Court: *Morrison* v. *Taylor*, 46 U. C. Q. B. 492. The report of *Lucas* v. *Fraser*, 9 P. R. 319, is erroneous. The motion was before Osler, J., in Court.

Where an order was erroneously made in Chambers instead of in Court, it was held that advantage of the irregularity must be taken by a summary motion to set aside the judgment, and that its invalidity could not be set up in an action founded upon it: *Martin* v. *Evans*, 6 Ont. 238.

(*a*) Upon hearing the motion the Court may grant the application on such terms and conditions as may be thought proper, or may refuse the same; or instead of either granting or refusing the same, may give such directions for the examination of either parties or witnesses, or for the making of further inquiries, or with respect to the further prosecution of the suit, as the circumstances of the case may require, and upon such terms as to costs as the Court thinks right. J. A. Rule 542.

The Chy. O. 272 was to the same effect.

In *Federal Bank* v. *Hope*, 6 Ont. 209, the Court refused to decide on a motion under this *Rule* whether a defence set up was a valid one, it not being clearly bad.

Where the plaintiff applied under the original *Rule* before the time for appearance, and the defendant had acted fraudulently in disposing of some property, and in otherwise embarrassing his creditors, it was held a proper case *as against the defendant* for the exercise of the discretion of the Court; but that the *Rule* could not be used to give an undue advantage against other creditors. Therefore, where other *bonâ fide* creditors were suing, but could not in ordinary course get execution till after the plaintiff, though they had commenced before him, an order was made on terms that the plaintiff should share *pari passu* with other judgment creditors who should place executions in the Sheriff's hands within eighteen days from the service of the plaintiff's writ, in case of an insufficiency of assets: *Kinloch* v. *Morton*, 9 P. R. 38; 1 C. L. T. 660. Since *The Creditors' Relief Act* a provision of this nature in the judgment for protection of other creditors is unnecessary.

After the above decision some of the Judges expressed doubts as to the power to impose such conditions, under the terms of the original *Rule*, and accordingly *Rule* 542, consolidated in the above *Rule*, was passed to make the power clear. See also 20 C. L. J. 77.

It was also held that there was no power to amend an order granted, without concealment or fraud, and not containing such conditions: *Harrison* v. *Leach*, 20 C. L. J. 124; 4 C. L. T. 185.

Special circumstances necessitating a hearing out of the ordinary course must be shewn: *Francis* v. *Francis*, 9 P. R. 209. Something beyond the plaintiff's desire to get a speedy judgment is necessary: *Kinloch* v. *Morton*, 9 P. R. 38; *Lucas* v. *Fraser*, 9 P. R. 319.

Where the affidavits filed for and against the motion were conflicting, the action was ordered to be entered for trial: *Francis* v. *Francis*, 9 P. R. 209.

5. Application for Account.

Rule 745.

745. In default of appearance to a writ indorsed under Rule 247, and after appearance [in a case in which the preceding Rules do not entitle the plaintiff to a judgment or order on præcipe or otherwise, then] unless the defendant, by affidavit or otherwise, satisfies the Court or a Judge that there is some preliminary question to be tried, an order for the account claimed, with all directions formerly usual in the Court of Chancery in similar cases, shall be forthwith made. J. A. Rule 86.

Action for account.

Same as the Eng. R. 1875, O. 15, r. 1, (1883 R. 121) except that the words in brackets are new.

Indorsement of claim for account.

Rule 247 provides for the indorsement of a claim for an account in all cases of ordinary account, such as a partnership, or executorship, or ordinary trust account, where the plaintiff desires to have an account taken in the first instance. The present *Rule* provides for two cases; first, default of appearance; in which case the order will be made as of right; secondly, appearance; in which case the order is to be made unless the defendant shows that there is some question which ought to be tried first.

A claim against an executor for an account on the footing of wilful default, is not an ordinary account within *Rule* 247, and therefore does not come within the present *Rule*: *Re Bowen, Bennett* v. *Bowen*, 20 Ch. D. 538.

An order for account may be made in any Division of the High Court: *York* v. *Stowers*, W. N. 1883, 174.

Before taking proceedings under this *Rule* in default of appearance the plaintiff must file an affidavit of service, or of notice in lieu of service: see *Rule* 704.

The *Rule* applies not merely where the plaintiff claims an account from defendant, but also where the plaintiff will himself be the accounting party: *Molony* v. *Molony*, 21 L. R. Ir. 91.

Under the corresponding English Rule, where the account claimed is an executorship or administration account, the order made is the same as the usual administration decree formerly made in Chancery: see *Bell* v. *Lowe*, W. N. 1875, 229; 1 Charl. Ch. Ca. 56; and *Pratt* v. *Brown*, cited in Dan. Forms, 3rd ed., 206. An account of the amount due in a foreclosure action may also in England be obtained: *Gatti* v. *Webster*, 12 Ch. D. 771; see *Smith* v. *Davies*, 28 Ch. D. 650; and in such cases any matter required on further consideration as to costs may be proved by affidavit: *Beaney* v. *Elliott*, W. N. 1880, 99. An affidavit not before the Chief Clerk was allowed to be read on further directions, there having been no trial: *Re Michael, Dessan* v. *Lewin*, 52 L. T. N. S. 609. In Ontario it is not customary to make orders for an account under this *Rule*, in mortgage actions.

The benefit of the *Rule* is only to be given where a writ is indorsed under *Rule* 247 with a claim to have an account taken. The proviso to that *Rule* states that the *Rule* does not apply to proceedings under *Rules* 965 to 988, i.e., to proceedings taken for administration in a summary way *without writ*, in which case, of course, there could be no indorsement. It will also not apply to cases of foreclosure, sale, and redemption, where a judgment may be obtained on *præcipe*, or on motion in Chambers: *Rules* 717, 718, 726. A form of indorsement claiming an account in administration actions is given in the Appendix, No. 11 (*a*, and *b*). It was pointed out in *Gatti* v. *Webster*, 12 Ch. D. 771, that the form of judgment given in Seton, 4th ed., p. 8, containing the following words; "a Judge not requiring any trial of this action other than the hearing of this application"—may not always be appropriate, and they are not to be used indiscriminately, so as to prejudice any issue that may be raised by the subsequent pleadings.

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Rules 746, 747.

The provisions of the *Rules* 499, 520, 648, for enforcing orders for discovery or inspection of documents, are not applicable to the order for accounts under this *Rule: Pike* v *Keene*, 35 L. T. N. S. 341; 24 W. R. 322.

Only common accounts will be directed to be taken, not accounts and inquiries the right to which depends upon the plaintiff making a case for them at the trial: *Re Gyhon, Allen* v. *Taylor*, 29 Ch. D. 834.

In a redemption action an order under the corresponding English Rule of 1883 (R. 121), should be for an account and inquiries only, and must not contain further directions equivalent to a general redemption decree: *Clover* v. *Wills & West, etc., Soc.*, 32 W. R. 895; 50 L. T. N. S. 382; 53 L. J. Chy. 622.

This *Rule* is not intended to enable parties upon a summons to obtain what is equivalent to a decree, but merely to take accounts upon which the Court can make a decree: *S. C.* W. N. 1884, 110; see also *Borthwick* v. *Ransford*, 28 Ch. D. 79.

The plaintiff cannot apply for the determination of questions at issue, except where the *Rules* permit such applications: *S. C.* 54 L. J. Chy. 569.

Application to be on notice.

746. An application for such order as mentioned in the last preceding Rule shall be made on notice, (*a*) and be supported by an affidavit filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account. The application may be made at any time after the time for entering an appearance has expired. J. A. Rule 87.

(*a*) Instead of "on notice" the Eng. R. 1875, O. 15, r. 2 (1883, R. 122), has the words "by summons." The *Rules* are otherwise identical. Where the defendant has not appeared, besides the affidavit mentioned in this *Rule*, the plaintiff is required by *Rule* 304 to file an affidavit of service. In cases where an order allowing service is necessary: (see *Rule* 274), the allowance should, doubtless, also be proved. If an order has not been obtained, the application to allow the service and for an order under this *Rule*, might be conveniently made at the same time. The application will be made in Chambers.

A form of summons from which a notice of motion may be framed will be found in Danl. Forms (3rd ed.) 206.

It would seem that a statement of claim should, in general, be delivered before a motion is made under this *Rule*. In *Re Huckwell, David* v. *Dalton*, W. N. 1879, 86, in an administration action, the motion was directed to stand over until a statement of claim was delivered See also *Green* v. *Colby*, 24 W. R. 246.

Orders for administration, partition or sale.

747. But the preceding two Rules are not to prevent orders for the administration of the estate real or personal of a deceased person, or for the partition or sale of an estate from being obtained on motion without any previous notice or other preliminary proceeding, and in the manner provided for by the Rules 965 to 991 in that behalf. J. A. Rule 88.

See note to *Rule* 745, *supra*.

Although *Rule* 745 should be considered to apply in some cases of administration and partition, nevertheless a judgment or order will in such cases be most appropriately obtained under *Rules* 965, *et seq.*

6. Motion for Judgment.

Rules 748, 749.

748. Unless it is elsewhere provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment. J. A. Rule 315. How judgment obtained.

Same as the Eng. R. 1875, O. 40, r. 1 (1883, R. 559).

The "Court" in this *Rule* means the "High Court of Justice," whether as distinguished from its Divisions or not: *Wellbank* v. *Conger*, 12 P. R. 354; usually the motion will be made before a single Judge: see sec. 61 of the Act, and *Davenport* v. *Ward*, 47 L. T. N. S. 348.

Rules 705 *et seq.* provide for the plaintiff's signing final judgment by default of appearance, and *Rules* 719 *et seq.* for the like judgment upon default of pleading without any motion.

Rule 718 provides for a judgment or order on *præcipe* in cases of foreclosure, sale or redemption.

Rules 687 and 688 provide for judgment on a trial, without a motion for judgment afterwards.

Rule 768 provides for a like judgment where, under the Act or these Rules, or otherwise, it is provided that judgment may be entered or signed upon the filing of an affidavit or production of a document.

Rules 965, 991 provide for obtaining judgments in Chambers for administration or partition.

Motions for judgment may be necessary in other cases to obtain the proper relief in case of defendant's default in appearing or pleading: see *Rule* 727; or where the Judge at the trial of the action has not ordered judgment to be entered: see *Rule* 682 and *Wellbanks* v. *Conger*, 12 P. R. 354; or different issues or questions have been determined in different ways, and at different times, where a motion for judgment on the result may thus become necessary: see *Rules* 729, 753; see also *Rules* 739, 745.

Before setting a case down on motion for judgment, the plaintiff must in general have delivered a statement of claim, or the notice authorized in lieu thereof: see *Minton* v. *Metcalf*, 46 L. J. Chy. 584; W. N. 1877, 142; and *Rule* 369; *Hunter* v. *Wilcockson*, 9 P. R. 305, and notes to *Rule* 368 p. 399. It would not seem to be required in cases under *Rule* 299; see notes to that *Rule*.

Two clear days' notice under *Rule* 479 is sufficient: *Martens* v. *Birney*, 10 P. R. 368; see *Roupell* v. *Parsons*, W. N. 1876, 61.

By direction of the Judges of the Chancery Division, the Clerk of Records and Writs is required in future to see that all preliminary proceedings are regular, before setting a cause down, and to classify motions for judgment into defended and undefended ones. Solicitors will therefore require, in setting down cases for judgment for default of appearance or pleading (1) to file with the Clerk of Records and Writs the writ of summons, affidavit of service of writ, and statement of claim, affidavit of non-appearance or no defence, and proof of the allowance of the service of the writ, when that is necessary under *Rule* 271; (2) a certificate of state of cause, where the action is pending in an outer county.

No motion for judgment is necessary in an action in the High Court, after a trial or assessment in a County Court: *Scutt* v. *Freeman*, 2 Q. B. D. 177.

It seems that in England, as a matter of form, further directions cannot be reserved; but the same object is accomplished by declaring that the further consideration of the action is adjourned: *Bennett* v. *Moore*, 1 Ch. D. 692; *Gilbert* v. *Smith*, 2 Ch. D. 686; *Brassington* v. *Cussons*, 24 W. R. 881. This difficulty would seem not to exist in practice here.

749. At the trial of any action no party shall be entitled to judgment on the grounds of his pleading being true, if No judgment on true plead-

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Rules 750, 751.

the facts proved are not sufficient in point of law to entitle him to judgment. 44 V. c. 5, s. 44.

ings merely.

In the Court of Chancery the Judge at the hearing always disposed of both questions of fact and law. He decided not only whether the plaintiff had proved the truth of his case, or the defendant the truth of his defence; but also whether the claim or the defence was a valid one.

At Common Law it was otherwise. The Judge at *Nisi Prius* was a commissioner to try the issues of fact joined between the parties as appearing upon the record, and to direct a verdict for plaintiff or defendant accordingly. He had power to decide questions of law arising incidentally in the course of the trial of the issues of fact, and in many other ways to deal with matters of law; but the broad question whether the plaintiff's claim, assuming his facts proved, was good in law, or whether the defendant's defence, if true in fact, was good in law, it was not within his province to determine. Those questions could be disposed of by the Court by demurrer, or brought before the Court in *banc* after trial by motion for judgment *non obstante veredicto*, and in other ways; but not before a Judge at the trial.

Gray v. *Stait*, 11 Q. B. D. 668, illustrates this *Rule*. That was an action for wrongful distress by seizure of goods off the premises after the expiration of the tenancy, and the tenant had given up possession. The defence set up was proved, viz.: that they had been fraudulently removed to prevent distress for rent; but nevertheless judgment was directed to be entered for the plaintiff for 1s.

See also *McGee* v. *Kane*, 14 Ont. 226, where this *Rule* was held not to be applicable. In that case the statement of claim had been held to be sufficient upon a demurrer, and the plaintiff having at the trial proved the material allegations in it, it was held that an objection that the facts proved were not sufficient in law to entitle the plaintiff to judgment, could not be entertained, and that the decision on the demurrer should be followed at the trial. See also *Weir* v. *Mathieson*, 11 Gr. 390.

If plaintiff was entitled at service of writ, but not afterwards.

750. In case the title of the plaintiff in an action to recover land, as alleged in the writ, existed at the time of service thereof, but had expired before the trial, the plaintiff shall, notwithstanding, be entitled to judgment, according to the fact that he was entitled at the time of serving the writ, and to his costs of the action. R. S. O. 1877, c. 51, s. 31.

A writ of possession will be allowed to issue although the plaintiff's estate terminated after action commenced, and before trial unless it will be unjust and futile to issue the writ, and it is for the defendant to shew affirmatively that such will be the result of issuing the writ: *Knight* v. *Clark*, 15 Q. B. D. 294.

Notice of motion for judgment.

751. Where the evidence in any action is under these Rules taken by affidavit, the notice of motion for judgment thereon shall be given at the same time or times after the close of the evidence, as in other cases is by these Rules provided after the close of the pleadings. J. A. Rule 306.

The Eng. R. 1875, O. 38, r. 6 (1883, R. 550), requires the affidavits to be printed. The notice is therein called "Notice of trial," instead of notice of motion for judgment." Otherwise the Rules are to the same effect.

The provisions of this *Rule* as to time do not apply to exclude the use of affidavits made under a Judge's order, though filed after notice of trial: *Waring* v. *Lacey*, 24 W. R. 318.

752. No action shall, except by leave of the Court or a Judge, be set down on motion for judgment after the expiration of 1 year from the time when the party seeking to set down the same first became entitled so to do. J. A. Rule 320. No motion after one year.

Identical with the Eng. R. 1875, O. 40, r. 9, (1883, R. 567).

753. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner [and there is no direction of a Court or Judge for the entry of judgment], the plaintiff may set down the action on motion for judgment as soon as such issues or questions have been determined. If he does not so set it down, and give notice thereof to the other parties, within 14 days after his right so to do has arisen, then after the expiration of such 14 days, any defendant may set down the action on motion for judgment, and give notice thereof to the other parties. J. A. Rule 318. After trial of issues of fact.

The words in brackets are not in the Eng. R. 1875, O. 40, r. 7, (1883, R. 565), and it names 10 days instead of 14, otherwise it is the same. The introduction of the words in brackets appear to make no difference in the construction of the above *Rule;* they are implied, though not expressed in the English Rule.

This *Rule* has been held to apply where a reference had been ordered to the Master to inquire whether a partition alleged in the pleading was binding upon the parties thereto. The Master found in the affirmative. A motion for judgment under this *Rule* was held proper, and the judgment was directed to be entered according to the report: *Consolidated Bank* v. *Wallbridge*, 18 C. L. J. 205.

754. Where issues have been ordered to be tried, or issues or questions of fact to be determined, in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or a Judge for leave to set down the action on motion for judgment, without waiting for such trial or determination. And the Court or Judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as appear just, and may give any directions which may appear desirable as to postponing the trial of the other questions of fact. J. A. Rule 319. After trial of some only of the issues of fact.

Identical with the Eng. R. 1875, O. 40, r. 8, (1883, R. 566).

Where an order was taken, by the consent of the parties, to determine certain issues of fact in a manner which the Judge afterwards held to be beyond

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Rule 755. the powers of the Court, Jessel, M.R., refused to proceed with the trial, on the ground that any decision founded upon this consent order would not be binding upon the parties: *Republic of Bolivia* v. *National Bol. Nav. Co.*, 24 W. R. 361.

On motion for judgment or new trial final judgment may be given by Court.

755. Upon a motion for judgment, or for a new trial, the Court may, (*a*) if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly; or may, if it is of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit. J. A. Rule 321.

Identical with Eng. R. 1875, O. 40, r. 10. The *Rule* of 1883, R. 568 introduced at *(a)* "draw all inferences of fact not inconsistent with the finding of the jury." Under this language in the Eng. R. it was held that when the Court is satisfied that the verdict is against the weight of evidence, and considers that all the facts are before it, it may enter judgment accordingly instead of ordering a new trial: *Millar* v. *Toulmin*, 17 Q. B. D 603; 12 App. Cas. 746.

The motion for judgment referred to must mean not the ordinary motion, to the Judge who tried the cause, for judgment after the findings upon the facts, but such a motion as is contemplated by *Rule* 798, where a judgment has already been directed to be entered, and a Divisional Court is moved for a new trial, or to enter another judgment.

Where the case is one proper for the decision of a jury, the powers conferred on the Court by this *Rule* may not affect the decision in *Moore* v. *Connecticut Mutual*, 6 App. Cas. 644, that a Court has power to enter a verdict in accordance with what they deem to be the true construction of the findings coupled with other facts, either admitted or so clearly proved that there could be no controversy about them, but have no power to enter a verdict in direct opposition to the finding of the jury upon a material issue: see also *Perkins* v. *Dangerfield*, 51 L. T. N. S. 535; W. N. 1884, 72; *Jones* v. *Hough*, 5 Ex. D. 122; and *Millissich* v. *Lloyds*, 40 L. J. [illegible]; W. N. 1877, 36; *Sewell* v. *B. C. Towing Co.*, 20 C. L. J. 170; 4 C. [illegible]; 9 S. C. R. 527.

This *Rule*, however, seems to confer upon the Court, the power to enter a verdict not in accordance with the finding of the jury, where the Court considers that the most convenient course is not to send the case for the opinion of another jury, but to enter a judgment in accordance with their own views, upon the whole case, if they consider that they have the proper materials before them upon which to decide: see *Hamilton* v. *Johnson*, 5 Q. B. D. 263, 266; *Lancey* v. *Brake*, 10 Ont. 428; *James* v. *Clement*, 13 Ont. 115; *Palmer* v. *Miller*, *Ib.*, 576; *Campbell* v. *Cole*, 7 Ont. 127; or to finally determine all questions in dispute though the jury may not have found upon them all: *Sewell* v. *British Columbia Towing Co.*, *supra*.

Where, therefore, the case is one in which no additional facts remain to be proved, and in which, upon the facts proved, no jury would be justified in finding a verdict adverse to the party against whom it has been found, the Court has before it all the materials necessary for finally determining the questions in dispute, and will act under this *Rule*: *Yorkshire Banking Company* v. *Beatson*, 5 C. P. D. 109, 127; *Stewart* v. *Rounds*, 7 Ont. App. 515, 519; *McConnell* v. *Wilkins*, 13 Ont. App. 438.

The power must be most sparingly and cautiously exercised, (*per* Wilson, C.J., in *Stewart* v. *Rounds*, *supra*); and will not be exercised where there is evidence to go properly to a jury: *Brewster* v. *Durrand*, W. N. 1880, 27; or

where if a new trial were ordered further evidence might be adduced: *Clark* v. *Molyneux* 3 Q. B. D. 237, 245; see *Baker* v. *G. T. Ry. Co.*, 11 Ont. App. 72. **Rule 756.**

In *Milissich* v. *Lloyds*, 46 L. J. C. P. 404, W. N. 1877, 36, an action for libel, the Court held that whether the report of a trial in question was a fair one or not, was a question for the jury, which the Court would not withdraw from them under this *Rule*.

Where there was a conflict of evidence, and the Judge who tried the cause without a jury, attributed greater weight to the evidence of some witnesses than others, but, in the opinion of the Court, took a wrong view of the law, the Court refused to make a decree on the evidence, and sent the case for a new trial: *Canada Landed Credit Co.* v. *Thompson*, 8 Ont. App. 696.

See also for applications of this *Rule*; *Mercier* v. *Williams*, 9 Q. B. D. 337; 10 App. Cas. 1, where judgment was entered for defendant upon a motion for new trial in an interpleader issue; *Daun* v. *Simmins*, 40 L. T. N. S. 556; 41 L. T. N. S. 783; 28 W. R. 129; W. N. 1879, 178; where a non-suit was entered, after a verdict for plaintiff, and though the rule only asked for a new trial, the Court being of opinion that there was really no evidence in support of the findings: also *Batty* v. *Clever*, 71 L. T. Jour. 43; and *Waddell* v. *Blockley*, 10 Ch. D. 416; *Eastland* v. *Burchell*, 38 L. T. N. S. 563; *Rosenberger* v. *Grand Trunk Ry. Co.*, 32 C. P. 349, 365; 8 Ont. App. 482; 9 S. C. R. 311; *Standard Bank* v. *Dunham*, 14 Ont. 67; *Heath* v. *Pugh*, 6 Q. B. D. 355.

The Court declined to act under this *Rule* in *Garland* v. *Thompson*, 9 Ont. 376; see also *Hislop* v. *McGillivray*, 7 C. L. T. 37.

This *Rule* was held not to apply to Inferior Courts by virtue of sec. 77 of the Jud. Act of 1881 (now R. S. O. 1887, c. 47, s. 23; c. 51, s. 73): *Pryor* v. *City Offices Co.*, 10 Q. B. D. 504.

756. Any party to an action may at any stage thereof apply to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, [(*w*) or in the examination of any other party] be entitled to; [(*x*) and it shall not be necessary to wait] for the determination of any other question between the parties (*y*); [(*z*) or he may so apply where the only evidence consists of documents and such affidavits as are necessary to prove their execution or identity without the necessity of any cross-examination; or he may so apply where infants are concerned, and evidence is necessary so far only as they are concerned, for the purpose of proving facts which are not disputed.] Summary relief on motion upon admissions in pleadings, etc.

(*a*) The foregoing Rules shall not apply to such applications, and any such application may be made by motion as soon as the right of the party applying to the relief claimed has appeared from the pleadings.

(*b*) The Court or a Judge may, on any such application, give such relief, subject to such terms, if any, as such Court or Judge may think fit. J. A. Rule 322.

(*w*) The words here in brackets are not in the Eng. R. 1875, O. 40, r. 11, (1883, R. 376), which here has "or otherwise," and those words were held to include admissions contained in an affidavit filed on a previous interlocutory application made in an action in which no pleadings had been delivered,

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Rule 756

and the writ not specially indorsed: *Landergan* v. *Feast*, 34 W. R. 469, 691; 54 L. T. N. S. 369. This was reversed on appeal: 55 L. T. N. S. 42; 55 L. J. Chy. 505; on the ground that the admission was not definite enough, and it was held that there must be a clear admission in the action in which the admission is made.

(*x*) Instead of the words in brackets here, the English Order has the words "without waiting."

(*y*) Where one defendant does not appear, or does not deliver a defence, and another delivers a defence on which the plaintiff's right to relief is admitted, the plaintiff may proceed against the latter under this *Rule*, and against the former by default: *Re Smith's Estate*, *Bridson* v. *Smith*, 24 W. R. 392; *Parsons* v. *Harris*, 6 Ch. D. 694; see however *Warner* v. *Davies*, 79 L. T. Jour. 136. See also *Jenkins* v. *Davies*, 1 Ch. D. 696, where a statement of defence, purporting to be the defence of a husband and wife, raised no defence as regarded the husband, and the plaintiff was held entitled under the English rules of pleading (though it would be otherwise here under *Rule* 403) to judgment against the husband as admitting the plaintiff's claim, without waiting for the determination of the case against the wife.

(*z*) The words here in brackets are not in the English Rule and are taken from the Chy. G. O. No. 270.

The object of this *Rule* is to enable a plaintiff or defendant to get rid of so much of the action as there is no controversy respecting. If the whole issue is not in controversy, either party may be entitled to move on the admissions of the other: *Thorp* v. *Holdsworth*, 3 Ch. D. at p. 640.

There cannot be an admission under this *Rule* where there are pleadings, until both claim and defence, (*Jurmer* v. *Davis*, 23 Sol. Jour. 462,) have been delivered: *McLeod* v. *Sexsmith*, 12 P. R. 606; and the indorsement on a writ was held to be not a pleading within the *Rule*: *Wallis* v. *Jackson*, 23 Ch. D. 204, followed by Boyd, C., in *Fell* v. *Williams*, though not mentioned in the report 3 C. L. T. 358; see also *Gillott* v. *Ker*, 24 W. R. 428; and the reference to pleadings in clause (*a*) of the *Rule*; and *Landergan* v. *Feast*, *supra*.

The *Rule* is applicable at any stage of the action, after pleadings: *McLeod* v. *Sexsmith*, *supra*, and therefore it was held that the plaintiff was entitled to judgment on an admission under this *Rule*, though he had delivered a reply, and the action was set down for trial: *Brown* v. *Pearson*, 21 Ch. D. 716; and the *Rule* may be acted on at the trial: *Tildesley* v. *Harper*, 7 Ch. D. 403. After a judgment obtained without pleadings, the *Rule* was held to be applicable on a motion under *Rule* 876 for leave to issue execution against a person as a partner under a judgment against the firm: *Tennant* v. *Manhard*, 12 P. R. 619.

The entering of a dispute note under *Rule* 299, limiting the defence to a part of the sum claimed and admitting the remainder is an admission under this *Rule*: *Crawford* v. *Gemmell*, 7 C. L. T. 117.

It is in the discretion of the Judge whether to give relief on the motion or not, and the Court of Appeal will not review his discretion: *Mellor* v. *Sidebottom*, 5 Ch. D. 342.

A defendant may move upon an admission entitling him to the "relief" of having the action dismissed: *Pascoe* v. *Richards*, 50 L. J. Chy. 337; 44 L. T. N. S. 87; *The Naples*, 35 W. R. 59.

In the exercise of such discretion, parties are, as a matter of convenience, not allowed in England to make under this *Rule* applications which involve a serious question of law to be argued which might better be decided on demurrer, or at the trial: *per* Mellish, L.J., in *Gilbert* v. *Smith*, 2 Ch. D. 689; *Mellor* v. *Sidebottom*, 5 Ch. D. at p. 344. See also *Studdert* v. *Von Steiglitz*, 19 L. R. Ir. 237.

These cases, however, do not fully apply in Ontario. The provisions of this *Rule*, which are not contained in the English Rule, are taken from and supersede the former Chancery practice regulating hearings on motion for decree (see Chy. O. 270), and on bill and answer. On a motion for decree the examination of a defendant might be read with his answer against him: *Proctor* v. *Grant*, 9 Gr. 31; *Mathers* v. *Short*, 14 Gr. 255; see also *Powell*

v. *Lea*, 20 Gr. 621; and *Rogers* v. *Wilson*, 12 Ont. 322. Affidavits proving exhibits might formerly be read on motion for decree under Chy. O. 270, or on a hearing on bill and answer: see *Killaly* v. *Graham*, 2 Gr. 281; *Chalk* v. *Raine*, 13 Jur. 981. But *query* how far this is the case now: *Cook* v. *Lemieux*, 10 P. R 577. It may be found that upon the documents which may be referred to the questions raised in the action cannot satisfactorily be disposed of, in which case the action may be directed to be brought on for trial in the usual way: *Gardner* v. *Brown*, (before Galt, C.J., 28th October, 1889). **Rule 756.**

Both those methods of hearing a case were formerly employed in cases involving the consideration of important questions of law. Suits for the construction of wills are familiar examples: see for instance *Fuller* v. *Macklem*, 25 Gr. 455; *Robson* v. *Argue*, 25 Gr. 407; *Patton* v. *Hickson*, 25 Gr. 102; *Clarkson* v. *Scott*, 25 Gr. 373. In such cases this *Rule* is no doubt applicable, and the motion will be properly made in Court: *Rogers* v. *Wilson*, 12 Ont. 322. In simpler cases similar to those in which the English Rule was intended to apply, the application may be made in Chambers: see *Gough* v. *Heatley*, W. N. 1884, 14; 32 W. R. 385; 49 L. T. N. S. 772; *Cook* v. *Heynes*, *Ib.* 75; *London, etc.*, v. *Digby*, 36 W. R. 497; 58 L. T. N. S. 724; 57 L. J. Chy. 505. The *Rule* has frequently been applied by the Master in Chambers: see *Trust and Loan Co.* v. *Hill*, 9 P. R. 8.

Even in England an application may be made where the judgment asked for is in the nature of a final judgment and not merely interlocutory: *Gilbert* v. *Smith*, 2 Ch. D. 686; *Jenkins* v. *Davies*, 1 Ch. D. 696; *Re Barker's Estate*, 10 Ch. D. 162, 165; but it has been held that the party moving must have a clear case, and if he claims a right which does not exist at law, the fact that it is not denied in the other party's pleadings will not entitle him to judgment: *Chilton* v. *London*, 7 Ch. D. 735; see *Rule* 749.

In an action on a foreign judgment where the only defence was a denial of the judgment, it was held that the plaintiff was not entitled to judgment under this *Rule*, upon the pleadings and an exemplification of the judgment, as it was necessary for the plaintiff to give evidence to connect the defendant with it, and support its genuineness, the defendant having put the judgment distinctly in issue: *Henebery* v. *Turner*, 2 Ont. 284. Illustrations.

In reply the plaintiffs admitted that a collision was not due to default of the defendant, or those on board, and submitted to a decree that it was due to inevitable accident. On motion by the defendant on the admission, the action was dismissed with costs: *The Naples*, 35 W. R. 59.

Where the plaintiff's case is not conclusively made out, the motion will be refused: *Cook* v. *Lemieux*, 10 P. R. 577, where it was held that much care must be taken in cases under this *Rule* not to take away the right of trial on *vivâ voce* evidence: see also *Gardner* v. *Brown*, *supra*.

In an action for infringement of a patent, the defendant admitted the infringement in ten instances, but denied any other infringement. On a motion for judgment on the pleadings the plaintiff was held bound to take the denial as well as the admissions, and entitled to an inquiry as to damages limited to the ten instances admitted: *United Telephone Co.* v. *Donohoe*, 31 Ch. D. 399.

An admission by defence must be taken just as it is pleaded: *Demorest* v. *Midland*, 10 P. R. 640. Thus in an action on a policy of insurance for £1000, a defence that on an apportionment of the loss under a certain condition in the policy, the defendants were liable for £62 only was set up. The plaintiffs were not allowed to have judgment for this and proceed for more, the defendant's contention being that the admission was that £62 was due as the result of an entire defence showing that no more was due: *Andrews* v. *Patriotic Assurance Co.*, 18 L. R. Ir. 115.

The whole of an admission in a pleading must be looked at, and the sense, and not merely the grammatical construction or the form thereof, is to be regarded as the criterion of the extent and scope of the admission: *Dovey* v. *Irwin*, 4 Ont. 8; and it must be clear and distinct: *Landergan* v. *Feast*, 34 W. R. 691; 55 L. T. N. S. 42.

The statement of one partner on his examination (in a suit against the firm), as to transactions which occurred during the partnership binds all the partners,

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Rule 756. unless they seek by examination of some of themselves to contradict or qualify the statements of the partner whose evidence they object to: *Taylor* v. *Cook & Co.*, 11 P. R. 60.

In a foreclosure action, the statement of defence craved leave to refer to deeds mentioned in the statement of claim and, save as by such deeds when produced should appear, the defence did not admit that they were to the effect mentioned in the statement of claim. Upon motion for judgment under this *Rule*, the deeds being produced, it was held that there was a sufficient admission of the execution of the deeds, as they appeared to be of the dates, and made between the parties, mentioned in the statement of claim: *Barnard* v. *Wieland*, W. N. 1882, 103; 30 W. R. 947.

In an action on a covenant for payment in a mortgage, the defendant admitting the mortgage, submitted that the land should be sold and proceeds applied in payment of the plaintiff, or, he having sold the land to another who had assumed the mortgage, that if he was bound to pay the plaintiff he was entitled to an assignment of the mortgage, and judgment was given for the plaintiff under this *Rule*, it being held that the defendant as mortgagor was not entitled to an assignment: *Crozier* v. *Alkenbach*, 19 C. L. J. 79.

Judgment for possession was given against a mortgagor who admitted the mortgage and default simply: *Trust & Loan Co.* v. *Hill*, 9 P. R. 8; so where he admitted that his mortgage was in default and plaintiff was mortgagee, merely saying, in addition, that some one else was in possession: *Padgett* v. *Binns*, W. N. 1884, 10; see also *Croft* v. *Collingwood*, *Ib.* 33.

Where the plaintiff's claim is admitted, but the defendant sets up a counter-claim for damages for a larger amount, the plaintiff is not necessarily entitled to judgment upon the admission of his claim. *Semble* if the counter-claim is apparently frivolous or unsubstantial, the plaintiff would be entitled to have the amount of his claim brought into Court to await the result: *Mersey Steamship Co.* v. *Shuttleworth*, 10 Q. B. D. 468; affirmed in appeal 11 Q. B. D. 531. A judgment for the plaintiff was made, where the counter-claim was in fact an independent claim for damages as to the quality of other goods than those for the price of which the plaintiff was suing; but execution was directed to be stayed till after the trial, if the defendant should pay the amount of judgment into Court: *Showell* v. *Bowron*, W. N. 1883, 50; 31 W. R. 550; 48 L. T. N. S. 613; 52 L. J. Q. B. 284.

In *Coddington* v. *Jacksonville, Pensacola and Mobile Railway Co.*, 39 L. T. N. S. 12, the plaintiff claimed a charge upon certain bonds of a foreign state which were deposited in the bank to the credit of the cause. The defendants, in their answer, admitted the plaintiff's title, and an order was made, before the hearing, for the sale of the bonds as perishable goods within the meaning of *Rule* 1133.

Under this *Rule* in a partition action, an inquiry was directed as to the persons interested in the property: *Gilbert* v. *Smith*, 2 Ch. D. 686; an order for sale was made: *Burnell* v. *Burnell*, 11 Ch. D. 213; an order was made for taking the accounts of partnership dealings: *Turquand* v. *Wilson*, 1 Ch. D. 85; the agent of the trustees of a will was ordered to deliver up all securities relating to the testator's estate, and to account for all sums received on behalf of the estate: *Rumsey* v. *Reade*, 1 Ch. D. 643; and an order for a dissolution of a partnership: *Thorp* v. *Holdsworth*, 3 Ch. D. 637; see also *Bennett* v. *Moore*, 1 Ch. D. 692; *Martin* v. *Gale*, 4 Ch. D. 428. Probably also the common application for payment into Court by an accounting party of a sum admitted to be in his hands may now, at any rate before judgment, be made in Chambers under this *Rule*, though formerly made in Court: *Re Curry*, 8 P. R. 340. As to what is a sufficient admission for this purpose, see *Re Curry*, *supra*; *Re Babcock*, 8 Gr. 409; *Collins* v. *Orme*, 3 Chy. Ch. 70; *London Syndicate* v. *Lord*, 8 Ch. D. 84; *Freeman* v. *Cox*, *Ib.* 148; *Symonds* v. *Jenkins*, 34 L. T. N. S. 277.

Admissions in letters written by a trustee before, and after, action brought, that he has received trust funds, and the recital of that fact in the settlement, the execution of which by the trustee has been proved, are sufficient admissions to support an order for payment into Court, although there is no formal

admission in the pleadings: *Hampden* v. *Wallis*, 27 Ch. D. 251; see also *Porrett* v. *White*, 31 Ch. D. 52. **Rules 757, 758.**

The Court can, on an interlocutory application, when it has before it the parties to an account, look at all the facts of the case, and use its discretion as to disallowing charges to which the party making them is clearly not entitled, and will order payment into Court of the sum which it thus decides to be plainly due to the other party: *Wanklyn* v. *Wilson*, 35 Ch. D. 180.

A foreclosure decree was refused where the defence did not admit the mortgage deed: *Davies* v. *Smith*, 29 Sol. Jour. 115 [or *Smith* v. *Davies*, 29 Sol. Jour. 132]: see W. N. 1884, 242; 52 L. T. N. S. 19.

Where a solicitor put in a fraudulent defence for his client, without the knowledge of the client making admissions on which judgment was obtained against the client, the judgment was set aside and the client allowed to withdraw the defence and put in a fresh one: *Williams* v. *Preston*, 20 Ch. D. 672.

It seems that in England, as a matter of form, further directions cannot be reserved; but the same object is accomplished by declaring that the further consideration of the action is adjourned: *Bennett* v. *Moore*, 1 Ch. D. 692; *Gilbert* v. *Smith*, 2 Ch. D. 686; *Brassington* v. *Cussons*, 24 W. R. 881. No difficulty of that kind would seem to arise here, (see *Rule* 758), and where the motion is made in Chambers the motion on further directions should also be made in Chambers: *McGillicuddy* v. *McCarthy*, 7 C. L. T. 165.

Pending application turned into motion for judgment, or hearing of cause.

757. Where it is made to appear to the Court or a Judge, on the hearing of any application which may be pending before the Court or Judge, that it will be conducive to the ends of justice to permit it, the Court or Judge may direct the application to be turned into a motion for judgment, or a hearing of the cause or matter; and thereupon the Court or Judge may make such order as to the time and manner of giving the evidence in the cause or matter, and with respect to the further prosecution thereof, as the circumstances of the case may require; and upon the hearing it shall be discretionary with the Court or Judge to either pronounce a judgment or make such order as the Court or Judge deems expedient. J. A. Rule 323.

Same in effect as the Chancery Order 614. There is no corresponding English Rule.

See this *Rule* applied in *Byrne* v. *Box*, 2 C. L. T. 47.

If cause not set down on F. D. within 14 days after confirmation of report, any party interested may set down and give notice.

758. Where further directions have been reserved, if the party having the conduct of the action does not set the same down by way of motion for judgment on further directions, and serve notice thereof within 14 days after the confirmation of the Master's report, any other party affected by the report may set the same down, and serve notice of the motion. Chy. O., 419.

Evidence taken in the Master's office cannot be read on a hearing on further directions: *Gould* v. *Burritt*, 11 Gr. 234; *Curling* v. *Austin*, 2 Dr. & Sm. 129; *McGill* v. *Courtice*, 17 Gr. 271. But on the question of costs reserved, the Court will look at an order made on appeal from the report, and also

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Rule 759. the pleadings, and other orders made in the cause: *Downey* v. *Roaf*, 6 P. R. 89.

Court on F. D., may refuse to act on report, or to carry out an erroneous judgment.

The Court may, on a hearing of the cause on further directions, refuse to act upon a report, although it be confirmed, if it appears to be improper, or unsatisfactory: *Taylor* v. *Craven*, 10 Gr. 488; *Baldwin* v. *Crawford*, 1 Gr. 202; *Harrison* v. *McShechan*, 80 L. T. Jour. 79; and it may also refuse to carry out the original judgment pronounced in the action, if it appears to have been improvidently granted: see *Commercial Bank* v. *Graham*, 4 Gr. 419; *Mitchell* v. *Strathy*, 28 Gr. 80.

A judgment pronounced by a single Judge on a hearing on further directions, is not appealable to a Divisional Court; *Wansley* v. *Smallwood*, 10 P. R. 233; except by consent: *Rule* 219.

Judgments where settled.

759. All judgments ~~delivered~~ in Toronto ~~or elsewhere than at the place of trial~~ shall be settled when necessary by a Registrar.

The Registrar here referred to is the Registrar of the Division in which the action, or matter, is pending.

When a judgment is pronounced, or an order made, by the Court, a note is taken by the Registrar or other officer attending the Court for the purpose, and a similar note is indorsed by counsel on their briefs; and from these notes the draft or minute of the judgment, or order, is prepared.

Judgments pronounced on circuit, are, when necessary, to be settled by the Deputy Registrar, Deputy Clerk, or Local Registrar: *Rule* 761.

Appointment to settle.

The party desiring to enter the judgment, or issue an order, the minutes of which require to be first settled, usually in practice prepares a draft, and attends the Registrar, or other officer authorized to settle the minutes of the judgment or order, for an appointment to settle it. The Registrar or other officer will, however, if required, himself prepare the draft of the judgment or order, and when it is ready will issue the appointment to settle it, if he shall deem one necessary. See *Rule* 762.

On the return of the appointment, the parties notified are to attend and make any objections they may have to the draft, which are disposed of by the Registrar, or the officer settling the minutes, who then marks the draft settled, and adds his initials. The minutes having been settled, the judgment, or order, is then engrossed, and having been compared with the draft and passed, it is then signed or marked by the Registrar, or other officer, who has settled the minutes for entry.

Appointment to pass.

Where the Registrar or other officer thinks it necessary he may give an appointment to pass; *e.g.*, when any blanks have been left in the draft; or the terms of the order, or judgment, are complicated, and there is any danger of error in transcribing the draft. The passing of the judgment, or order, is merely the act of comparing the engrossment with the draft and seeing that it agrees with it, and signing and marking it for entry.

Registrar may make alterations.

The Registrar or other officer in drawing up, or settling any judgment or order, may introduce such alterations as from his experience he believes the Court will sanction; and these alterations are binding on the parties: see *Davenport* v. *Stafford*, 8 Beav. 503; *Hargrave* v. *Hargrave*, 3 Mac. & G. 348; Seton, 1546; *McKindsey* v. *Armstrong*, 11 P. R. 200.

Where questions of difficulty arise, the Registrar may require the matter to be mentioned to the Court.

Varying minutes.

Motion to vary minutes.—After the draft or minutes have been settled by the Registrar, or other officer, but not before, any party dissatisfied may move to vary the minutes; and the Registrar, or other officer, should be previously informed of the application: *Prince* v. *Howard*, 14 Beav. 208; *Hood* v. *Cooper*, 26 Beav. 373; *Tennant* v. *Trenchard*, L. R. 4 Chy. 537, 545; *British Dynamite Co.* v. *Krebs*, 25 W. R. 846; and such application may be made at any time before the judgment, or order, is passed and entered; 1 Turn. & Ven. 319;

Danl. Pr. 875; Seton 1546. The notice of motion should be served on all parties interested, and state the alteration desired. **Rule 789.**

The Court may refuse to permit any question to be argued on a motion to vary the minutes, except what was the actual order made, and whether the intention of the Court has been correctly expressed: *South Wales Min. Co.* v. *Davies*, 31 Sol. Jour. 110; unless both parties consent to an addition being made, or when it cannot be ascertained what order was pronounced; in which cases the Court may allow the case to be re-argued: see Seton 1546; *Hendrie* v. *Beatty*, 29 Gr. 423. The Court has, however, on a motion to vary minutes, varied the decree: *Johnson* v. *School Trustees*, 26 Gr. 204; and until a judgment has been actually entered a Judge may recall, or alter the judgment: *Glasgow* v. *Glasgow*, 9 Ont. 511, note; *Canadian Loan Co.* v. *Dysart*, *Ib.*; *Re Suffield & Watts*, 20 Q. B. D. at p. 697; *Re Adam Eyton*, 36 Ch. D. 299, and other cases in notes to *Rule* 780.

Any variation made on a motion to vary the minutes is embodied in the draft, and except where the costs of the motion are ordered to be paid, no further order need be drawn up by any party. Costs of motion.

If there is fair ground for the application, and there has been no improper opposition, the costs are usually made costs in the cause, and the judgment, or order, may be post-dated so as to include the costs of the day: see Seton 1546.

Where an order has been made in Chambers it cannot be drawn up as a Court order, even though the case be one which might have properly been argued in Court, unless both the parties and the Court consent: *Re Henning*, 11 P. R. 272.

Where the minutes have been settled by a Local Officer they may be varied either on application to a judgment clerk, or on motion to "the Judge," presumably the Judge who pronounced the judgment: *Rule* 761.

Where, after judgment was pronounced, a mistake was discovered in the statement of claim, on a subsequent application to amend the statement of claim, the judgment was directed to be post-dated as of a day subsequent to the amendment: *Winkley* v. *Winkley*, 44 L. T. N. S. 572.

Under the former practice, if the suit abated after decree pronounced, or between hearing and judgment, the decree might be passed and entered notwithstanding the abatement of the suit: Seton, 1547; *Beamish* v. *Pomeroy*, 1 Chy. Ch. 32. Abatement.

A party not producing his briefs when required, was ordered to do so within a limited time, and in default the order was to be drawn up without them: *Yeatman* v. *Read*, 14 W. R. 123.

A solicitor who has been discharged by his client before the passing and entry of an order, will not be allowed to withhold papers on which he claims to hold a lien, so as to prevent the drawing up or entry of the order: *Simmonds* v. *G. E. Ry. Co.*, L. R. 3 Chy. 797; *Clifford* v. *Turrill*, 2 D. & S. 1.

An appointment to settle minutes, served one day and returnable the next, was sufficient under the former practice: *Re Christmas*, 19 Beav. 519. No time is prescribed by the *Rules* within which a judgment or order is to be bespoken, and issued,—under the former practice a time was limited by Chy. Ord. 10, 11: see Holmested's Rules & Ords. 8; and after the lapse of the prescribed time the judgment or order was not to be issued without leave—but this practice was not very strictly followed. After the lapse of four years' notice of the application to issue an order was required to be given to all parties: *Re Forrester*, *Messnier* v. *Forrester*, 1 Chy. Ch. 29.

Entry of Judgments and Orders.—Before an order requiring entry can be enforced by attachment for disobedience, it must be entered, and such entry should have been made before the expiry of the time limited by the order for doing the act thereby ordered to be done: *Ballard* v. *Tomlinson*, 48 L. T. N. S. 515.

Proceedings under a judgment, or, order requiring entry, before it has been entered, are irregular and voidable: *Telson* v. *Jervis*, 8 Beav. 366; *Drummond*

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v. *Anderson*, 3 Gr. 150. Although in the case of injunctions and restraining orders, parties are bound by notice of the restraining order, however received, from the time when it is pronounced: Seton, 174.

Time for entry.

By English Gen. Ord. of 4th December, 1691, all orders pronounced in Michaelmas or Hilary Terms, or the vacations following, were to be entered before the first day of the ensuing Michaelmas Term; and all orders pronounced in Easter or Trinity Terms, or the following vacations, were to be entered before the first day of the ensuing Term. This order is considered to be still in force in England: see Seton, 1547. Whether it is binding here seems doubtful: *Rule* 3; see, however, Jud. Act, ss. 22, 56.

Entry *nunc pro tunc.*

Orders may be made to enter judgments, or orders *nunc pro tunc*: *Donne* v. *Lewis*, 11 Ves, 601; *Lawrence* v. *Richmond*, 1 J. & W. 241. But when a defendant would be prejudiced by such an order it will be refused: *Drummond* v. *Anderson*, 3 Gr. 150.

Varying judgment.

After a judgment, or order, has been passed, and entered, it can, as a general rule, only be varied on appeal or rehearing: see *Pepper* v. *Pepper*, W. N. 1868, 104; *Re Robinson*, W. N. 1873, 28; *Andrews* v. *Bohannon*, W. N. 1869, 80; *Teil* v. *Barlow*, 3 D. J. & S. 426; *Mason* v. *Seney*, 2 Chy. Ch. 30; *Moffatt* v. *Hyde*, 6 U. C. L. J. 94; *Simmers* v. *Erb*, 21 Gr. 289; but where the applicant has neglected to move to vary the minutes in the usual way, the amendment will only be granted on payment by the applicant of all costs: *Re Swire*, *Mellor* v. *Swire*, 30 Ch. D. 239; 53 L. T. N. S. 205. In cases of clerical mistakes, or errors arising from any accidental slip or omission, a judgment or order may be corrected on motion, without appeal: *Rule* 780. So also a judgment may be amended on motion where it has been obtained by default: see *Kline* v. *Kline*, 3 Chy. Ch. 79; or on *præcipe*: *Nelles* v. *Vandyke*, 17 Gr. 14.

Registrars may confer.

760. The Registrars may confer together in settling minutes of judgments.

When judgments settled by Dep. Reg.

761. All judgments delivered ~~at the place of trial other~~ elsewhere than at Toronto, shall be settled when necessary by the Deputy Registrar, Deputy Clerk or Local Registrar, at the place of trial; subject to the right of any party affected to apply upon notice to the other parties interested to one of the Judgment Clerks, or to the Judge, to vary the minutes.

Appointments to settle minutes or pass orders, how to be issued.

762. No notice of settling minutes, or passing a judgment or order is to be given unless by direction of the officer by whom the judgment or order is to be settled, nor until the proposed minutes of the judgment or order have been prepared by, or delivered to the officer by whom the same is to be settled; the notice (where the officer deems a notice proper) is to be by an appointment signed by him, a copy whereof is to be served; the proposed minutes shall remain in his office for inspection until settled or passed, and any party may take a copy thereof. Chy. O. 12, 596.

The Registrar, or other officer, may dispense with notice of settling or passing if he think fit; but except where the order or judgment is simple, notice is usually required to be given; the minutes must be first prepared, and left with the Registrar, or other officer (see *Rule* 761), and an appointment obtained from him: see *Rule* 759 note.

An appointment served one day for the next is sufficient: *Re Christmas*, 19 Beav. 519.

Rules 763-765. Procedure where party makes default.

763. Where a notice is given to settle minutes, or to pass a judgment or order, and the party served attends thereon, but the party giving the notice does not attend, or is not prepared to proceed, the officer settling the judgment or order may proceed *ex parte* to settle the minutes, or pass the judgment or order, or may in his discretion order the party giving the notice to pay to the other party the costs of his attendance; or if a party served asks for delay, the officer may grant the delay on such terms as he thinks reasonable as to payment of costs or otherwise. Chy. O. 13.

Where either party does not attend, it would seem that the officer is not justified in proceeding *ex parte* until the lapse of a half an hour from the time appointed: *Rule* 481.

8. Entry of Judgments and Orders.

Judgment pronounced in Court.

764. Every judgment whether pronounced by the Court or signed by default shall be drawn up and signed by a Registrar, Local Registrar, Deputy Registrar or Deputy Clerk of the Crown, as the case may require. J. A. Rule 326, *first part.* (a)

Date of judgment.

765. Every judgment pronounced by the Court shall be dated as of the day on which such judgment is pronounced, and shall take effect from that date, unless otherwise directed by the Court or a Judge, [and shall also bear upon its face the date upon which it is signed.] *See* J. A. Rule 326.

(*a*) Every judgment signed by default shall be dated on the day on which it is signed. *See* J. A. Rule 327.

The words in brackets are new.

Otherwise the same as the first part of Eng. R. 1875, O. 41, r. 2. The *Rule* of 1883 (R. 571), introduces a provision for ante-dating or post-dating a judgment by leave.

See *Rule* 891, and *Winkley* v. *Winkley*, 44 L. T. N. S. 572.

This *Rule* does not apply when the judgment itself regulates the entry: *McLaren* v. *Canada Central*, 10 P. R. 328, where the judgment was, "I direct judgment to be entered after the 5th day of Hilary Sittings for $100,000."

Where a judgment is varied by a Divisional Court the judgment should be entered as of the date on which the Divisional Court pronounced judgment: *Beckett* v. *G. T. Ry. Co.* 12 P. R. 377.

Orders in Chambers should be dated on the day on which they are finally made: *Ashley* v. *Taylor*, 27 W. R. 228.

In *Lyon* v. *Tweddell*, 44 L. T. N. S. 785; 50 L. J. Chy. 571; 17 C. L. J. 367, it was held, that where dissolution of a partnership was asked, it should be decreed from the judgment, not from the issue of the writ.

Rules 766-770. Forms.

766. The forms in Part X. of the Appendix may be used for judgments, with such variations as circumstances may require. J. A. Rule 325.

This *Rule* is identical with the last sentence of the Eng. R. 1875, O. 4, 2 r. 1, (1883, R. 569). The English Rule also provides for the entry in a book, and for a copy of the pleadings being delivered to the officer by the party entering the judgment; the English practice being that pleadings are not filed in the first instance, but simply delivered between the parties. The practice in this Province has been to file them; and this is still the practice here under the new system: *Rule* 398.

For form of judgment against executors: see *Huyck* v. *Proctor*, 10 P. R. 26.

An order made by consent, and not with the sanction or direction of the Court, should contain a statement on its face that it is by consent: *Michel* v. *Mutch*, 34 W.R. 251; 54 L. T. N. S. 45; 55 L. J. Chy. 485.

Immediate judgment.

767. In all cases the judgment pronounced by the Court may be signed and entered forthwith, unless otherwise ordered. *New.*

Entry on affidavit, etc.

768. Where it is provided that any judgment may be signed upon the filing of any affidavit or production of any document, the officer shall examine the affidavit or document produced, and if the same be regular and contain all that is by law required, he shall enter judgment accordingly. J. A. Rule 328.

Identical with the Eng. R. 1875, O. 41, r. 4, (1883, R. 575).

Entry on order or certificate.

769. Where any judgment may be signed pursuant to any order or certificate, or return to any writ, the production of such order or certificate, sealed with the seal of the Court, or of such return, shall be a sufficient authority to the officer to sign judgment accordingly. J. A. Rule 329.

Identical with the Eng. R. 1875, O. 41, r. 5, (1883, R. 573).

Orders obtained on condition deemed to be abandoned so far as beneficial to party obtaining unless condition performed.

770. In all cases where a person or party obtains a judgment or order from the Court, or from a Master, upon condition, and fails to perform or comply with the condition, he is to be considered to have waived or abandoned the judgment or order, as far as the same is beneficial to himself, and any other party or person interested in the matter, on the breach or non-performance of the condition, may either take such proceedings as the judgment or order in such case may warrant, or such proceedings as might have been taken if the judgment or order had not been made. Chy. O. 196.

Where a plaintiff gave notice of trial for 2nd October, and on 23rd September the defendant obtained an order postponing the trial on payment of costs, it was held to be a conditional order not staying plaintiff's proceedings,

and one which the defendant was at liberty to abandon without paying any costs except those of the application: *Allen* v. *Mathers*, 9 P. R. 477; *Pugh* v. *Kern*, 5 M. & W. 164; *Brega* v. *Hodgson*, 4 P. R. 47; *Horton* v. *Westminster Commissioners*, 7 Ex. 911. **Rules 771-774.**

771. It shall not be necessary in any judgment or order to reserve liberty to apply, but any party may apply to the Court from time to time as he may be advised; and where any judgment or order directs the payment of money out of Court, it shall not be necessary to direct that a cheque be drawn for the purpose. Chy. O. 186. Liberty to apply, need not be reserved.

It is said that all orders of the Court carry with them *in gremio* liberty to apply to the Court, *per* Fry, J., *Fritz* v. *Hobson*, 14 Ch. D. 542; 42 L. T. N. S. 225. But this liberty was held not to be implied in orders of a final nature: *Penrice* v. *Williams*, 23 Ch. D. 353; 48 L. T. N. S. 868; nor, in favour of defendant, in an order dismissing an action, except for the purpose of enforcing the terms of the order: *Huntley* v. *Link*, 26 Sol. Jour. 59.

Where costs of an interlocutory motion were reserved "until the hearing or other final disposition of the cause," and an order was subsequently made allowing a demurrer to the plaintiff's bill for want of equity, but the costs of the interlocutory motion were not then asked for, it was held that a subsequent application might be made to the Court to amend the order by directing the allowance of the costs reserved: *St Michael's College* v. *Merrick*, 26 Gr. 216; 18 C. L. J. 130; *Viney* v. *Chaplin*, 3 D. G. & J. 281; *Fritz* v. *Hobson*, 14 Ch. D. 542; *Blakey* v. *Hall*, 56 L. T. N. S. 400; and see *Gosnell* v. *Bishop*, 38 Ch. D. 385. Costs reserved to trial may be subsequently disposed of.

772. Every judgment shall be entered at full length in a book to be kept for that purpose. Entry of judgment.

773. No order of course, and no order obtained *ex parte* and not being of a special nature, is to be entered in full unless so directed by the Court or a Judge; but this provision is not to be construed as applying to judgments, orders in the nature of judgments, or to final orders for sale, or foreclosure. Chy. O. 195. Orders of course, and orders obtained *ex parte*, not to be entered unless directed.

See *Rules* 774, 991. An order of which there was no entry, and of which the original was lost, was directed to be redrawn: *Ex parte Dean of St. Paul's*, 18 W. R. 724. Lost order, may be redrawn.

Inasmuch as this *Rule* expressly prescribes that certain orders are not to be entered in full, it would seem to follow that all orders which do not come within the class mentioned must be so entered. This is in accordance with the former practice in Chancery.

774. No orders of course, or orders made in Chambers, are to be entered in full, except: Orders required to be entered in Chambers.

Judgments issued upon *Præcipe*;
Judgments against Infants;
Orders declaring persons Lunatics;
" for Administration;
" for Partition;
" for the Sale of Infants' Estates;

Rules 775, 776.

Orders for Payment of Money into or out of Court;
" for Foreclosure or Sale;
" of Revivor;
Vesting Orders;

and such other orders as may from time to time, in any particular case or otherwise, be directed to be entered. Chy. O. 594.

Judgments and orders to be entered.

Judgments for foreclosure, or sale, in mortgage suits, and orders for administration, or partition, when pronounced in Chambers, must be drawn up as judgments and be entered in the judgment book either of the Registrar of the Division in which the action is pending, or of the proper local officer in the same manner as other judgments: *Rule* 546.

The other orders, not being judgments, enumerated in this *Rule* are entered by the Entering Clerk in Chambers.

Where an order, which had not been entered, was lost, it was directed to be redrawn: *Ex parte Dean of St Paul's*, 18 W. R. 724. No proceedings can properly be taken upon a judgment or order required to be entered, until it has been entered: see *Ballard* v. *Tomlinson*, 48 L. T. N. S. 515. But where an administration judgment had been issued before being entered, and was subsequently entered after proceedings had been taken under it, such proceedings were upheld: *Re Morphy, Morphy* v. *Niren*, 11 P. R. 321.

Entering.

775. The Entering Clerk is to note in the margin of the judgment or order book the day of entering a judgment or order, and is at the foot of the judgment or order to note the same date, and the book in which the entry has been made and the pages of such book. Chy. O. 32.

9. Form of Judgments and Orders, Etc.

General form of judgment for foreclosure or sale.

776. Judgments for foreclosure or sale, where a reference is required, are, after the proper recitals hitherto in use, to direct, in general terms, that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had for redemption or foreclosure, (*or* for redemption or sale, *as the case may be*) and that for these purposes the cause is referred to (*naming the Master*); and a judgment so expressed is to be read and construed as if the same set forth the particulars contained in Rules 124 to 134 and Rule 353. Chy. O. 441.

Judgments under Judicature Act for foreclosure or sale, effect of.

Judgments for foreclosure, or sale, since *The Judicature Act* have been authorized to be drawn in a similar form to that prescribed by Chy. Ord. 441, from which this *Rule* is taken: see App. Forms, Nos. 182, 183. The former *Rules* did not expressly state that judgments so worded were to have the effect which Chy. O. 441 stated they should have, but in *McDougall* v. *Lindsay*, 10 P. R. 248, it was held that such was the effect of judgments so drawn; and in addition to the provisions of the Chy. Ords. 442-454, there was also now incorporated in all such judgments the further provisions contained in original *Rules* 331, 336, so far as applicable to each particular case. When a sale was ordered, original *Rule* 331 provided that the Master might sell by public auction, private contract, or tender, as he might think best. He might also,

at the meeting held for settling the advertisement, fix a reserved bid which was required to be notified in the conditions of sale. The Master was also to settle all necessary conveyances, in case any infants, or lunatics, were interested, or the parties differed. Original *Rule* 336 also provided for reconveyances, and delivery of documents, by any party redeemed. **Rules 777-779.**

Where the circumstances of the case are special, a judgment in the ordinary form prescribed by this *Rule* would not be appropriate. Thus, where a tender was pleaded a special inquiry was directed on this point, and further directions, and costs, were reserved: *Peers* v. *Allen*, 19 Gr. 98. So also where the defendant pleaded payment in full, costs were reserved: *Gooderham* v. *DeGrassi*, 2 Gr. 135. In such cases, this must still be done, or the judgment must provide for the dismissal of the action in case the Master shall find in the defendant's favour. So also, where the defendants were rival claimants to the equity of redemption, special directions were inserted in the decree: *Ramsey* v. *Thompson*, 8 Gr. 372. In special cases.

When infants are defendants, a judgment of foreclosure must also ordinarily reserve a day to show cause: see *Rule* 717. Day to show cause

It is for the plaintiff himself to determine whether or not a reference is required. This will depend upon whether or not there are any subsequent incumbrances, of this he must satisfy himself by getting the proper certificates from the proper officers: see *Rule* 125. Where there are no subsequent incumbrancers, the account should be taken on entering the judgment, if the plaintiff take a reference to the Master unnecessarily, he cannot recover the extra costs so occasioned: *Hamilton* v. *Howard*, 4 Gr. 581; *Purdy* v. *Parks*, 9 P. R. 424. Reference to take account, when unnecessary.

The reference, if directed, should be made to a Master in the county where the writ issued: *Macara* v. *Gwynne*, 3 Gr. 310. But the reference may afterwards be changed on motion, for sufficient cause. Reference, when to be directed.

Where the plaintiff took a judgment without a reference, and, after obtaining a final order of foreclosure, discovered that there were subsequent incumbrances, the Court refused to make a supplemental judgment directing the usual accounts and inquiries against the incumbrancers, but amended the judgment by inserting the usual reference as to incumbrancers which had the effect of nullifying the previous proceedings: *Wilgress* v. *Crawford*, 12 P. R. 658.

777. Judgments and orders are to be divided into convenient paragraphs, and such paragraphs are to be numbered consecutively; and where accounts are directed to be taken, or inquiries to be made, the direction in that behalf may be in the form No. 187 in the Appendix, with such variation as the circumstances of the case require. Chy. O. 187. Orders to be divided into paragraphs.

778. In all judgments and orders, sums are to be stated in dollars and cents. Chy. O. 188. Sums to be stated in dollars and cents.

779. Every judgment or order shall show on its face the day of the week and month on which it was given or made, and (except judgments signed by default or upon an order for leave to sign judgment and orders of course), shall show the name or names of the Judge or Judges who gave or made the same. *See* Rules H. C. J. viii. Form of orders

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Rule 780.

10. Variation of Judgments and Orders.

Correction of mistakes in judgments and orders.

780. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge on motion without an appeal. J. A. Rule 338.

Identical with Eng. R. Dec., 1879, R. 5 (1883, R. 319), and substantially the same as Eng. Chy. O. 23, Rule 21, as to which see Morgan Chy. Acts and Orders, 4th ed., 493; Seton, 1547-8.

A record when passed and entered, can only be amended as provided by the *Rules* of Court: *Blake* v. *Harvey*, 29 Ch. D. 827.

Where a report or certificate is varied, it is not the practice to make any actual physical alteration in the document: see *Fox* v. *Bearblock*, 45 L. T. N. S. 469; 46 L. T. N. S. 145.

This *Rule* is based upon and supersedes Chy. Gen. Order 335, which was as follows:

"335. An application to amend an order which has not been drawn up in conformity with the judgment pronounced so as to make the same conformable thereto; and an application to correct any other clerical mistake in an order, or an error arising from an accidental slip or omission, may be made in Chambers on petition, and the Court may grant the same if under all the circumstances the Court sees fit."

What kind of errors corrected.

Under that Order a direction necessarily consequent upon the judgment, but omitted from the decree drawn up might be supplied, such as a direction (now unnecessary, see *Rule* 107), to settle a conveyance: *Moffatt* v. *Hyde*, 6 U. C. L. J. 94; *Trevelyan* v. *Charter*, 9 Beav. 140; or a reference as to title, in a decree for specific performance: *Hughes* v. *Jones*, 26 Beav. 24; and an error in an order arising from an error in the chief clerk's certificate which had escaped the notice of all parties: *Eckersley* v. *Eckersley*, W. N. 1884, 133; a foreclosure judgment in the form without a reference as to incumbrancers, it having been discovered that there was an incumbrancer: *Wilgress* v. *Crawford*, 12 P. R. 658; or other mistake or slip: *Turner* v. *Hodgson*, 9 Beav. 265; *Askew* v. *Peddle*, 14 Sim. 301; and see *Eadie* v. *McEwen*, 14 Gr. 404; see also *Ex parte Straight*, 16 W. R. 661; *Andrews* v. *Bohannon*, W. N. 1869, 80; *Jefferys* v. *Smith*, 11 W. R. 479; *Re Glanville's Trusts*, W. N. 1878, 21; *Warman* v. *Zeal*, W. N. 1871, 241; *Re Tiel*, 11 W. R. 351; but not any term which could only have been introduced by express direction of the Court, which was not given: *Bird* v. *Heath*, 6 Ha. 236; *Whitehead* v. *North*, Cr. & Ph. 78; nor any substantial addition except by consent: *Willis* v. *Parkinson*, 3 Sw. 233; but see *Rule* 781.

The application must, as a general rule, be on notice: *Radenhurst* v. *Reynolds*, 11 Gr. 521.

An error was corrected under this *Rule*, not because it did not correctly carry out the intention of the Court at the time, but because the parties were mistaken as to the fact upon which the judgment as it stood was founded: *Barker* v. *Purvis*, 31 Sol. Jour. 155; 56 L. T. N. S. 131. But in *Klinck* v. *Ontario Loan & I. Co.*, before the Divisional Court, Ch. D., 28 June, 1889, it was considered that a Judge had no power to amend his judgment, after it had been formally issued, even on the ground of mistake, and an order made under such circumstances was vacated, and a new order to the like effect was made by the Divisional Court.

A motion to amend a decree in which the pleadings and evidence, or anything beyond the judgment pronounced, and the decree, is required to be looked at, must be made in Court: *Lapp* v. *Lapp*, 3 Chy. Ch. 234; 4 Chy. Ch. 3. As to how far the judgment may be varied: see *Hendrie* v. *Beattie*, 2 C. L. T. 102, and notes to *Rule* 759.

In *Livingstone* v. *Wood*, 29 Gr. 157, a decree directing an account was amended, by striking out a declaration that the plaintiff was entitled to certain credits which had not formed a substantive part of the judgment, so as

to make the decree conform to the actual judgment, and enable the credits to be further investigated in the Master's office. **Rule 780.**

A consent, judgment or order may be amended by striking out terms not consented to: *Merchant's Bank* v. *Grant*, 3 Chy. Ch. 64.

On motion under the corresponding English Rule, an order made under the Settled Estates' Act was varied, so as to dispense with consents of tenants for life to leasing powers granted: *Re Riley's Trusts*, 30 W. R. 78.

Where an order had been made on the petition of several persons, two of whom had not authorized it, the Court, under this *Rule*, amended the order by striking out the names of these two as petitioners, and treating them as not having been served with the petition: *Re Savage*, 15 Ch. D. 557.

Where the costs of a motion for an interim injunction having been reserved to the trial of the action, the plaintiff's counsel omitted to ask for them at the trial, and they were not provided for, it was held that the omission might be supplied under this *Rule*: *Fritz* v. *Hobson*, 14 Ch. D. 542, 561. So, where the Judge inadvertently omitted to make any order as the costs of the action: *Hardy* v. *Pickard*, 12 P. R. 428. Supplying omissions. As to costs.

See for amendment of orders so as to provide for costs omitted by mistake: *Blakey* v. *Hall*, 56 L. J. Chy. 568; 56 L. T. N. S. 400; *Viney* v. *Chaplin*, 3 DeG. & J. 282; *St. Michael's College* v. *Merrick*, 26 Gr. 216.

In *Lawrie* v. *Lees*, 7 App. Cas. at p. 34, Lord Penzance said: "I cannot doubt that under the original powers of the Court, quite independent of any order that is made under the Judicature Act, every Court has the power to vary its own orders which are drawn up mechanically in the registry, or in the office of the Court, to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful to make it plain." Thus an alteration may be made so as to make the record truly contain what was adjudged: *Re Swire, Mellor* v. *Swire*, 30 Ch. D. 239, and if notice to vary is not given, and the Registrar notified thereof, before he issues the order, the applicant may have to pay costs: *S. C.* 53 L. T. N. S. 205. Varying judgment to carry out intention of the Court.

After a judgment by consent has been passed and entered, it cannot be afterwards amended, except for reasons sufficient to set aside an agreement on the ground of mistake: *Atty.-Gen* v. *Tomline*, 7 Ch. D. 388; *Davis* v. *Davis*, 13 Ch. D. 861. But where parties had consented to a judgment establishing a will which afterwards turned out to be a forgery, it was held that they were not estopped from shewing the forgery, and setting aside the compromise judgment on that ground: *Priestman* v. *Thomas*, 9 P. D. 210. Mistake.

An interlocutory order consented to by mistake may be discharged, though the mistake was on one side only: *Mullins* v. *Howell*, 11 Ch. D. 763; and see *Gilbert* v. *Endean*, 9 Ch. D. 259; but not because one of the parties finds it less beneficial than he expected: *Cousineau* v. *London F. Ins. Co.*, 12 P. R. 512; *Powell* v. *Smith*, L. R. 14 Eq. 85; *Midland* v. *Johnston*, 6 H. L. C. 811.

Where an order has been made by consent, the consent given without mistake is binding, and cannot be withdrawn, even before the order is drawn up: *Harvey* v. *Croydon*, 26 Ch. D. 249; over-ruling *S. C.* W. N. 1883, 222; *Elsas* v. *Williams*, 52 L. T. N. S. 39; *Re West Devon, etc., Mines*, 38 Ch. D. 51, 55; *Holt* v. *Jesse*, 3 Ch. D. 177, and *Rogers* v. *Horn*, 26 W. R. 232, in which, as reported, it was held that the consent might be withdrawn before the order was passed and entered: see *Williams* v. *Meakins*, Crump. & Evans Chy. Pr. 562. Consent order.

After an order made declaring that children took *per stirpes*, it was discovered that this was contrary to authorities, and by arrangement the matters mentioned to the Court again, and an order altering the order so as to declare that they took *per capita* was made: *Re Blackwell, Bridgman* v. *Blackwell*, W. N. 1886, 97.

And where the decree did not direct the payment of costs "forthwith," and it did not appear that such a direction was intended by the judgment, an application to amend was refused: *Wilson* v. *Robertson*, 3 Chy. Ch. 100.

An order arranged by consent between the parties, and not directed by the Court, should show on its face that it is by consent: *Michel* v. *Mutch*, 34 W. R. 251; 54 L. T. N. S. 45; 55 L. J. Chy. 485.

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Rules 781, 782.

Counsel has full authority to compromise an action at the trial: *Matthews* v. *Munster*, 20 Q. B. D. 141; but see *Watt* v. *Clark*, 12 P. R. 359.

Reconsideration by the Judge.

A Judge can always reconsider his decision until the judgment or order is drawn up: *Re St. Nazaire Co.*, 12 Ch. D. p. 91; *Miller's Case*, 3 Ch. D. 661; *Atty.-Gen.* v. *Tomline*, *supra*; *Canada Land, etc., Co.* v. *Dysart*, 9 Ont. 511; *Glasgow* v. *Glasgow*, *Ib.*; *Re Suffield* and *Watts*, 20 Q. B. D. at p. 697; *Re Adam Eyton*, 36 Ch. D. 299.

Amendment of judgment on *præcipe*.

A judgment entered on *præcipe* cannot be amended on application in Chambers, by inserting therein any special direction which could not properly be included in a judgment issued on *præcipe*: *Ross* v. *Vader*, 3 Chy. Ch. 29.

Liberty to apply.

Liberty to apply is implied, without being expressly reserved: *Fritz* v. *Hobson*, 14 Ch. D. 542, 561, but only in orders not final: *Penrice* v. *Williams*, 23 Ch. D. 353. It is not implied in favour of a defendant against whom the action has been dismissed, except for the purpose of enforcing the terms of the order: *Huntley* v. *Link*, 26 Sol. Jour. 59.

As to amending judgments, by moving to vary the minutes, see notes to *Rule* 759.

Order made without jurisdiction.

An order made without jurisdiction, if not appealed against, must stand: *West* v. *Downman*, 27 W. R. 697; and a *de facto* judgment, which has not been set aside, cannot be objected to, as having been rendered *ultra vires*, in an action of trespass for acts done under it; see *Bruce* v. *Canadian Bank of Commerce*, before Osler, J., 26th September, 1882; *Forester* v. *Thrasher*, 9 P. R. 383.

Amendment as to matters on which there was no adjudication.

781. Where a judgment or order as drawn up requires amendment in any other particular on which the Court did not adjudicate, the same may be amended in open Court on petition without an appeal, if under all the circumstances the Court deems fit. Chy. O. 336.

Where the application was made after the time within which the cause could have been reheard without leave, it was held that the applicant need not apply for leave to move, but must, nevertheless, make out such a case as would be necessary, in order to obtain leave to rehear after the time had elapsed: *O'Donoghue* v. *Hembroff*, 19 Gr. 95.

Application by petition, to impeach judgments, etc.

782. Any party entitled to the variation or reversal of a judgment or order, upon the ground of matter arising subsequent to the making thereof, or subsequently discovered, or to impeach a judgment or order on the ground of fraud, or to suspend the operation of a judgment or order, or to carry a judgment or order into operation, is to proceed by petition in the cause, praying the relief which is sought, and stating the grounds upon which it is claimed. Chy. O. 330.

In England, where no such practice as that prescribed by this *Rule* is in force, it is held by analogy to the former practice, that in order to set aside a judgment obtained by fraud, a new action must now be brought: *Flower* v. *Lloyd*, 6 Ch. D. 297.

On petition under Chy. Ord. 330, security required.

Formerly a person presenting a petition under this Chy. Ord. 330, from which this *Rule* is taken, in a case where formerly a bill of review, or a bill in the nature of a bill of review, should have been filed, was required to give security for costs: *Sadlier* v. *Doyle*, before Proudfoot, V.C., 19 and 26 Nov. 1877, and see Beames' Orders, pp. 314, 366, and see Canadian Order in Chy. 12th July, 1844, lxxix; but see Chy. Ord. 1; but it would seem that no such security is now required to be given unless expressly ordered.

Leave to file a petition under this *Rule* is not necessary in any case: *Duggan* v. *McKay*, 1 Chy. Ch. 380. **Rules 783, 784.**

For cases in which petitions have been presented under Chy. Ord. 330: see *Bank of Upper Canada* v. *Wallace*, 16 Gr. 280; *Brouse* v. *Stayner*, 16 Gr. 1; *Dumble* v. *Cobourg & P. R. W. Co.*, 29 Gr. 121; *Mason* v. *Seney*, 12 Gr. 143; *Colonial Trusts* v. *Cameron*, 21 Gr. 70; *Robson* v. *Wride*, 14 Gr. 606; 15 Gr. 565.

Petitions to Impeach Judgment on the Ground of Fraud.—A bill of this kind was, prior to Chy. Ord. 330, proper, where a decree had been obtained by fraud. Where the decree, however, had also been affirmed by the House of Lords, it would seem to have been necessary that application should be first made to the House of Lords for directions: *Shedden* v. *Patrick*, 1 Macq. H. L. C. 535, and see *Tommey* v. *White*, 4 H. L. C. 313. Petitions to impeach judgments on ground of fraud.

Petitions to Suspend the Operation of a Judgment.—Bills of this kind were formerly necessary whenever it was sought to stay the execution of a decree: *e.g.*, where an appeal was pending from the decree. But relief of this kind has, since Chy. Ord. 330, been granted on motion in Chambers, without even a petition: *Campbell* v. *Edwards*, 6 P. R. 159; *Walker* v. *Niles*, 3 Chy. Ch. 418. In such cases security was generally required to be given: *Ib.* The staying proceedings pending an appeal is discretionary. In a case where the Court refused to stay proceedings pending an appeal from an order allowing a demurrer, it directed that an answer filed should not prejudice the appeal: *McMurray* v. *Grand Trunk R. W.*, 3 Chy. Ch. R. 125. Petitions to suspend operation of judgment.

Petitions to Carry a Judgment into Operation.—Bills of this kind were sometimes necessary where the parties had neglected to proceed upon the decree, and their rights under it had become embarrassed by subsequent events, and it was necessary to have them settled by the decree of the Court. See Mitford Pleadings, 3rd ed., 75. Petition to carry judgment into operation.

Petitions of Review.—Prior to Chy. Ord. 330, where a party sought to impeach a decree, either for error in law appearing in the body of the decree, without further examination of matters of fact, or in respect of some new matters arising after the decree; or on new evidence discovered after decree made, which could not possibly have been used when the decree was pronounced; in such cases, where the decree had been enrolled, a bill of review was filed, and where it had not been enrolled, a bill in the nature of a bill of review was the proper proceeding. Petition of review.

When the bill was filed on the ground of error, it was necessary to specifically assign the error complained of, and it must have been an error of law, apparent on the face of the decree, and not a mere error of judgment: *Green* v. *Jenkins*, 6 Jur. N. S. 515, *e.g.*: It could not be assigned for error that any matter had been decreed contrary to the proofs: *Mellish* v. *Williams*, 1 Vern. 166; and see *Rule* 786. When bill filed on ground of error, error of law must be apparent on face of decree.

For cases since *The Judicature Act*: see *Synod* v. *De Blaquiere*, 10 P. R. 11; *Bank of B. N. A.* v. *Western Ins. Co.*, 11 P. R. 434.

783. The petition is to be verified by affidavit, and served upon the solicitors of all parties interested; and in case a party has no solicitor, then upon the party. Chy. O. 331. Petition to be verified and served on all parties interested.

See note to *Rule* 782.

784. Upon the copy of the petition served is to be indorsed the following memorandum or notice: "If you do not appear on the petition the Court will make such order on the petitioner's own shewing as shall appear just, in your absence; and if this petition is served personally, you Notice to be indorsed on copy served.

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will not receive any notice of the future proceedings on the petition." Chy. O. 332.

See note to *Rule* 782.

Hearing of petition.

785. Upon the hearing of the petition, the Court may either make a final order, or direct the petition to stand over, with liberty to the parties interested in sustaining the judgment or order to file a special answer to the same; and may make such order as to the production of further proof, and the manner thereof, and the further hearing of the petition, as the Court deems meet. Chy. O. 332.

See note to *Rule* 782.

The respondent may file affidavits in answer to the petition, without first obtaining the leave of the Court: *Robson* v. *Wride*, 14 Gr. 606; 15 Gr. 565.

Evidence required when reversal sought on new matter.

786. Where the reversal or variation of order is sought upon new matter, such proof as would have been requisite upon a motion to file a bill of review must be supplied. Chy. O. 334.

See note to *Rule* 782.

Proof requisite to support bill of review.

The rule as to the proof requisite upon a motion to file a bill of review was thus laid down in the Privy Council, in *Hosking* v. *Terry*, 8 Jur. N. S. 977: "The rule which we collect from the cases cited in the argument is this, that the party who applies for permission to file a bill of review, on the ground of having discovered new evidence, must show that the matter so discovered has come to the knowledge of himself and his agents, for the first time since the period at which he could have made use of it, and that it could not, with reasonable diligence, have been discovered sooner; and secondly that it is of such a character, that if it had been brought forward in the suit, it might probably have altered the judgment." See also *Mason* v. *Seney*, 12 Gr. 143.

11. Entry of Satisfaction.

Satisfaction of judgments, entry of.

787. In order to acknowledge satisfaction of a judgment, it shall be requisite only to produce a satisfaction piece in form as hereinafter mentioned, and such satisfaction piece shall be signed by the party or parties acknowledging the same or their personal representatives, and their signatures shall be witnessed by some practising solicitor, expressly named by him or them, and attending at his or their request to inform him or them of the nature and effect of such satisfaction piece before the same is signed; which solicitor shall declare himself in the attestation thereto to be the solicitor for the person so signing the same, and state he is witness as such solicitor (provided that a Judge at Chambers may make an order dispensing with such signature under special circumstances, if he thinks fit); and in cases where the satisfaction piece is signed by the per-

sonal representative of a party deceased, his representative character shall be proved by the production of the probate of the will, or of the letters of administration, to the officer in custody of the judgment. Rules T. T. 1856, 64. Rules 788, 789.

See App. Form No. 214. The plaintiff's signature may be dispensed with, and his solicitor in the cause be authorized to acknowledge satisfaction, upon proof that the solicitor is authorized by the plaintiff to arrange the claim, and that the delay in obtaining the plaintiff's signature would be prejudical: *Rudall* v. *Hurd*, 3 U. C. L. J. 14; *Pawson* v. *Wrightman*, 2 U. C. L. J. 184; so also when the amount of the judgment is small and the plaintiff resides out of the jurisdiction: *Bank of Montreal* v. *Cronk*, 3 U. C. L. J. 32; or when the plaintiff resides abroad and has given his solicitor written authority to acknowledge satisfaction for him: *Darling* v. *Wright*, 3 U. C. L. J. 50. When a satisfaction piece is executed before an attorney of another Province, a certificate of his due admission must be produced, and his signature duly verified: *Moss* v. *Dayly*, 3 U. C. L. J. 74; signature before a practising attorney of a foreign country is a sufficient compliance with this *Rule: Abernethy* v. *Beddome*, 6 P. R. 162.

An order to enter up satisfaction will not be granted where it is not clear that the judgment has been satisfied: *Lewine* v. *Savage*, 3 U. C. L. J. 89.

After the judgment has been satisfied, the plaintiff's solicitor cannot be compelled by defendant to procure a satisfaction piece to be executed by his client; but the solicitor may be ordered to disclose his client's place of residence, so that the defendant may tender a satisfaction piece for execution, and if the plaintiff refuse to sign it he may be ordered to do so: *Carr* v. *Coulter*, 2 P. R. 226.

The arrest of one of several defendants on a *ca. sa.* and his subsequent discharge with the consent of the plaintiff, operates as a satisfaction of the judgment, even though the plaintiff at the time of the discharge expressly stipulated that his other remedies on the judgment were not to be impaired: *Hamilton* v. *Holcomb*, 7 U. C. L. J. 40; where a vendor after recovering judgment for his purchase money, subsequently cancels the contract of sale, that operates as a satisfaction of the judgment: *Cameron* v. *Bradbury*, 9 Gr. 67.

788. Every satisfaction piece shall be entered in the office where the judgment is entered. Rules T. T. 1856, 65. Satisfaction piece where to be entered.

12. Motions Against Verdicts or Judgments.

In England there is a special provision for motions for a new trial in jury cases in the Q. B., C. P., and Ex. D., and not in the Chy. D. The Ontario Act does not preserve the distinction provided for by the English Act in the jurisdiction, and consequent practice of the various Divisions.

789. Where there has been a trial by a jury, any application for a new trial shall be to a Divisional Court. J. A. Rule 307. Application to Div. Court.

The Eng. R. Dec. 1876, R. 5, was to the same effect. Eng. R. 1883, R. 551, is different.

This *Rule* embraces every application for a new trial, after a trial by jury, and therefore includes interpleader proceedings: *Cole* v. *Campbell*, 9 P. R. 498; *Robinson* v. *Tucker*, 14 Q. B. D. 371, over-ruling *Burstall* v. *Bryant*, 12 Q. B. D. 103, and applies to cases in the Chy. Div. tried by a jury: *Hespeler* v. *Beck*, 4 C. L. T. 41.

Rules 798 and 799, make provision for motions respecting the trial, or verdict, other than by way of motion for a new trial.

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Rules 790, 791. For the different grounds on which a new trial may be granted, see note to *Rule* 791.

As to motions for a new trial, where a case has been tried without a jury, see notes to *Rule* 798.

Grounds to be stated in order *nisi* for new trial.

790. In every notice of motion for a new trial the grounds upon which the motion is to be made shall be shortly stated therein; but in case of any omission the Court may permit the notice to be amended and served again on such terms as are deemed reasonable. R. S. O. 1877, c. 50, s. 288.

A notice of motion for a new trial on the ground of misdirection, or non-direction, should state how and in what matter the Judge misdirected, or failed to direct the jury: *Pfeiffer* v. *Midland Ry. Co.*; 18 Q. B. D. 243; *Mugatt* v. *Smith*, 12 P. D. 116; *Scott* v. *Crerar*, 11 Ont. 541; *Furlong* v. *Reid*, 12 P. R. 201; see 12 Ont. 607. Amendment may be allowed in a proper case, but was refused in *Furlong* v. *Reid*.

Restrictions on new trials.

791. A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, [or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them] unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appears to such Court that such wrong or miscarriage affects part only of the matter in controversy, [or some or one only of the parties], the Court may give final judgment as to part thereof [or as to some or one only of the parties], and direct a new trial as to the other part only [or as to the other party or parties]. J. A. Rule 311; Eng. R. 1883, 556.

Same as the Eng. R. 1885, O. 39, r. 3, except the provisions in brackets, which are taken from Eng. Rules 1883, R. 556.

Grounds for new trial.

The following are the grounds for granting a new trial;—

1. Improper admission, or rejection, of evidence.
2. The improper non-suiting of the plaintiff.
3. Misdirection of the jury,
4. Perverse verdict, or verdict against the weight of evidence.
5. Verdict for too small, or too great, damages.
6. Surprise, and discovery of new evidence: see Arch. Pr. 13th ed., 1210.

Misdirection.

Formerly a misdirection by the Judge in point of law, or the improper admission or rejection of evidence in any material matter was, at Law, ground for a new trial as of right. The Common Law Courts had only the power to grant a new trial of the action generally: see *Faund* v. *Wallace*, 35 L. T. N. S. 361. This practice was altered by *The Administration of Justice Act*: see R. S. O. 1877, c. 50, s. 289, which contained a provision to the same effect as the present *Rule*.

A new trial may now be ordered on a particular question: see also *Rule* 312.

Quære whether "misdirection" in the *Rule* applies to the case of the Judge ruling that there is no evidence to go to the jury, and therefore withdrawing

the case from them, and giving judgment for defendant: see *Hall* v. *Jupe*, 43 L. T. N. S. 411. **Rule 791.**

Where a new trial is moved for on the ground of misdirection, the onus of showing that the misdirection did not cause a miscarriage of justice, lies upon the party showing cause: *Anthony* v. *Halstead*, 37 L. T. N. S. 433.

It is not misdirection for the Judge to tell the jury his own opinion on the issue before them: *Smith* v. *Dart*, 14 Q. B. D. 105, 108.

An appeal does not lie to the Supreme Court from a judgment upon a motion for a new trial on the ground of misdirection: *O'Sullivan* v. *Lake*, 9 C. L. T. 260.

"Substantial wrong," or miscarriage.

Substantial wrong was considered to have occurred where, amongst other things, inadmissible evidence was received after objection to it, and was commented on by the Judge in his charge, as being important: *Bank of Hamilton* v. *Isaacs*, 16 Ont. 450.

For other cases as to what amounts to "substantial wrong," see *Pickup* v. *Thames Insurance Co.*, 3 Q. B. D. 594; *Shapcott* v. *Chappell*, 12 Q. B. D. 58; *Swift* v. *Nunn*, W. N. 1878, 217; *McDonald* v. *Murray*, 5 Ont. 559; *Howell* v. *Listowel Rink & Park Co.*, 13 Ont. 476.

The defendant's counsel, in order to show that a witness called by him was hostile, and to treat him as such under s. 22 of the C. L. P. Act (Eng.), asked the Judge to look at the affidavit of a witness in a former action. As there was nothing in the witness's demeanour, or way in which he gave his evidence, to shew that he was hostile, the Judge refused to look at the affidavit, and it was held on motion for a new trial that the Judge's discretion was absolute, and the Court had no jurisdiction to review his decision: *Rice* v. *Howard*, 16 Q. B. D. 681.

Objections to jury not causing miscarriage.

The omission to swear a juror, where no injustice was done, is not a ground for a new trial: *Cook* v. *G. T. Ry. Co.*, 9 C. L. T. 403; nor the fact that a juryman was challenged for cause, the party moving for the new trial, having accepted the opinion of the Judge that there was no cause, and having proceeded with the trial: *Wood* v. *McPherson*, 17 Ont. 163.

Verdict against weight of evidence.

It is the practice in England, adopting the practice of the former Court of Queen's Bench, not to grant a new trial, on the ground that the verdict is against the weight of evidence, where the damages are under £20, except under peculiar circumstances, such as the trial of a right, or where the personal character of a person may be injured: *Joyce* v. *Metropolitan Board of Works*, 44 L. T. N. S. 810; 17 C. L. J. 411; *Booth* v. *Briscoe*, 2 Q. B. D. 496; see also *Jenkins* v. *Morris*, 14 Ch. D. 674.

If the damages found by the jury are so small, as to show that they must have omitted to consider some of the elements of damage, the Court will grant a new trial: *Phillips* v. *London & S. W. Ry. Co.*, 5 Q. B. D. 78; 5 C. P. D. 280.

On an application for a new trial upon the weight of evidence, where there has been no miscarriage in law, the question is, does the verdict in the opinion of the Court do substantial justice, and, if not, does the evidence warrant interference: *Grieve* v. *Molson's Bank*, 8 Ont. 162, and the Court though considering that a different verdict would have been more satisfactory, may refuse to interfere, the question being one proper for the decision of a jury: *Malcolmson* v. *Hamilton Prov. & L. Soc.*, 10 Ont. App. 610.

The ordinary reasoning according to which the verdict of a jury on a question of fact ought not to be disturbed unless the preponderance of evidence against the verdict is strong and clear, does not apply to cases in which the verdict depends upon a question of science which is not fully solved, but is still within the region of *bonâ fide* controversy. The importance of the verdict to others besides the parties to the litigation, and the novelty of the question are elements to be taken into consideration. Where a new trial is granted on the ground of the unsatisfactory nature of the verdict, a condition should not be imposed that the party applying for the new trial should pay the costs of the previous trial: *Managers of Metropolitan Asylum* v. *Hill*, 47 L. T. N. S. 29.

A new trial, on the ground that the verdict is against the weight of evidence, should not be granted, unless the verdict was one which the jury,

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viewing the whole evidence reasonably, could not properly find: *Webster* v. *Friederberg*, 17 Q. B. D. 736, correcting *Solomon* v. *Bitton*, 8 Q. B. D. 176; see also *Metropolitan Ry. Co.* v. *Wright*, to same effect in the House of Lords, 11 App. Cas. 152; *Quinlane* v. *Murnane*, 18 L. R. Ir. 53; *Commissioners for Railways* v. *Brown*, 13 App. Cas. 133; see also remarks in 31 Sol. Jour. 135.

A new trial should not be granted merely because the Judge who tried the case, or the Court is dissatisfied with the verdict of the jury: *Solomon* v. *Bitton*, 8 Q. B. D. 176; see *Jenkins* v. *Morris*, 14 Ch. D. p. 684; *Wilcocks* v. *Howell*, 5 Ont. 360.

Though the report of the Judge who presided as to whether he was satisfied or dissatisfied with the verdict is not conclusive, great weight will be attached to it: *Webster* v. *Friederberg*, 55 L. T. N. S. 295; affirmed in appeal: *Ib.*, 49; 17 Q. B. D. 736.

The Court may, in its discretion, refuse a new trial on the consent of the plaintiff alone to the damages being reduced to such an amount as the Court may think, if given by the jury, would not have been excessive: *Belt* v. *Lawes*, 12 Q. B. D. 356.

Where cross-actions involving the same question of law and fact are separately tried with the result that contradictory verdicts are obtained, if the evidence is so fairly balanced that the jury might reasonably find either way both cases ought to be tried again, not separately, but together. The Court cannot be called upon either to exercise the functions of a jury, or to issue contradictory judgments: *Australian, etc., Co.* v. *Smith*, 14 App. Cas. 321.

In *Riding* v. *Hawkins*, 14 P. D. 56, the plaintiff's case, when opened, seemed to proceed on a case of fraud, and undue influence only was alleged. The plaintiff applied for leave to amend, which was granted, and the trial proceeded after the defendant had refused an offer of the Judge to adjourn the trial at the plaintiff's expense; the finding was for the plaintiff on the question of fraud, but for the defendant in the issues on the original pleadings. It was held that defendant was not precluded, by his refusal of the offer of adjournment, from moving for a new trial on the ground of being surprised by the plaintiff's new case. It was also held that the amendment was properly allowed, due care having been taken that the defendant should not be damnified.

See *Canada Landed Credit Co.* v. *Thompson*, in note to *Rule* 755.

Surprise.

The abstaining by a party from proof under an idea that his adversary had no real intention of putting him to such proof, and being thereby taken by surprise, is no ground for a new trial: *Andrews* v. *Stuart*, 1 C. L. T. 724.

Where the reason for the application is surprise, the affidavits must state the grounds of surprise: *Dow* v. *Dickenson*, W. N. 1881, 52.

As to when a new trial or supplemental trial may be had on the ground of discovery of new evidence, see note to *Rule* 676.

New trial as to part.

A new trial will not be granted on the ground of premature admission of evidence which has afterwards become admissible: *Faund* v. *Wallace*, 35 L. T. N. S. 361; nor of the discovery of new evidence, unless it is nearly or quite conclusive: *Anderson* v. *Titmas*, 36 L. T. N. S. 711.

792. A new trial may be ordered on any question in an action, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question. J. A. Rule 312.

Same as Eng. R. 1875, O. 39, r. 4, (1883, R. 557).

Quære, whether a new trial may not now be ordered as to one defendant, without disturbing the verdict as to another: *Purnell* v. *G. W. Railway Co.*, 1 Q. B. D. 636.

Where there are distinct issues, the Judge may, under this *Rule*, accept the verdict of the jury on those issues on which they agree, and discharge them as to others, and a new trial may be ordered on undecided issues: *Marsh* v. *Isaacs*, 45 L. J. C. P. 505. **Rules 793-795.**

793. On the argument of a motion for a new trial or against a judgment, the counsel of the party making the motion shall begin, and shall state fully the grounds of the application, and shall have the reply. J. A. Rule 314. Counsel supporting application to begin and have reply.

794. When a new trial is granted to a party on condition of payment of costs, or other condition, no order shall be made on default in performing such condition unless a motion is made therefor upon notice. Rules T. T. 1856, 45. Rule for new trial on payment of costs, how rescinded for non-payment.

Where a new trial is granted on payment of costs, it is the duty of the party obtaining the indulgence to get the costs taxed and paid, so as to enable the case to be tried at the next opportunity: *Johnson* v. *Sparrow*, 1 U. C. Q. B. 396; *Grantham* v. *Powell*, 1 P. R. 256; but see *VanEvery* v. *Drake*, 3 P. R. 84; *Stacey* v. *McIntyre*, 5 P. R. 205; *Pacaud* v. *McEwan*, 6 P. R. 20; *Lyman* v. *Snarr*, 3 P. R. 86; but where the solicitor of the party to pay the costs promptly applied to the solicitor of the opposite party begging to know what the costs were that he might pay them, of which communication no notice was taken, a rule subsequently obtained *ex parte* discharging the rule for a new trial and the judgment entered thereon were set aside without costs: *Doe d.Arnold* v. *Auldjo*, 6 U. C. Q. B. 21. The party to receive costs cannot insist in their being taxed: *Stock* v. *Shewan*, 18 C. P. 185. Where the costs were tendered, but refused because there was not sufficient time to give proper notice of trial for the next assizes which, however, the defendant offered to waive, it was held that the plaintiff was not entitled to have the rule for a new trial rescinded: *Rabidon* v. *Harkin*, 2 P. R. 129; and see *Thompson* v. *Sewell*, 4 O. S. 16. The costs must be paid before notice of trial can properly be given: *Stock* v. *Shewan*, 18 C. P. 185.

Where an order was made granting a new trial on payment into Court of $500 within a limited time, and in default dismissing the motion with costs, it was held no further order was necessary: *Story* v. *McKay*, before Divl. Court, Chy. D., 6 Sept., 1888.

795. Any verdict or judgment obtained where one party does not appear at the trial may be set aside by a Divisional Court or by a Judge in Court or by the Judge at the sittings upon such terms as may seem fit. J. A. Rule 270. Setting aside judgment by default.

See Eng. R. 1875, O. 36, r. 20, (1883, R. 457). The English Rule requires the application to be made within six days after the trial, after which time there is no power to restore the action: *Walter* v. *James*, 34 W. R. 29; 53 L. T. N. . 597.

The original of this *Rule* has been altered so as to make it clear that it does not give jurisdiction to the Master in Chambers or a Judge in Chambers to set aside a judgment obtained by default of the opposite party at the trial: see *Hilliard* v. *Arthur*, 10 P. R. 281, 426; *Ross* v. *Carscallen*, 11 P. R. 104.

Where a judgment was given at the trial for the defendant owing to the absence of the plaintiff, and an application to reinstate was refused by the Judge, it was held that the plaintiff might apply to the Divisional Court to set aside the judgment, and for a new trial: *Wilson* v. *Irwin*, 10 P. R. 598.

The Court of Appeal has jurisdiction to hear an appeal from a judgment by default, but such appeals are not encouraged. A party should apply to have the judgment set aside and the case re-tried: *Vint* v. *Hudspeth*, 29 Ch. D. 322.

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Where a defendant was not represented at the trial of an action, because his solicitor was ignorant of the fact that the action had with others been transferred from one Judge of the Chancery Division to another, Fry, J., held that the solicitor had therein been guilty of gross negligence, and that the plaintiff could not be relieved. But it was held on appeal, that the judgment must be set aside, on payment of the costs of the day. Jessel, M.R., observing: "Solicitors cannot any more than other men conduct their business without sometimes making slips; and where a solicitor watches the list, and happens to miss the case, in consequence of which it is taken in his absence, it is in accordance with justice, and with the course of practice, to restore the action to the paper on the terms of the party in default paying the costs of the day; which include all costs thrown away by reason of the trial becoming abortive": *Burgoine* v. *Taylor*, 9 Ch. D. 4.

Where the Court was satisfied that the absence of the defendant and his counsel was purely accidental, a judgment by default was set aside on payment of plaintiff's costs of hearing, including reasonable disbursements to counsel, and the costs of the application: *Wolffe* v. *Hughes*, 17 C. L. J. 427. On similar terms an action dismissed was restored to the paper, where, in consequence of the illness of the plaintiff's solicitor, the necessary arrangements were not made: *Birch* v. *Williams*, W. N. 1876, 168.

Where one counsel had been unavoidably detained by a railway accident, and the other had been prevented by indisposition from conducting the case (see *Cockle* v. *Joyce*, in *Burgoine* v. *Taylor*, 9 Ch. D. 3), and where the defendant had personally been guilty of no negligence, though his solicitor had neglected to attend to the defence, and the defendant made an application within six days of his having heard that the trial had taken place, the Court granted an extension of time, to enable him to make application to set aside the judgment: *Mitchell* v. *Wilson*, 25 W. R. 380. So also where one side had trusted to a reasonable expectation of a settlement of the dispute: *Wright* v. *Clifford*, 26 W. R. 369; 47 L. J. Chy. 544.

As to delay in applying, see *May* v. *Head*, W. N. 1880, 26; *Wilkins* v. *Bedford*, 35 L. T. N. S. 622; *Webster* v. *Coal Consumers Co.*, 1 Charl. Ca. (Court) 131; *Attwood* v. *Chichester*, 3 Q. B. D. 722; *King* v. *Sandeman*, 38 L. T. N. S. 461, and notes to *Rules* 705, and 796.

Judgment by default may be set aside on terms.

796. Any judgment by default may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as the Court or Judge may think fit. J. A. Rule 214.

Same in effect as the Eng. R. 1875, O. 29, r. 14 (1883, R. 308).

Where a judgment has been obtained irregularly, the party against whom it has been obtained is entitled *ex debito justitiæ* to have it set aside: *Anlaby* v. *Prætorius*, 20 Q. B. D. 764. The court has only power to impose terms as a condition of giving him costs: *Ib.* This *Rule* applies rather in cases where a regular judgment is sought to be set aside as an indulgence.

To set aside a regular judgment, an affidavit of merits will be necessary: *Farden* v. *Richter*, 23 Q. B. D. 124; but where merits are shewn, it is only a question of proper terms: see *Wright* v. *Mills*, 60 L. T. N. S. 887.

Mere delay is not in itself a reason for refusing to set aside a judgment by default. Some irreparable injury must be shewn to result to the plaintiff: see *Attwood* v. *Chichester*, 3 Q. B. D. 722; *Watt* v. *Barnett*, 5 Q. B. D. 183, 363, and notes to *Rule* 705; but lapse of time and acquiescence may be an answer to the motion: *McLean* v. *Smith*, 10 P. R. 145.

Where a judgment obtained on default of appearance at the trial was set aside, the defaulting party was ordered to pay the costs of the day, and of the application to restore: *Cockle* v. *Joyce*, 26 W. R. 59.

A plaintiff not being ready to proceed with the trial of his action when it came on unexpectedly, applied for a postponement, and upon its being refused let judgment go by default; a Divisional Court refused to set aside the judgment; but the Court of Appeal, upon fresh materials offering a reasonable

explanation of the plaintiff's unreadiness, set aside the judgment, and ordered the action to be restored to the list on his paying the costs of the day, including all costs thrown away, and the costs of the applications both to the Divisional Court, and to the Court of Appeal: *King* v. *Sandeman*, 38 L. T. N. S. 461; 26 W. R. 569; see also *Williams* v. *Brisco*, 29 W. R. 713, where a judgment was set aside and leave given to defend upon payment of all costs of the action subsequent to the delivery of the statement of claim; and *Ryan* v. *Fish*, 9 P. R. 458, where judgment of seisin signed in an action of dower, under a misapprehension of plaintiff's solicitor as to its effect was vacated. **Rules 797, 798.**

A judgment by default in an action against a lessee for recovery of land on a forfeiture was set aside under this *Rule* on the application of equitable mortgagees, although not parties to the action: *Jacques* v. *Harrison*, 12 Q. B. D. 136; but on appeal it was held that the order was technically wrong, as the applicant ought to have obtained the leave of the defendant to move in his name, or to have applied for leave to defend on terms of indemnifying defendant, and the order made was amended so as to allow the mortgagees to defend in defendant's name: *S. C.* 12 Q. B. D. 165. The *Rule* is designed to enable judgments by default to be set aside by those who have, or who can acquire a *locus standi*, and does not give a *locus standi* to those who have none: *Ib.*

Where the action had been improperly brought against the defendant, and the plaintiff was aware of the impropriety, and had suffered no irreparable mischief, it was held that the lapse of time was no bar to the application to set aside judgment by default: *King* v. *Sandeman*, *supra*.

Where the defence had been struck out for wilful refusal to produce, and judgment by default obtained, the Court refused to set it aside on any terms: *Haigh* v. *Haigh*, 31 Ch. D. 478; and see *Dunn* v. *McLean*, 6 P. R. 156.

See also notes to *Rules* 705, and 795.

797. Any judgment of nonsuit, unless the Court or a Judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; (*a*) but in any case of mistake, surprise, accident, [(*b*) or otherwise], any judgment of nonsuit may be set aside on such terms, as to payment of costs and otherwise, as to the Court or a Judge shall seem just. J. A. Rule 330. Judgment of non-suit.

(*a*) Up to this point the *Rule* corresponds with the Eng. R. 1875, O. 41, r. 6, and makes a material change in the previous practice at Law. Formerly, a judgment of non-suit left a plaintiff at Law free to commence another action for the same cause. There was no such practice in Chancery.

(*b*) The English Rule has not the words "or otherwise;" this is the only difference between the above *Rule* and the corresponding part of the English Rule. The effect of this difference is, perhaps, to give a somewhat greater discretion to the Court here than in England, as to setting aside a judgment of non-suit.

There can now be no such thing as the former "judgment of non-suit," unless perhaps under *Rule* 672: *Poyser* v. *Minors*, 7 Q. B. D. 329.

As a non-suit is therefore now the same as a judgment on the merits, it may be pleaded in bar to a fresh action for the same cause: *Bywater* v. *Dunne*, 10 L. R. Ir. 380; and if the non-suit be reversed on appeal, the defendant is not entitled, as of right, to a new trial for the purpose of adducing evidence on his behalf: *Macdonald* v. *Worthington*, 7 Ont. App. 531, 563.

This provision is not applicable to Division Courts under sec. 73, or sec. 304, of *The Division Court Act*, R. S. O. 1887, c. 51; *Building & Loan Ass.* v. *Heimrod*, 3 C. L. T. 361; *Bank of Ottawa* v. *McLoughlin*, 8 Ont. App. 543.

798. Where at or after the trial of an action by a jury, the Judge has directed that any judgment be entered, any Appeal from decision of a

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Rule 798. Judge, in what cases allowed.

party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the Judge having caused the [judgment] to be wrongly entered, with reference to the finding of the jury upon the question, or questions, submitted to them.

The original Rule had "finding" instead of "judgment." Otherwise it was the same as Eng. R., Dec. 1876, R. 7 (compare 1883, R. 561).

(*a*) Where at or after the trial of an action before a Judge, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply [for a new trial], or to set aside the judgment, and to enter any other judgment, upon the ground that the judgment so directed is wrong.

The words "or for a new trial" are new, and are taken from R. S. O. 1877, c. 50, s. 287. Otherwise substantially the same as Eng. R. 1875, O. 40, r. 7, (compare 1883, R. 562).

(*b*) Such application may in either of the above cases be to a Divisional Court of the High Court, or to the Court of Appeal, and when the application is made to a Divisional Court it shall be made at the first sittings for which the motion can be set down in due course after the judgment has been rendered, unless otherwise ordered. *See* J. A. Rules 510, 523.

See *Rule* 800.

It would seem to be necessary to move at the first sittings, for which, after the rendering of judgment, seven clear days' notice of motion can be given before the first day of the sittings: *Sierichs* v. *Woodcock*, in note to *Rule* 800; and the time would seem to be computed from the day of rendering the judgment, irrespective of the day of entering it: see *Hickey* v. *Stover*, 11 P. R. 88.

A motion to extend the time for moving under this *Rule* should be made before the Divisional Court itself: *Imperial Loan Co.* v. *Baby*, 13 P. R. 59. For circumstances under which the time may be extended, see *Hickey* v. *Stover*, 11 P. R. 88.

(*c*) It shall not be necessary to move separately against or with respect to the findings of the jury and the judgment directed to be entered thereon. *New.*

This *Rule* was originally passed to make the business of the Divisional Courts and the Court of Appeal respectively, nearly of the same character as before *The Judicature Act*, it having been held in *Trude* v. *Phœnix Insurance Co.*, 29 Gr. 426, and other cases soon after the passing of the Act, that under original *Rule* 317 the jurisdiction of Divisional Courts in trials before a Judge without a jury, was restricted to cases in which the findings of fact were undisputed, and it was only sought to modify or set aside the conclusion drawn by the Judge therefrom; and that in other cases any motion against the judgment should be to the Court of Appeal: see also *Re St. Nazaire Co.*, 12 Ch. D. 88.

Scope of *Rule*.

In jury cases the present *Rule* provides for a motion to enter some judgment different from that pronounced at the trial, but not for a motion for a new

trial. In non-jury cases, motions for a new trial as well as to reverse the judg- **Rule 798.**
ment pronounced are provided for.

The party against whom a judgment is given has always to consider in moving against it, whether his complaint is as to the findings of fact, and this consideration will determine whether his remedy is to move for a *new trial*, or to enter such judgment as may be the proper one.

The practice on motions for a new trial in jury cases is dealt with by *Rule* Jury cases.
789, and applies in cases where the facts have not been correctly found. This may occur (1) by reason of the jury having made an error which the applicant is entitled to complain of, or (2) by reason of some action of the Judge which has prevented the facts from being properly brought forward, such as misdirection, rejection of evidence, or non-suit of the plaintiff. In such cases the objection is not to the conclusions of the Judge from the finding, and his consequent entry of judgment upon it; but the objection is to the correctness of the finding itself, for instance where the Judge misdirects the jury: *Hamilton* v. *Johnson*, 5 Q. B. D. 263, 266; or non-suits the plaintiff: *Etty* v. *Wilson*, 3 Ex. D. 359; or refuses to do so, and a verdict is found for the plaintiff, and judgment directed to be entered thereon: *Davies* v. *Felix*, 4 Ex. D. 32; or where the Judge gives judgment for one party on the findings of the jury: *Hamilton* v. *Johnston*, 5 Q. B. D. 263; or where, the facts being undisputed, the Judge directs the jury to find for one party, and it is contended the finding should have been the other way: *Yetts* v. *Foster*, 3 C. P. D. 437. In all these cases, though the action is that of the Judge, the dispute is in respect to the propriety of the finding of the facts, and the motion should therefore be ordinarily for a *new trial*. A motion cannot be made under the present *Rule* to enter a different judgment, unless the case is one in which the Court considers that it has all the needful evidence before it and can therefore, under *Rule* 755, instead of directing a new trial, direct the proper judgment to be entered.

Motions for a new trial in jury cases can only be made to a Divisional Court. Motions to enter a different judgment may be made either to the Divisional Court, or the Court of Appeal.

Motions in non-jury cases, whether for a new trial, or to enter a different judgment, may be made either to a Divisional Court or the Court of Appeal.

Where both the findings of fact, and the conclusions of law, are complained of, the application in jury cases must be to a Divisional Court under *Rules* 789 and 798, combined: see under the Eng. practice *Robinson* v. *Tucker*, 14 Q. B. D. 376.

Where the trial has been before a Judge without a jury, *Rule* 798*a* applies, Non-jury cases.
whether the finding of fact, or the conclusions deduced from it, are questioned; and whether it is proper to direct a new trial or to enter a different judgment.

In such cases the remedy is generally by motion to reverse the judgment under this *Rule*, or by appeal to the Court of Appeal in the ordinary way, and if the Judge has improperly rejected evidence, the Court has power to let in the evidence improperly rejected, instead of directing a new trial: see *Dollman* v. *Jones*, 12 Ch. D. 553; and *Rule* 585.

The practice adopted by the Court of Appeal in such cases in England is thus explained by Lord Justice Cotton, in *Jones* v. *Hough*, 5 Ex. D., at p. 125. "When the appeal comes before us, the Court of Appeal has the full right, if it thinks necessary, although there is no motion for a new trial to say that the conclusion of fact arrived at is not satisfactory; and as they have not the materials before them to arrive at a proper conclusion, the Court will order a new trial; and I can instance a case where this would be done; where the question turns on the credibility of witnesses who had been heard *vivâ voce*, and seen by the Judge, who himself had tried the case. In such a case, even although the Court had thought the conclusion was not a correct one, they might direct that the case should go back for a new trial. Here the case is not one which turns on the amount of credibility to be given to the different witnesses, but on the conclusion of fact from certain letters, and from certain evidence which was taken upon commission. Under those circumstances, it is our duty to deal with the matter; and if we see before us the materials for arriving at a conclusion on the facts contrary to that which was arrived at by

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Rule 799.

the learned Judge, we ought not, in my opinion, to put the parties to the expense and delay of sending the matter back for a new trial. Of course I need not say in all questions of fact, especially where there has been *vivâ voce* evidence before the Judge in the Court below, the Court of Appeal ought to be most unwilling to interfere with the conclusion which the Judge has arrived at when he has had the opportunity, which the Court have not, of seeing the witnesses, and judging of their demeanour."

The Court of Appeal, or the Divisional Court, under this *Rule*, has full power to review the decision of the Judge upon the facts. See also the language in *Jones v. Hough*, 5 Ex. D., at p. 122 (quoted with approval in *Prentice* v. *Consolidated Piano Co.*, 13 Ont. App. 74), where Bramwell, L.J., says: "If upon the materials before the learned Judge, he has, in giving judgment, come to an erroneous conclusion upon certain questions of fact, and we see that the conclusions are erroneous, we must come to a different conclusion, and act upon the conclusion that we come to, and not accept his finding. * * A great difference exists between a finding by the Judge, and a finding by the jury. Where the jury find the facts, the Court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury; but where the Judge finds the facts, then the Court of Appeal has the same jurisdiction that he has, and can find the facts whichever way they like. I have no doubt, therefore, that is our jurisdiction, our power, and our duty." See also the observations of Brett, M.R., in *Read* v. *Anderson*, 13 Q. B. D. 781.

Where there was a conflict of evidence and the Judge who tried the case attributed greater weight to the evidence of some witnesses than others, but in the opinion of the Court of Appeal took a wrong view of the law, the Court refused to make a decree upon the evidence, and sent the case for a new trial: *Canada Landed Credit Co.* v. *Thompson*, 3 C. L. T. 158.

As to the principles upon which Courts act in reviewing the findings of a Court of first instance on the facts, see *supra*, p. 35.

As to appeals from the decision of a Judge sitting as and for the Court, but not at the trial, see notes to secs. 43, 61 and 70 of the Act.

Where there is a general judgment against several defendants, the last clause of this *Rule* does not enable them to sever, and appeal to several Courts; but they must all appeal to the tribunal to which the defendant who takes the first step has appealed: *per* Armour, J., in *Hateley* v. *Merchants Despatch Co.*, 4 Ont. 723.

Where a motion for a new trial was made conditionally upon the result of a decision pending in the Court of Appeal, it was held that the usual steps to bring the motion on within the usual time should be taken, and that if necessary application should be made to the Court to postpone the hearing of the motion till the decision of the Court of Appeal should be given. The Court has full discretion over such an application to extend the time for giving notice of such motion, and is not limited to cases where the party has been misled: *Peckett* v. *Short*, 32 W. R. 123.

Interpleader.

Where a Judge has directed judgment to be entered on an interpleader issue, an appeal lies under this *Rule*: *Witt* v. *Parker*, 25 W. R. 518; see *Wilson* v. *Kerr*, 18 U. C. Q. B. 470; *Dodds* v. *Shepherd*, 1 Ex. D. 75; 45 L. J. Ex. 457; *Withers* v. *Parker*, 28 L. J. Ex. 383; *Robinson* v. *Tucker*, 14 Q. B. D. 371; *Dawson* v. *Fox*, 14 Q. B. D. 377.

Motion for judgment where jury disagree.

799. In any case where on the trial the jury disagree and find no verdict, the Court may, notwithstanding such disagreement give judgment of non-suit. *See* R. S. O. 1877, c. 50, s. 290.

See *Bank of B. N. A.* v. *Eddy*, in note to *Rule* 682; also *Casey* v. *C. P. Ry. Co.*, 15 Ont. 574, where judgment was given for defendants, the plaintiff's own evidence shewing that the accident, the occasion of the damages claimed by him, was caused by his own negligence.

The making of a motion under this *Rule* was held to stay the carrying of the case down to a second trial, where the motion was not heard at an intervening sittings of a Divisional Court because the notes of evidence were not ready in time: *Schuhl* v. *Rosenstadt*, 9 C. L. T. 114. **Rules 800-802.**

800. Every motion against a judgment or for a new trial shall be a seven clear days' notice, and the motion shall be set down at least two days before the first day of the sittings of the Divisional Court for which the notice is given, unless otherwise ordered. *See* J. A. Rule 522. Length of notice.

This *Rule* is in accordance with the former practice on rehearing: see Chy. G. O. 418; except that 7 clear days setting down was required.

Both the seven days and the two days are clear days: see *Rule* 475, and *Rumohr* v. *Marx*, 18 C. L. J. 444; 19 C. L. J. 10; 3 C. L. T. 31, decided under the former practice.

The seven clear days' notice of motion must be given for the first day of the sittings and will not be sufficient if given for any subsequent day although given in time to permit the motion to be set down two clear days before the commencement of the sittings: *Sierichs* v. *Woodcock*, (the Div. Court C. P. D., 26 Nov., 1889).

Where a solicitor had instructed his clerk to set down a case, but the clerk, by a mistake in supposing that the seven days were not clear days allowed the last day to pass, this was held not a sufficient ground for granting leave to set the case down: *Rumohr* v. *Marx*, *supra*.

Where judgment for defendants was delivered on 22nd November, and the plaintiff's solicitor immediately applied for a copy, but did not receive it until 29th November, which was the last day for setting down a motion to reverse the judgment, and there was, therefore, no time to consult either the plaintiff or counsel, the Court held that the delay was sufficiently excused, and granted leave to set down upon payment of costs: *Foley* v. *Canada Permanent, etc.*, 18 C. L. J. 444; 3 C. L. T. 32.

Where a cause had been set down and subsequently struck out by order of a Judge, an application to the Court at the sittings for which the cause had been set down, for leave to set the cause down at such sittings by way of appeal from the order striking it out, was held to be an exception to this *Rule*, and not required to be set down: *Bell* v. *Macklin*, 21 C. L. J. 95.

Where a case is improperly set down, a substantive motion should be made to strike it out: *Wansley* v. *Smallwood*, 10 P. R. 233. When the objection has not been taken until the case has been called on for argument, costs have sometimes been refused, although the objection was sustained.

801. If a party who serves a notice of motion for a new trial or against a judgment, does not set the motion down, he shall be deemed to have abandoned the same. *New.* Abandoning motion.

The opposite party may doubtless apply at the opening of the sittings on the first day for the costs of the abandoned motion: see *Reg.* v. *Armstrong*, (the Div. Court C. P. D., 21 Dec., 1889.)

802. On every application for a new trial, or to enter a different judgment, where the evidence was at the trial taken down by a short-hand writer, there shall, unless the Court otherwise orders, be filed when the motion is set down 3 copies of the evidence in words at length, each copy to be certified as correct by the short-hand writer. C. L. Rules, 10th March, 1876, 1. Copies of shorthand notes to be delivered on motions for new trial, etc.

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Rules 803, 804.

Per Boyd, C., October, 8, 1888: "This *Rule* is not for the present to be enforced strictly." It is not usual to require the copies of the shorthand notes to be delivered at the time of setting down the case; to do so would necessitate constant applications to the Court to be relieved from the operation of the *Rule*. It is considered sufficient to deliver the copies of the notes at any time before the case is argued; although, of course, it is desirable that they should be delivered as soon as possible. A case is not usually put on the peremptory list for argument before the copies of the notes have been delivered, if other cases are ready; but if a cause should be placed on the peremptory list, and the notes are not forthcoming when the cause is called on, counsel for the party whose duty it is to deliver them, should be prepared with an affidavit, showing that due diligence has been used to procure them, or the cause may be struck out with costs.

CHAPTER VIII.

APPEALS.

1. Appeals to Court of Appeal, 803-845.
   (i) *High Court Appeals*, 803-834.
   (ii) *County Court Appeals*, 835-845.
2. Appeals from Chambers, 846-847.
3. Appeals from Masters and Referees, 848-850.
4. Appeals from Taxation, 851-854.
5. Appeals to the Judicial Committee of the Privy Council, 855-857.

1. Appeals to the Court of Appeal.

(i) *High Court Appeals.*

Notice of appeal.

803. The notice of appeal required by Section 71 of *The Judicature Act* may be in the Form No. 41 in the Appendix.

See notes to sec. 71, p. 80.

When execution to be stayed.

804. Upon the perfecting of the security, mentioned in section 71 of the Judicature Act, execution shall be stayed in the original cause, except in the following cases:—

Subject to certain exceptions in which partial performance is required by delivery into Court.

(1) If the judgment appealed from directs the assignment or delivery of documents or personal property, execution shall not be stayed until the things directed to be assigned or delivered have been brought into the Court appealed from, or placed in the custody of such officer or receiver as that Court or a Judge appoints, nor until security has been given to the satisfaction of that Court or Judge, and in such sum as may be directed, that the appellant will obey the order of the Court of Appeal;

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Rule 804. Or by executing instrument.

(2) If the judgment appealed from directs the execution of a conveyance or any other instrument, execution shall not be stayed until the instrument has been executed and deposited with the proper officer of the Court appealed from, to abide the judgment of the Court of Appeal;

Or by the giving of special security not to commit waste.

(3) If the judgment appealed from directs the sale or delivery of possession of real property or chattels real, execution shall not be stayed until security has been entered into to the satisfaction of the Court appealed from, and in such sum as that Court or a Judge directs, that during the possession of the property by the appellant, he will not commit or suffer to be committed any waste on the property, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, and also, in case the judgment is for the sale of property and the payment of a deficiency arising upon the sale, and the appellant will pay the deficiency;

Or to pay debt and costs.

(4) If the judgment appealed from directs the payment of money, execution shall not be stayed until the appellant has given security, to the satisfaction of the Court appealed from or a Judge, that if the judgment, or any part thereof, be affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof as to which the judgment may be affirmed if it be affirmed only as to part, and all damages awarded against the appellant on the appeal. R. S. O. 1877, c. 38, s. 26.

Security for Costs, etc.—Sec. 71 of the Act provides for the giving of security for costs in the sum of $400 as a condition precedent to an appeal.

Staying Execution under Judgment appealed from—

The security provided for by sec. 71 is only for the costs of the appeal. The giving of such security for the costs of the appeal effects a stay of execution, except in the cases mentioned in this *Rule*: see *McGarvey* v. *Strathroy*, 6 Ont. 138; *Toronto* v. *Toronto Street Ry. Co.*, 12 P. R. 361. In any of such cases if the appellant desires to stay the execution of the judgment he must further comply with this *Rule*; execution will not otherwise be stayed: *Fox* v. *Toronto & Nipissing Ry. Co.*, 26 Gr. 352; *Gossage* v. *Canadian L. & E. Co.*, 24 U. C. Q. B. 452: see *Barker* v. *Lavery*, 14 Q. B. D. 769.

In order to stay execution where the judgment directs payment of money, whether as debt, damages, or costs, further security must be given under this *Rule*: *Powell* v. *Peck*, 8 P. R. 85; see also *Heward* v. *Heward*, 2 Chy. Ch. 245; and execution for costs can only be stayed upon giving security for both the costs in the Court below and in the Court of Appeal: *Grand Trunk Ry.* v. *Ont. & Que. Ry.*, 9 P. R. 420. The application to stay execution should not be made *ex parte*: *Ib.*, and is made in the Court below: see Jud. Act, sec. 71, and *G. T. Ry. Co.* v. *Ont. & Que. Ry. Co.*, *supra*; *Wilson* v. *Church*, 11 Ch. D. 576; *Otto* v. *Lindford*, 18 Ch. D. 394; *Cropper* v. *Smith*, 24 Ch. D. 315.

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Rule 804.

Instead of giving a bond, money may be paid into Court to abide the result of the appeal; in such case, some additional sum, to answer the difference between the legal rate of interest, and that allowed on deposits in Court, may be required to be paid: *McDonald* v. *Worthington*, 8 P. R. 554.

A stay of execution for the payment of money or costs awarded by the Court below, will be given to an appellant as a matter of right upon giving the security by this *Rule* prescribed: see *Campbell* v. *Edwards*, 6 P. R. 159; *Fox* v. *Toronto & Nipissing Ry. Co.*, 26 Gr. 352. The Court may on such an application consider whether the appeal is frivolous: *Norval* v. *Canada Southern Ry. Co.*, 7 P. R. 462.

It has been held that the recovery of costs, payable under an order, will not be stayed by the Court of Appeal, pending an appeal to the House of Lords, if the solicitors to whom they are payable, give their personal undertaking to refund, in case of the order being reversed: *Grant* v. *The Banque Franco-Egyptienne*, 3 C. P. D. 202; *Morgan* v. *Elford*, 4 Ch. D. 352; *The Khedive*, 5 P. D. 1; but see *supra* and *Atty.-Gen.* v. *Emerson*, 88 L. T. Jour. 97.

Costs of motion.

The costs of an application to stay execution in England, where there is no enactment similar to *Rule* 804, are as a general rule ordered to be paid by the applicant: see *Merry* v. *Nickalls*, L. R. 8 Chy. 205; *Cooper* v. *Cooper*, 2 Ch. D. 492; *Morgan* v. *Elford*, 4 Ch. D. 358. In *Burdick* v. *Garrick*, L. R. 5 Chy. 453, and *Adair* v. *Young*, 11 Ch. D. 136, however, they were made costs in the appeal.

In Ontario, the costs of applications to stay execution, or proceedings, are in the discretion of the Court: *Rule* 1170; and the general rule is to make the costs, costs in the appeal. Sometimes formerly they were ordered to be paid by the applicant: see *Norval* v. *Canada Southern Ry. Co.*, 15 C. L. J. 86; 7 P. R. 462; *Fox* v. *Toronto & Nipissing Ry. Co.*, *supra*.

Where security has been perfected for a stay of execution under *Rule* 804, the execution is not only stayed, but is superseded, so that it ceases to bind, if it has been issued and placed in the Sheriff's hands: *O'Donohoe* v. *Robinson*, 10 Ont. App. 622.

When money made under execution, will be ordered to be refunded, or possession of land be ordered to be restored.

If the money has been made by the Sheriff, but not paid over before the Judge's *fiat* to stay execution is served on the Sheriff, the appellant may demand back the amount levied from the Sheriff: see sec. 72 of the Act, p. 82. And where a suit was brought to restrain an action of ejectment, and the plaintiff failed, and thereupon a writ of *hab. fac. poss.* had been executed before the proceedings thereon could be stayed, possession was ordered to be restored to the appellant pending the appeal, on his giving security as required by *Rule* 804: *Campbell* v. *Royal Canadian Bank*, 19 Gr. 477. But when the money has been made by the sheriff, and transmitted to the respondent's solicitor, before an order staying execution is served, such money will not be ordered to be refunded, even though the order staying the execution be granted before the money actually reached the solicitor's hands: *McDonell* v. *McKay*, 2 Chy. Ch. 354; see further *Rules* 804, 805, 808, 809, 811.

Stay of proceedings—when ordered pending appeal.

Staying Other Proceedings under the Judgment Appealed from.—Pending an appeal, proceedings upon accounts and inquiries are not in general stayed: *Hyam* v. *Terry*, 29 W. R. 32; *Whitehead* v. *Buffalo and L. H. R. W. Co.*, 7 Gr. 578; *Butler* v. *Standard Fire Ins. Co.*, 8 P. R. 41; *Heward* v. *Heward*, 2 Chy. Ch. 242; (but see *Bank of U. C.* v. *Pottroff*, 8 U. C. L. J. 328); but they will be stayed where the appeal, if successful, would be nugatory if proceedings were continued pending the appeal: *Wilson* v. *Church*, 12 Ch. D. 454; 41 L. T. N. S. 50; 48 L. J. Chy. 690; 28 W. R. 284; or where the appellant would sustain irreparable injury: *Adair* v. *Young*, 11 Ch. D. 136; 40 L. T. N. S. 591; *Walford* v. *Walford*, L. R. 3 Chy. 812; *Goldie* v. *Date P. S. Co.*, 7 P. R. 1; *Cotton* v. *Corby*, 5 U. C. L. J. 67; but not otherwise: *McMurray* v. *Grand Trunk R. W. Co.*, 3 Chy. Ch. 125. In *Re Palmer*, 48 L. T. N. S. 52, the Court refused to stay the trial of issues of fact, pending an appeal on a question of law; and see *McDonald* v. *Murray*, 9 P. R. 464, where a new trial was allowed to proceed, pending an appeal from the rule granting the new trial where it was shewn that important evidence might be lost, and the plaintiff would be prejudiced financially by delay, but in *Goldie* v. *Date P. S. Co. supra*,

a notice of trial given without leave, pending such an appeal, was held irregular: see also *Hyam* v. *Terry*, 29 W. R. 32; and where an appeal to the Supreme Court was pending upon a question arising as to whether the action should be tried with, or without a jury, the trial was stayed: *Conmee* v. *Canadian Pacific Ry. Co.*, 11 P. R. 356. **Rule 804.**

When an appeal was pending against an order for production of documents, proceedings to enforce the order pending the appeal were stayed, on the terms of the appellant bringing the documents in question into Court: *Emmerson, Ind.*, 33 Ch. D. 326; 55 L. T. N. S. 422.

The application to stay proceedings will not be entertained if the time for appealing has elapsed: *Brigham* v. *Smith*, 3 Chy. Ch. 315.

Proceedings to commit a defendant for a breach of an injunction, will not be stayed pending an appeal from the judgment, or order, granting the injunction: *Gamble* v. *Howland*, 3 Gr. 281, 303; and see *McLaren* v. *Caldwell*, 29 Gr. 438; and pending an appeal from a judgment awarding an injunction, the injunction will not be suspended: *Ib.*, and see *S. C.*, 6 Ont. App. at p. 494; *Fox* v. *Toronto & Nipissing R. W. Co.*, 26 Gr. 352, unless in the case of a mandatory injunction, where obedience to the injunction would render the appeal nugatory: see *Dundas* v. *Hamilton & Milton Road Co.*, 19 Gr. 455; but see *McGarvey* v. *Strathroy*, 6 Ont. 138; 19 C. L. J. 393, where Proudfoot, J., refused a sequestration to enforce an injunction restraining the defendants from permitting water to flow on plaintiff's land, pending an appeal, after security had been given under R. S. O. 1877, c. 38, s. 26, from which this *Rule* is taken; and see also *Toronto* v. *Toronto Street Ry. Co.*, 12 P. R. 361. Injunction, when suspended.

Where a sum of money is ordered to be paid, or in default a receiver is directed to be appointed, the appointment of a receiver can only be stayed pending an appeal, on security being given for the amount ordered to be paid, as required by *Rule* 804 (4): *Fox* v. *Toronto and Nipissing R. W. Co.*, 26 Gr. 352. Appointment of Receiver, when stayed.

In mortgage cases, simply for foreclosure, or sale, proceedings may be stayed pending an appeal without security being given: *Bank of U. C.* v. *Pottroff*, 8 U. C. L. J. 328. And it would seem that the Court appealed from, may, in its discretion, irrespective of this *Rule*, suspend the operation of its judgment in any case pending an appeal: *Cotton* v. *Corby*, 5 U. C. L. J. 67. Mortgage actions, when stayed.

Where an appellant proceeds to enforce an order or judgment appealed from pending the appeal; and by his appeal he claims relief inconsistent with that given by the order or judgment appealed from, he will be held to have abandoned his appeal: *International Wrecking Co.* v. *Lobb*, 12 P. R. 207. Money paid into Court pending appeal,—disposition of.

Where money has been paid into Court for a specific purpose, and that purpose has been answered in favour of the party paying it in, it will be paid out to that party; therefore, when security for costs of an appeal to the Court of Appeal has been given, by paying money into Court; in the event of the appeal proving successful, the appellant is entitled to have the money paid out to him, notwithstanding the respondent may desire to appeal to the Supreme Court: *McLaren* v. *Caldwell*, 9 P. R. 118; *Wilson* v. *Beatty, Re Donovan*, 10 P. R. 71; *Atherton* v. *B. N. A. Co.*, L. R. 5 Chy. 720; *Lindsay Petroleum Co.* v. *Hurd*, 3 Chy. Ch. 16; *Billington* v. *Provincial Ins. Co.*, 9 P. R. 67; *Crossman* v. *Shears*, 15 C. L. J. 110; and the respondent in such a case, if he desires to stop the payment out, must give security for damages consequent on its detention in Court: *McDonald* v. *Worthington*, 8 P. R. 554.

Similarly an appeal bond may be delivered up, where the appellant is successful, all liability upon it being at an end, notwithstanding that an appeal to the Supreme Court may be pending: *Burgess* v. *Conway*, 11 P. R. 514.

This principle does not, however, apply to enable a party who has paid money into Court as security for costs in the High Court and succeeded, to obtain payment of the money out to him pending an appeal to the Court of Appeal, as the appeal is a step in the original action: *Rule* 818, and the purpose for which the money is paid in is not answered, unless the appeal is unsuccessful: *National Ins. Co.* v. *Egleson*, P. R. 202. But where the opposite party was otherwise secured, payment out was directed: *Napier* v. *Hughes*, 9 P. R. 164. Similarly where a bond was given for security for costs a motion to have it delivered

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Rules 805, 806.

up was refused, an appeal being pending to the Court of Appeal: *Hateley* v. *Merchants' Despatch*, 12 Ont. App. 640; 11 P. R. 9.

Money paid in by a party as security for costs in appeal will generally be paid out to the solicitor for the party on his undertaking to refund it if the appeal is allowed by the Supreme Court: *Kelly* v. *Imperial, etc.*, 10 P. R. 499; *Steele* v. *York*, 7 C. L. T. 170.

And where a sum of money has been paid into Court, not to answer any specific purpose, but generally to abide further order, then the Court has a discretion as to ordering the money to be paid out pending an appeal, and in such a case, may require security to be given to refund if required: *King* v. *Duncan*, 9 P. R. 61; *Canadian Land Co.* v. *Dysart*, 11 P. R. 51; *e.g.*, where owing to the poverty of the successful party there is danger that it may not be recovered if the decision should be reversed: *Re Airey, Airey* v. *Bower*, 79 L. T. Jour. 95.

Where a fund in Court is, by the judgment appealed from, directed to be paid out to the respondent, the Court may stay the payment out, upon the appellant giving security for the difference between legal interest and the interest which will actually accrue in Court: *McDonald* v. *Worthington*, 8 P. R. 554; *Brewer* v. *Yorke*, 31 W. R. 109; *Bradford* v. *Young*, 28 Ch. D. 18.

Where money has been paid in as security for costs of an appeal by a party who is unsuccessful, it will be applied in payment of the costs of the appeal, and the balance will not be treated as that party's own moneys and applied to pay other costs of the action payable by him, if it is shewn to have been borrowed for the specific purpose of securing the costs of the appeal: *McKenzie* v. *Kittridge*, 1 C. L. T. 110. See also *Worthington* v. *Johnson*, 72 L. T. Jour. 373.

Where money was so paid out to a respondent to satisfy costs of an unsuccessful appeal, but the decision was reversed by the Privy Council, the respondent was compelled, in an action brought for the purpose, to repay the moneys so paid out forprincipal and interest, with interest on that gross amount at six per cent., and all sums otherwise paid for costs without interest: *Citizens Ins. Co.* v. *Parsons*, 32 C. P. 492. *Semble* that an action was only necessary because the money had been paid out to persons not parties to the original suit as trustees for the creditors of the original plaintiff: *Ib.* See *McKindsey* v. *Armstrong*, 11 P. R. 200.

Proceedings in an action upon an appeal bond were stayed, where a further appeal was pending and security had in it been given for the costs secured by the bond: *McLaren* v. *Stephen*, 10 P. R. 88.

Appeal disallowed, where security not put in in time.

An appeal under *The Joint Stock Companies Winding-up Act*, (R. S. O. c. 183), s. 27 (2) cannot be entertained where security has not been given within eight days from the rendering of final judgment, or order, appealed from: *Re Union Ins. Co.*, 7 Ont. App. 783.

When given, a *fiat* to stay execution to be granted.

Judge may order execution to issue.

805. When the security has been perfected and allowed, any Judge of the Court appealed from may issue his *fiat* to the Sheriff to whom any execution on the judgment has issued, to stay the execution, and the execution shall be thereby stayed, whether a levy has been made under it or not; but if the grounds of appeal appear to be frivolous, the Court appealed from, or a Judge, upon motion on notice, may order execution to issue or to be proceeded with. R. S. O. 1877, c. 38, s. 28.

See note to *Rule* 804.

Security to be by bond.

806. Unless otherwise specially ordered by the Court appealed from, or a Judge thereof, the security required by

section 71 of *The Judicature Act* and Rule 804 shall be personal and by bond, and may be in the form No. 209 in the Appendix, *mutatis mutandis*. Provided that in any case in which execution may be stayed on the giving of security under the preceding Rules, such security may be given by the same instrument whereby the security prescribed in section 71 is given. App. O. 2. Rules 807, 808. Form of bond.

See note to *Rule* 804.

807. The bond shall be executed by the appellant or appellants, or one or more of them, and by two sufficient sureties, unless the Court or a Judge thinks fit to dispense with the execution thereof by the appellant. App. O. 3. Appeal bond, parties to.

Instead of giving a bond, security may be given by paying $400 into Court, and leave to pay in that sum will be granted on an *ex parte* application: *Connolly* v. *O'Reilly*, 8 P. R. 159; or, after a bond has been given, the Court below may allow money to be paid into Court as security in substitution therefor: *Chatham & Dover, E.*, v. *The Erie & Huron Ry. Co.*, 7 P. R. 399; but it is not sufficient to deposit the money, and obtain a certificate of the deposit; it must also appear that the security so given, is to the satisfaction of the Court appealed from, or a Judge thereof: *Macdonald* v. *Abbott*, 3 S. C. R. 278. As to the time for putting in security, see sec. 71 of the Act, p. 79; *McRae* v. *White*, 9 P. R. 288.

If either surety dies or becomes insolvent, pending the appeal, an application may be made to compel the appellant to substitute another: *Saunders* v. *Furnival*, 2 Chy. Ch. 159; *Gage* v. *Canada Publishing Co.*, 10 P. R. 169. The application must be made to the Court appealed from: *Lumsden* v. *Davis*, 10 P. R. 10. Further security where it may be ordered.

A bond cannot be excepted to on the ground that the sureties are "standing sureties" of the applicant, in the absence of evidence as to their insufficiency: *Norval* v. *Canada Southern Ry. Co.*, 7 P. R. 313. It is irregular for the solicitor of the appellant to become surety in an appeal bond. *Beckitt* v. *Wragg*, 1 Chy. Ch. 5; *Grand Trunk Ry. Co.* v. *Ontario & Quebec Ry. Co.*, 3 C. L. T. 173. Exceptions to sureties.

A married woman has been held to be not a proper surety: *Mullin* v. *Pascoe*, 8 P. R. 372. But see *The Married Woman's Property Act*, (R. S. O. 1887, c. 132) and *Kerr* v. *Stripp*, 40 U. C. Q. B. at p. 134; *Frasee* v. *McFarland*, 43 U. C. Q. B. 281; *Lawson* v. *Laidlaw*, 3 Ont. App. 77; and *Hessin* v. *Baine*, 2 Ont. 302.

An officer of the Court is not an improper surety: *Wilkins* v. *McLean*, 7 C. L. T. 5.

When the title to land, in respect of which a surety qualified was not registered, it was held that he was an insufficient surety unless registration of his title was procured: *Adamson* v. *Adamson*, 9 P. R. 96.

When an appellant gives notice of discontinuance of his appeal, the respondent may without further order, tax his costs of the appeal, and, in case of non-payment, obtain an order for the delivery of the appeal bond to him for suit: *Hughes* v. *Hughes*, 19 C. L. J. 10. Discontinuance of appeal—effect of.

808. Where the judgment appealed from directs the payment of money, the security required by Rule 804, shall be in double the amount so directed to be paid; provided always that, in cases where the security to be given shall be in a sum above $2,000, it shall be in the discretion of the Amount of security to be given to procure stay of execution where judgment

Rules 809-811.

is for payment of money.

Court appealed from or of a Judge thereof, to allow security to be given by a larger number of sureties apportioning the amount among them as may appear reasonable; and provided further, that, where the amount by the judgment directed to be paid exceeds $10,000, it shall be in the discretion of the Court or Judge to allow security to be given for such amount less than double as may appear reasonable. App. O. 4.

When dispensed with in mortgage actions.

It has been held that *Rule* 804 (4) does not apply to appeals from judgments, in mortgage cases for foreclosure, or sale, simply: *Bank of Upper Canada* v. *Pottroff*, 8 U. C. L. J. 328, but where such a judgment also contains a personal order for payment of the mortgage debt, then the sub-section (4) would apply and security must be given before execution can be stayed.

Suit for account.

Where, in a suit for an account, at the hearing of the cause, a sum of money was directed to be paid into Court, pending a reference to take the accounts, it was held that proceedings might be stayed on such direction, pending an appeal, upon security being given: *Whitehead* v. *Buffalo & Lake Huron Ry. Co.*, 7 Gr. 578.

The Court has no discretion, on an appeal to the Supreme Court of Canada, to increase the amount of security (fixed by R. S. C. c. 135, s. 46, at $500,) because of the number of respondents: *Archer* v. *Severn*, 12 P. R. 472.

Where sale or delivery of possession of property ordered.

809. Where the judgment appealed from directs the sale, or delivery of possession, of real property, or chattels real, the security required by Rule 804, shall be taken in double the yearly value of the property in question, unless the Court appealed from, or a Judge thereof, otherwise directs. App. O. 5.

The Court refused to stay execution of a judgment for defendant in replevin for a month to enable the plaintiff to give security: *Scott* v. *Carveth*, 20 U. C. Q. B. 435.

Affidavit of justification to be made by sureties.

810. The parties to every such bond as sureties shall by affidavit respectively make oath that they are resident householders or freeholders in Ontario, and severally worth the sum mentioned in the bond, over and above what will pay and satisfy all their debts; and the affidavit may be in the form No. 209 in the Appendix. App. O. 6.

Bond and affidavits to be filed. When allowed.

811. The bond, with an affidavit of the due execution thereof, and affidavit of justification, shall be deposited with the proper Registrar of the Court appealed from in Toronto, and shall be deemed to be perfected and allowed, unless within 14 days after being served with notice thereof the respondent moves for its disallowance. App. O. 7.

The bond, and affidavits of execution, and justification, are separate documents, and each must be stamped with a proper filing stamp: *McBeth* v. *Smart*, 1 Chy. Ch. 269.

The affidavits of execution, and justification, should be entitled in the cause.

The affidavit of justification cannot be dispensed with: *Donnelly* v. *Jones*, 4 Chy. Ch. 48. **Rules 812-814.**

Where the respondent objects to the sufficiency of the bond, he must move to disallow it, or it will, under this *Rule*, stand allowed after the lapse of fourteen day from service of notice of its filing. The motion should be made in the Court appealed from. The application may be entertained by the Master in Chambers, or, when the bond is filed in an outer Court, by a Local Master, or County Court Judge, having jurisdiction: see *Rules* 41, 138; *Brigham* v. *Smith*, 1 Chy. Ch. 334. Motion for disallowance of bond when made.

Affidavits may be read in opposition to the affidavits of justification of the sureties: *Campbell* v. *Royal Canadian Bank*, 6 P. R. 45; *Brigham* v. *Smith*, 1 Chy. Ch. 334; and the sureties are also liable to cross-examination on their affidavits of justification: *Rule* 577, and formerly might, under Chy. O. 268, be so examined by being served with an appointment and subpœna though no motion against the bond was pending: *Hughes* v. *Hughes*, 17 C. L. J. 110; 1 C. L. T. 189; *sed quære* under the present *Rule* 577. Affidavits may be used. Sureties may be examined.

See also *Firth* v. *Ryan*, 20 C. L. J. 175; and notes to *Rule* 807.

Where the bond stands allowed under this *Rule*, by reason of the lapse of fourteen days from its filing, a Judge's fiat to the sheriff to stay execution may be obtained: *Rule* 805. But where the appellant claims to stay execution before the fourteen days have expired, then a special application for that purpose is necessary under the following *Rule*. Fiat to stay execution, when granted.

Where the appeal to the Court of Appeal is dismissed, an action on the appeal bond will be stayed, where the appellant has given proper security, and is prosecuting an appeal from the decision of the Court of Appeal to the Privy Council: *McLaren* v. *Stephen*, 10 P. R. 88; 19 C. L. J. 404. Action on appeal bond, when stayed.

812. The appellant may, after such deposit, make a special application, before the expiration of 14 days, to stay execution in any of the cases mentioned in Rule 804. App. O. 8. Special application to stay execution may be made.

813. The appeal shall be a step in the cause or matter in which the judgment complained of was given, and shall be upon a case to be stated by the parties, or in the event of difference to be settled by the Court appealed from, or a Judge thereof, and shall set forth so much of the pleadings, evidence, affidavits, documents, and the ruling or judgment objected to, as may be necessary to raise the question for the decision of the Court of Appeal. R. S. O. 1877, c. 38, s. 31 (1). Appeal to be a step in the cause and upon a case stated.

The formal judgment as drawn up must be printed. That is, the subject of the appeal and not the reasons upon which it is founded: *Thomson* v. *Robinson*, 16 Ont. App., at p. 184.

814. After the security has been perfected, the appellant shall prepare a draft of the case mentioned in the preceding Rule, and shall submit the draft to the respondent, who shall return the same within 4 days, with his modifications or suggestions, and in the event of differences, the appellant shall give 2 clear days' notice of an application to the Court, or a Judge, to settle the case. App. O. 9. After security perfected, case to be prepared—draft to be submitted to respondent.

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Rules 815-819.

The security referred to in this *Rule* is the security for $400 for the costs of appeal under s. 71 of the Act, and not the security required to be given in order to secure a stay of execution under *Rule* 804.

Co-defendants not entitled to notice of settling case.

When one of several defendants appeals, the other defendants are not entitled to notice of settling the case, even though the plaintiff claim relief over against them: *Freed* v. *Orr*, 6 Ont. App. 690; and see *Rule* 828.

The Court, or Judge, to settle the case in the event of the parties differing, is the Court appealed from or a Judge thereof: see *Rule* 813.

The case should only contain so much of the proceedings as is necessary to raise the questions involved in the appeal. In *Parsons* v. *Standard Ins. Co.*, 4 Ont. App., at p. 330, Burton, J.A., in remarking upon the unnecessary length of the case, said: "It appears to us to be a very grave abuse and violation of the Rules we have made on the subject, and we do not intend to impose upon the Registrar the task which the appellants have cast upon us of wading through this mass of matter for the purpose of discovering whether some portion of it may properly be applicable to this appeal, but we disallow the whole of the appeal books in the taxation. If a similar case should occur again after this warning it will be our duty seriously to consider whether it is not sufficient reason for refusing the whole costs of the appeal."

If the notes of the evidence taken have been lost, the Court of Appeal may allow the evidence to be taken over again: *Ex parte Firth, Re Cowburn*, 19 Ch. D. 419; 51 L. J. Chy. 473.

Raising new points on appeal.

A new point may not be allowed to be raised in the Court of Appeal, where if raised, it might have been met by evidence: *Ib.*

Where as a matter of pleading certain issues were not raised, but at the trial had been treated as if raised, the objection was not allowed to be taken in the Court of Appeal: *Kennan* v. *Murphy*, 8 L. R. Ir. 285.

Where an appellant succeeds upon a point not adjudicated upon in the Court below he may not be allowed his costs: *Goddard* v. *Jeffreys*, 46 L. T. N. S. 904; *Page* v. *Austin*, 7 Ont. App. 1: *Van Velser* v. *Hughson*, 9 Ont. App. 390; *Cooper* v. *Cooper*, 59 L. T. N. S. 1.

In the Privy Council an appellant is not allowed to take a point not taken in the Court below: *Corporation of Adelaide* v. *White*, 55 L. T. N. S. 3.

Name of Judge to be stated.

815. The case shall state the name or names of the Judge or Judges appealed from.

Reasons of, and against appeal—to be served.

816. The appellant shall serve his reasons of appeal along with, and as part of, the draft case mentioned in the preceding Rules, and the respondent shall serve his reasons against the appeal, within 10 days from such service, or within such further time as a Judge of the Court of Appeal may allow. App. O. 11.

Part of judgment appealed from.

817. If the appeal is from a part only of the judgment, the reasons of appeal shall specify the part. App. O. 12.

Neglect of respondent to serve reasons against appeal—effect of.

818. If the respondent neglects to serve reasons against the appeal, the Court may hear the appeal *ex parte*, and give judgment thereon without the intervention of the respondent. App. O. 13.

Appeal book to be printed.

819. Upon being served with the respondent's reasons against the appeal, or upon his having made default in

service thereof, the appellant shall cause appeal books to be printed containing the case as settled by the parties, or the Judge, and the reasons for the appeal, and the reasons against the appeal, if such latter reasons have been served as aforesaid, and any notice given under Rule 821, and shall forthwith deliver one of such copies to the Registrar of the Court of Appeal, by whom the same shall be filed as the stated and settled case, and 10 copies for the use of the Judges and officers of the Court; and also 30 copies for the purpose of being delivered, in the event of an appeal to the Supreme Court of Canada, to the party appealing to that Court, for use upon such appeal. App. O. 14, 69.

Rules 820, 821.

Number of copies to be delivered.

820. The respondent may, after such printed book has been delivered to the Registrar, apply to a Judge of the Court of Appeal for leave to serve his reasons, upon affidavit accounting for the delay, and such leave may be given upon such terms as the Judge may think proper. App. O. 15.

Leave to deliver reasons against appeal, after book printed, may be granted.

821. A cross appeal shall not under any circumstances be necessary, but if a respondent intends upon the hearing to contend that the decision should be varied, he shall with his reasons against the appeal give notice of such contention to any parties who may be affected by such contention, and such notice shall concisely state the grounds of such contention in the same manner as reasons of appeal are stated. The omission to give such notice, shall not diminish the powers conferred by Act upon the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs. App. O. 16.

Cross appeal unnecessary—proceedings in lieu of.

This *Rule* is substantially the same as the English R. Sup. C. 1875, O. 58, r. 6, (1883, R. 870).

Notice by way of cross appeal will come on with the original appeal: see *Cooney* v. *Nicholls*, 7 L. R. Ir. 107.

Notice by a respondent under the English Rule to vary the decision of the Court was proceeded upon, though the point was one in which the original appellant had no interest: *Ralph* v. *Carrick*, 11 Ch. D. 873. But the Court will not, under the power contained in this *Rule*, entertain a cross appeal merely on a question of costs: *Harris* v. *Aaron*, 4 Ch. D. 749.

Where respondents gave notice of intention to have the judgment varied, and both appeals were dismissed, the appellants were ordered to pay the costs, except such as were occasioned by the notice: *The Lauretta*, 4 P. D. 25.

Where there were two respondents, one of whom gave a cross notice affecting the other respondent, the appellant, whose appeal was dismissed, was ordered to pay half the costs of both the respondents, and the unsuccessful respondent in the cross appeal was ordered to pay half the costs of the other respondent:

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Rules 822, 823.

Harrison v. *Cornwall Mineral Ry. Co.*, 18 Ch. D. 334. Where, however, the costs could not have been materially increased by the notice, no apportionment was made but a fixed sum was allowed for costs incidental to the notice: *Robinson* v. *Drakes*, 23 Ch. D. 98.

Where after a cross notice given the appellant discontinues or abandons, the respondent's notice is to be treated as a cross appeal, but the appellant may bring forward the matter of his appeal by way of objection to the cross appeal: "*The Beeswing*," 10 P. D. 18.

Where relief over claimed by respondent against defendants who do not appeal.

Where one of several defendants appealed, and the plaintiff claimed relief over against the co-defendants who did not appeal, service of notice of appeal, under s. 71 of the Act, *supra* p. 79, on such co-defendants was held unnecessary but it was held that they were sufficiently notified by being served with the respondent's reasons against the appeal, a copy of the printed appeal book, and notice of the hearing of the appeal: *Freed* v. *Orr*, 6 Ont. App. 690. And where a plaintiff appealed as against one of two defendants, and claimed no relief as against the other defendant, but gave him notice of the appeal on the ground that his co-defendant might claim relief over against him, which, however, he did not do, the appeal as against the defendant as to whom no relief was claimed was upon an interlocutory motion dismissed with costs to be paid by the plaintiff: *O'Sullivan* v. *Lake*, 12 P. R. 550.

Reasons, what to contain.

822. The reasons for and against the appeal shall contain a statement of the points of law intended to be argued, and the authorities relied upon. App. O. 17.

Appeal books, how to be printed.

823. The appeal book shall be printed on paper of good quality, on one side of the paper only, and in demy-quarto form, with small pica type leaded; and every tenth line of each page shall be numbered in the margin, the numbering to be from the top of each page and not from the beginning of the book; and the size of the books shall be 11 inches in height, and 8½ inches in width. An index showing in detail each pleading, order or entry with its date, each witness by name, each exhibit or other document with its description and date, and all other principal matters, shall be added; it shall be at the beginning of the book and is not to be arranged alphabetically, but in the order in which the matters are printed in the book. The opinions of the Judges of the Court appealed from shall not be printed where the same have already been issued in the regular reports, but a reference to the same shall be given in the appeal books, and shall be sufficient. The style of the cause in the Court below shall be used and retained in the appeal book, and in every proceeding in the Court of Appeal, the designation "appellant" or "respondent" being added, *e.g.*,

Between A. B. (*respondent*)
and PLAINTIFF.
C. D. (*appellant*)
DEFENDANT.

App. O. 67, 68.

The following directions respecting the printing of appeal books have been issue by the Court of Appeal. **Rules 824-826.**

The Registrar, before receiving any appeal book, is to see that the following requirements have been observed :

1. Paper : good quality, printed on one side only. (The book should have the printed page on the left hand side).

2. Form : demy quarto.

3. Type : pica leaded or small pica leaded. (Pica leaded preferred).

4. Marginal numbering of every tenth line of each page.

The numbering of the lines is not to run on through the book, but the lines of each page are to be numbered separately, *e.g.*, 10, 20, 30, 40.

5. Index of principal matters.

The index is to shew in detail

(*a*) Each pleading, rule, order, or entry, with its date.

(*b*) Each witness by name.

(*c*) Each exhibit or other document, with its description and date.

The index is to be at the beginning of the book, and is not to be arranged alphabetically, but in the order in which the matters are printed in the book.

The Registrar is also to see that the title page contains a correct statement of the Court or Judge whose judgment is appealed from. An appeal from a single Judge is to be stated to be an appeal from the Judge, giving his name ; and no appeal is to be called an appeal from the Queen's Bench Division, or from the Chancery Division, or from the Common Pleas Division, unless it is from the judgment of a Divisional Court.

The appeal book is to contain the date of the first proceeding and the date of the filing of the several pleadings at the commencement of the copy thereof : *Rule* 845.

When Orders 67 and 68 (now *Rule* 823) were promulgated, a notice was added as follows :

NOTE—*Rule* 19 (now 824) which precludes the Registrar from receiving books unless printed according to the foregoing terms, will be rigidly enforced. After the above intimation parties will only have themselves to blame should the books be rejected by the Court on account of their not being properly arranged.

824. The Registrar shall not file the case without the leave of a Judge if the preceding Rule has not been complied with. App. O. 19. Otherwise Registrar not to file case.

825. If the press has not been carefully corrected, the Court may disallow the costs of printing, or may decline to hear the appeal, and make such order as to postponement and payment of costs as may seem just. App. O. 20. Costs when errors in press.

In *Barber* v. *Morton*, 2 C. L. T. 340, Burton, J.A., said : "I think there is no reason to interfere with the previous decision in this Court as to allowing ten cents a folio for revising proof. It is, I think, little enough if the work is properly done ; and if not properly done then the Court should adhere to its *Rule* and disallow this charge altogether."

826. The printed case, and the copies thereof for the use of the Court, shall be delivered to the Registrar, within thirty days after the allowance of the security, unless the Time for delivering appeal books.

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Rules 827-829.

Dismissal of appeal for non-delivery.

time shall be extended by the Court of Appeal, or a Judge; and in the case of neglect or omission by the appellant to comply with this Rule, the respondent may apply to a Judge upon 2 clear days' notice to the appellant for an order dismissing the appeal as for want of prosecution, and the Judge may thereupon make such order as to dismissing the appeal, or otherwise, as may appear just. App. O. 21. R. S. O. c. 38, s. 31 (2).

The "security" referred to in this *Rule* is for the costs of the appeal, and not the security required to be given in order to procure a stay of execution.

The full Court will not interfere with the discretion exercised by a single Judge under this *Rule*; *O'Neill* v. *Travellers Insurance Co.*, 9 Ont. App. 54; *Platt* v. *Grand Trunk Ry. Co.*, 12 P. R. 380.

Where notice of appeal had been served, but no security given, a motion to dismiss the appeal for want of prosecution was refused: *Smith* v. *Smith*, 11 P. R. 6; 22 C. L. J. 222.

Appeals, how entered for hearing.

Notice of hearing.

827. Appeals shall be entered by the Registrar upon the list for hearing at the next regular sittings of the Court which shall commence at least 8 days after the receipt by him of the printed copies; and the appellant shall serve the respondent or such respondents as are directly affected by the appeal, with notice of hearing, at least 7 days before the first day of such sittings; and he shall at the same time deliver to the respondent two printed books. App. O. 22. *See* R. S. O. 1877, c. 38, s. 32.

An appellant ought to serve notice on all parties who will be affected by the order of the Court of Appeal; and if such person is not served, he may appear without service and obtain costs: *Re New Callao, etc.*, 22 Ch. D. 484.

Court may order parties not served to be notified.

828. If, in the opinion of the Court, any parties not served ought to be notified, the Court may direct service to be made, and may postpone the hearing of the appeal for that purpose, upon such terms as may seem just. App. O. 23.

In *Re Salmon, Priest* v. *Uppleby*, 61 L. T. N. S. 146; W. N. 1889, 106, the Court directed third parties to be served, who, if the judgment were reversed, would have to indemnify defendant, the defendant so desiring, though the Court considered that the third parties were only indirectly affected. The defendant was ordered to pay the costs of the adjournment.

Default of parties at hearing—effect of.

829. If either party neglects to appear at the proper day to support, or resist the appeal, the Court may hear the other party, and may give judgment without the intervention of the party so neglecting to appear, or may postpone the hearing upon payment of such costs as the Court shall direct. App. O. 24.

Rules 830-832.

830. The decision of the Court of Appeal shall be certified by the Registrar of the Court of Appeal to the proper officer of the High Court, who shall thereupon make all proper and necessary entries thereof, and all subsequent proceedings may be taken thereupon, as if the decision had been given in the Court below. R. S. O. 1877, c. 38, s. 44.

The Clerk to certify result of appeals.

831. Where the Registrar considers a notice of settling the certificate of the Court of Appeal to be proper, he shall appoint a time for the purpose, and two clear days' notice thereof shall be given to the unsuccessful party or parties. App. O. 31.

Certificate of appeal—settlement of.

It was formerly the practice in the Court of Chancery to apply *ex parte* in Chambers for an order making the certificate of the Court of Appeal an order of the Court of Chancery before proceeding to enforce it. In the Common Law Courts the issue of a rule upon the certificate was held unnecessary: *Re McArthur and the Township of Southwold*, 8 P. R. 27.

Since the Jud. Act, though not by reason of any provision contained in it, the Master in Chambers has held that an order in Chambers of the High Court is unnecessary: *Freed* v. *Orr*, 9 P. R. 181; *Lowson* v. *Canada Farmers Ins. Co.*, *ib.*, 185, and that the Registrar of the proper Division of the High Court, acting under the present *Rule* 830, can correct the original judgment from the certificate of the Court of Appeal. This is the practice now to be followed: see *Lowson* v. *Canada Farmers, etc.*, 8 Ont. App. 613; though there are several cases in which a contrary opinion is expressed: see *National Insurance Co.* v. *Egleson*, 9 P. R. 203; *Norval* v. *Canada Southern Ry. Co.*, 9 P. R. 339. Process is then issued on the judgment as corrected: *Lowson* v. *Canada Farmers, etc.*, 8 Ont. App. 613. The inconveniences attending such procedure are pointed out in 19 C. L. J. 302.

The mode of making the entry differs. In the Chancery Division the certificate of the Court of Appeal is entered in the judgment book, and a note referring thereto is made in the margin of the entry of the original judgment, or order, affected thereby. In the Queen's Bench and Common Pleas Divisions a new judgment is drawn up, entitled in that Division, reciting the previous judgment, the appeal, and the result thereof as certified, and then concluding with the words, "It is therefore considered that (*setting forth the substance of the judgment, as awarded by the Court of Appeal*).

The Registrar in drawing up the certificate may introduce any proper and usual provision though not expressly ordered in the judgment delivered on the appeal, and this authority extends to the insertion of directions for the restitution of money paid in obedience to a reversed judgment: *McKindsey* v. *Armstrong*, 11 P. R. 200.

Any party dissatisfied with the minutes of the certificate, may move to vary them: *General Share and Trust Co.* v. *Wetley*, 20 Ch. D. 130, and see *Rule* 759, *et seq.*

Moving to vary minutes of certificate.

When the certificate drawn up and issued, does not conform to the judgment of the Court, a motion may be made to amend it so as to make it conform thereto: *Ex. John* v. *Rykert*, 3 C. L. T. 119; *McKindsey* v. *Armstrong*, 11 P. R. 200.

Or to amend same.

Appellants may discontinue.

832. An appellant may discontinue his proceedings by giving to the respondent a notice headed in the Court and cause, and signed by the appellant or his solicitor, stating that he discontinues such proceedings; and thereupon the

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Rules 833-835.

respondent shall be at once entitled to the costs of and occasioned by the proceedings in appeal, and may either sign judgment for such costs or obtain an order for their payment in the Court below, and may take all further proceedings in that Court as if no appeal had been brought. R. S. O. 1877. c. 38, s. 41.

Where an appellant has given notice of his intention to withdraw his appeal and has obtained respondent's consent, he cannot afterwards revoke it and proceed with the appeal: *Watson* v. *Cave*, 29 W. R. 768; 44 L. T. N. S. 40; 50 L. J. Chy. 561; 17 C. L. J. 366.

Where an appellant discontinued, it was held that no order for payment of costs was necessary the present *Rule* 832, giving the respondent his costs, and the respondent might therefore at once tax costs and obtain the bond for security out of Court to proceed upon it: *Hughes* v. *Hughes*, 19 C. L. J. 10.

A respondent may consent to a reversal of the judgment, etc.

833. A respondent may consent to the reversal of the judgment, order or proceeding appealed against, by giving to the appellant a notice headed in the Court and cause, and signed by the respondent or his solicitor, stating that he consents to the reversal of the judgment, order or other proceeding, and thereupon the Court shall pronounce judgment of reversal as of course. R. S. O. 1877, c. 38, s. 42.

Appeal to Supreme Court.

834. No case shall be certified on an appeal to the Supreme Court of Canada, unless the proof sheets of the judgments in the Court of Appeal have been submitted to the Judges thereof for correction. *New.*

(ii) *County Court Appeals.*

Original papers to be certified and transmitted in C. C. appeals.

835. For the purpose of avoiding unnecessary expense in appeals from the County Courts—particularly in making copies of papers—it is ordered that the pleadings, motions, orders, and other papers certified to the Court of Appeal under ~~section 41~~ of the Act respecting County Courts, shall be the original papers filed in the County Court; and when the evidence has been taken by an official reporter, his transcript of the evidence used, or prepared for use, in the County Court upon the motion which is the subject of the appeal, shall be the evidence so certified.

Papers—how to be transmitted, and returned.

(*a*) The said papers, together with the Judge's charge, and his judgment or decision, and also the evidence when not taken by an official reporter, and all objections and exceptions to the evidence, shall be fastened together and transmitted with the Judge's certificate to the Registrar of the Court of Appeal, who is to return them to the County Court when the appeal is disposed of.

(*b*) It shall not be necessary to certify or transmit the evidence, or the objections or exceptions thereto, in any case in which the appeal is from a judgment or decision upon the pleadings, or upon an action not founded upon the evidence. App. O. 39*a*. **Rule 835.** Evidence, when need not be certified.

The reference to section 41 in this *Rule* is no doubt an error for sec. 51 : see R. S. O. c. 47, s. 51.

R. S. O. c. 46, s. 51, which is the section intended to be referred to in this *Rule* is as follows :

"51. Upon the bond being so approved, or the deposit being paid into Court, the Judge shall, at the request of the appellant, certify under his hand to the Court of Appeal, the pleadings in the cause, and all motions, rules, or orders, made, granted or refused, therein, together with the Judge's charge, and the judgment or decision on the same, and, where a trial has been had, the evidence and all objections and exceptions thereto, and all other papers in the cause affecting the question raised by the appeal."

This section, however, is modified by sec. 45, which provides that the Judge shall only be required to certify the motions, rules, orders, affidavits, evidence, and other materials, necessary for the full understanding of the matter in appeal, together with his judgment or decision on the same.

The words "upon an action" in clause (*b*) are probably intended to mean "upon a judgment in an action."

COUNTY COURT APPEALS.

County Court appeals are regulated by the provisions of R. S. C. c. 47, ss. 40-52.

Cases in which an Appeal lies from County, and District Courts.—An appeal lies from County and District Courts to the Court of Appeal from a judgment directed by a Judge of any such Court at or after the trial in a case tried by him without a jury, or after the trial upon the special findings of the jury in a case tried with a jury : R. S. O. c. 47, s. 41, s-s. 1, but, instead of appealing to the Court of Appeal, a motion may be made to the County Court for a new trial, or to set aside the judgment on any ground except that upon the evidence given, the judgment so directed is wrong in law : *Ib.*, s-s. 2 ; and see *Norton* v. *McCabe*, 12 P. R. 506 ; and in cases tried with a jury instead of appealing to the Court of Appeal, a similar motion may be made before the County Court for a new trial or to set aside the judgment directed to be entered on the findings of the jury upon any ground except that the judgment so directed to be entered is wrong in law : *Ib.*, s-s. 3. Either party may appeal from the judgment of the County Court upon application made under sub-sections 2 and 3, *supra* : *Ib.*, s-s. 4. Cases in which appeals lie from County Courts.

An appeal also lies to the Court of Appeal at the instance of any party to a cause or matter from every decision made by a Judge of a County Court under any of the powers conferred on him by any *Rules* of Court or statute, unless provision is therein made to the contrary ; and from every decision or order made by a Judge of a County Court sittings in Chambers under the provisions of the law relating to the examination of debtors : see *Rules* 926, *et seq* ; attachment of debts and proceedings against garnishees : see *Rules* 935, *et seq* ; and from every decision or order made in any cause or matter disposing of any right or claim, provided always that the decision or order is in its nature final and not merely interlocutory : R. S. O. c. 47, s. 42.

Prior to 45 Vict. c. 6, there could be no appeal from the County Court in garnishee proceedings : *Sato* v. *Hubbard*, 6 Ont. App. 546. Although the jurisdiction of the Court of Appeal is not excluded in appeals from the County Court, where a new trial has been granted, or refused, as a matter of discretion, still the Court will not readily interfere in such cases with the discretion exer-

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Rule 835.

cised by the Judge appealed from: *Hunter* v. *Vanstone*, 6 Ont. App. 337; and see *Wilson* v. *Brown*, 7 Ont. App. 181; though it may do so, where the evidence strongly preponderates in favour of the appellant: *Campbell* v. *Prince*, 5 Ont. App. 330. So also, where the Judge of the County Court finds in favour of the respondent on contradictory evidence, the Court of Appeal will not interfere, even though, if the matter had come before it in the first instance, it would have decided otherwise: *Rees* v. *McKeown*, 7 Ont. App. 521.

Where a case is tried by a Judge of a County Court without a jury and he gives judgment, an appeal lies direct therefrom to the Court of Appeal, and it is not necessary to apply in term to the County Court Judge to review his decision: *Ferguson* v. *McMartin*, 11 Ont. App. 731. When the case has been tried by a junior Judge, the senior Judge, and a Judge of another County Court, have no jurisdiction to review his decision: *Ib.* An appeal lies from an order made in a County Court to enter judgment under *Rule* 739; *Bank of Minnesota* v. *Page*, 14 Ont. App. 347.

An appeal will lie upon an interpleader order: *Feehan* v. *Bank*, U. C. 10 C. P. 32. An appeal will lie from a decision under *The Partition Act*, on a special case stated: *Re Shaver and Hart*, 31 U. C. Q. B. 603; and see *Furness* v. *Mitchell*, 3 Ont. App. 510.

Formerly there could be no appeal after judgment entered: *Murphy* v. *Northern Ry. Co.*, 13 C. P. 32; *Duffil* v. *Dickinson*, 14 C. P. 142; *Wood* v. *Grand Trunk Ry. Co.*, 16 C. P. 275; but an appeal may now be had from any appealable decision, notwithstanding judgment has been signed, provided that security be given within ten days from the decision appealed against, or within such further time, not exceeding thirty days, as the Judge of the County Court appealed from may allow; and in case the appeal is successful the Court may set aside, or vary, the judgment: see R. S. O. c. 47, s. 43.

Cases in which appeal held not to lie from County Courts.

Cases in which an appeal has been held not to lie. No appeal lies from any decision of a Judge of a County Court in contested municipal election proceedings: *Regina ex rel., Grant* v. *Coleman*, 7 Ont. App. 619; R. S. O. c. 184, s. 207.

The order of a Judge on an application to amend, was formerly held not appealable: *Branigan* v. *Stinson*, 10 U. C. Q. B. 403; and see *Anglin* v. *Municipality of Kingston*, 16 U. C. Q. B. 121; but see *Peterkin* v. *McFarlane*, 4 Ont. App. 25; and a decision upon a case by consent without pleadings, was formerly held not to be appealable: *Harding* v. *Knowlson*, 17 U. C. Q. B. 564; and when a verdict is entered by consent, subject to the opinion of the Judge upon the law and facts, no appeal will lie from his decision thereon: *McCall* v. *Waddell*, 19 C. P. 213; but see now R. S. O. c. 47, s. 42, *supra*. No appeal lies from the ruling of the Judge as to the right to begin: *Hastings* v. *Earnest*, 7 U. C. Q. B. 520.

An appeal will not lie from the granting of a rule *nisi* before it has been made absolute, or discharged: *Robinson* v. *Richardson*, 32 U. C. Q. B. 344; but it seems that the rule absolute, or rule discharging the rule *nisi*, need not be taken out before appeal: *Penton* v. *Grand Trunk Ry. Co.*, 28 U. C. Q. B. 367.

The Court formerly refused to entertain an appeal, where the decision turned wholly upon the evidence, and involved no point of law: *Fowler* v. *McDonald*, 3 U. C. Q. B. 385; *Bradley* v. *Crane*, 4 U. C. Q. B. 122; *Manning* v. *Ashall*, 23 U. C. Q. B. 302; *Clark* v. *Hurlburt*, 6 C. P. 438; *McKinstry* v. *Furby*, 24 U. C. Q. B. 176; *Harris* v. *Robinson*, 25 U. C. Q. B. 247. Nor where the Judge granted a new trial on the ground that he had not sufficiently directed the jury as to the law: *Somers* v. *Livingstone*, 24 U. C. Q. B. 64.

Who may appeal.

Who May Appeal.—Besides the actual parties to the cause, persons suing or being sued in the name of others, though not mentioned in the record, and persons on whose behalf, or for whose benefit any suit is prosecuted or defended, may appeal: see R. S. O. c. 47, s. 40.

Time for appealing.

Time for Appealing.—No time is expressly limited by the Statute within which an appeal from a County Court must be lodged: but proceedings are only authorized to be stayed for a period not exceeding thirty days in all, to enable the appellant to give the security required: R. S. O. c. 47, ss. 43, 46.

All appeals, however, must be set down to be heard at the first sittings of the Court for the hearing of arguments which shall commence after the expiration of thirty days from the decision complained of: see *Rule* 856. **Rule 835.**

Sunday is not reckoned in the thirty days where it is the first day: *Cooper* v. *Dixon*, 3 C. L. T. 198; nor where it is the last day: see *Rule* 476.

Security to be given on appeals from C. C.

Security.—Every appellant must give security for such sum as the Judge may direct, either by bond, or by payment into Court.

Condition of bond.

If a bond be given it must be executed by two persons, whether named as sureties or as parties interested or otherwise, and must be for such sum as the Judge of the Court appealed from directs, conditioned that the appellant shall abide by the decision of the cause by the Court of Appeal, and pay all sums of money and costs, as well of the suit as of the appeal, awarded and taxed to the opposite party: R. S. O. c. 47, s. 47.

Affidavits of justification, and of execution of bond, to be filed.

Affidavits of justification to the amount of the penalty of the bond, are to be made by the obligors, and annexed to the bond, and an affidavit of the due execution of the bond is also necessary. These affidavits should be entitled in the cause. The bond with these affidavits is then to be produced to the Judge of the Court appealed from, to be approved by him, and, when approved, is to be filed in the office of the Court appealed from, until the opinion of the Court of Appeal has been given, when it is to be delivered out to the successful party: *Ib.* ss. 47-49.

Whem the Judge refuses to certify the proceedings on the ground of an alleged insufficiency of the bond, the question as to its sufficiency may be tested by an application for a mandamus to compel the Judge to certify: *Regina* v. *Wells*, 17 U. C. Q. B. 545; *In re Keenahan* v. *Preston*, 21 U. C. Q. B. 461.

Objections to sufficiency of bond, how taken.

But when the Judge has allowed the bond and certified the proceedings to the Court of Appeal, the Court of Appeal will not refuse to hear the appeal, nor will it entertain an application to strike out the appeal on objections to the form, or amount, of the bond, or the sufficiency of the sureties, or on the ground that the bond was not filed in due time; *Penton* v. *Grand Trunk Ry. Co.*, 28 U. C. Q. B. 367; *McLellan* v. *McLellan*, 2 C. L. J. 297; *Haworth* v. *Fletcher*, 20 U. C. Q. B. 278; but see *Pentland* v. *Heath*, 24 U. C. Q. B. 464. Applications to set aside the bond must be made to the Judge of the County Court.

The appeal bond, conditioned as prescribed by the statute, is security both for the costs of the appeal, and also for the costs below: *Waddell* v. *Robertson*, 26 U. C. Q. B. 376.

Staying proceedings pending appeal.

Staying Proceedings.—Proceedings may be stayed for thirty days to enable security to be given: R. S. O. c. 47, s. 46. The allowance of the security, is in practice regarded as a stay of further proceedings, but there appears to be no provision in the *Rules* or statutes, which makes the perfecting of security *ipso facto* a stay of proceedings pending the appeal, though possibly in some cases the respondent would find difficulty in enforcing his judgment, pending the appeal, owing to all the original papers being transmitted to the Court of Appeal under *Rule* 835.

The Court appealed from would, however, have inherent jurisdiction, to make an order granting such stay pending the appeal: see *Cotton* v. *Corby*, 5 U. C. L. J. 67.

As to appeals from Division Courts: see R. S. O. c. 51, s. 148, as amended by 51 Vict. c. 10, s. 2.

As to appeals from Provisional Judicial District Courts: see R. S. O. c. 91, s. 56.

As to appeals from stipendary magistrates: see R. S. O. c. 91, sec. 31.

As to appeals from a Judge of a County Court, in proceedings under *The Liquor License Act:* see R. S. O. c. 194, s. 119.

As to appeals from a Judge of a County Court, in proceedings under *The Act Respecting Water Privileges:* see R. S. O. 119, s. 15.

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Rules 836-840.

C. C. appeals when to be set down.

836. An appeal shall be set down to be heard at the first sittings of the Court for the hearing of arguments which commences after the expiration of 30 days from the decision complained of. App. O. 40.

Sunday is not reckoned in the thirty days' notice, when it is the first day: *Cooper* v. *Dixon*, 3 C. L. T. 198, (*sed quære*); nor where it is the last day: see *Rule* 476.

C. C. appeal how set down.

837. An appeal shall be set down for hearing, by delivering to the Registrar of the Court of Appeal, at least 8 days before the sittings at which the appeal is to be heard, the certified copy of the pleadings, proceedings, evidence and other matters required by section 41 of chapter 43 of the Revised Statutes of Ontario, and ten appeal books for the use of the Judges of the Court of Appeal and the officers of the Court. App. O. 41.

The reference in this *Rule* is to the Revised Statutes of 1877. The statute intended to be referred is now R. S. O. c. 47, s. 51.

Where an appeal is not duly prosecuted, it may be dismissed for want of prosecution, on application to a Judge of the Court of Appeal in Chambers, and his decision will not usually be interfered with: *Platt* v. *Grand Trunk Ry. Co.*, 24 C. L. J. 121.

Appeal books, how printed.

838. The books shall be printed on paper of good quality, on one side of the paper only, in demy quarto-form, with small pica type, leaded, and every tenth line of each page shall be numbered in the margin, commencing from the top of each page and not from the beginning of the book, and a statement of the reasons of appeal shall form a part thereof. App. O. 42.

The appeal books are printed by the appellant without any previous settlement of the case. If the respondent is dissatisfied with the case printed by the appellant, he must apply to a Judge of the Court of Appeal in Chambers to set it aside, unless he merely complains of an omission, in which case he may, under *Rule* 843, deliver a memorandum of such omitted matter to the Registrar.

Pleadings, how to be printed.

839. A full copy of the pleadings shall not be printed in the books, unless it be necessary for the proper consideration of the question raised upon the appeal, *ex. gr.* in questions arising on demurrer. In other cases it shall be sufficient to state the substance of the pleadings, in a brief form, but so as to be intelligible. App. O. 43.

Evidence not relevant, not to be printed.

840. It shall not be necessary to print evidence which does not bear upon the question in appeal, but the books must always contain the opinion delivered by the Judge on any motion against the verdict or judgment, and his

charge in case of a trial by a jury, and his note of judgment in case of a trial by himself. App. O. 44. Rules 841-846.

See *Re McConnell*, 33 W. R. 359, a case involving the construction of a will, where there was no shorthand writer's note of the judgment appealed from and no note by counsel on either side, and in consequence, the Court in allowing the appeal gave no costs.

841. Exhibits used at the trial shall not be printed in the books, unless their contents are material to the question in appeal, and then only such parts as are material. App. O. 45. Exhibits, how far to be printed.

842. All formal matters, such as copies of the motion papers and rules discharging, or making rules *nisi* absolute, shall be omitted, but such reference shall be made to them including the dates thereof, as may appear necessary for giving a clear and intelligible statement of the case. App. O. 46. Formal proceedings not to be printed *in extenso*.

843. The appellant shall, at least 6 days before the sittings at which the appeal is to be heard, serve the respondent with the notice of the setting down of the appeal, and with a copy of the ~~printed~~ appeal book, and of the grounds and reasons of his appeal. ~~In case the respondent is of opinion that any necessary matter has been omitted, he may at any time before the hearing leave with the Registrar a memorandum briefly referring to such omitted matter.~~ App. O. 48. Appeal book and notice of setting down, to be served on respondent six days before sittings.

844. If the foregoing Rules are not complied with, the appeal shall not be heard, unless the Court or a Judge, ... ll, on application made upon 2 clear days notice to the respondent, otherwise order. App. O. 50. Otherwise appeal not heard.

845. All books, as well in High Court, as County Court appeals, shall contain the date of the first proceeding in the suit or matte... ; and the dates of the filing of the several pleadings shall be stated at the commencement of the copy or summary thereof. In the event of non-compliance with this Rule, the books will not be received by the Registrar, nor will the appeal be heard. App. O. 52. Non-compliance with Rules, effect of.

2. Appeals from Chambers.

846. Any person affected (*x*) by any order or decision of the Master in Chambers, a Local Judge or a local Master, may appeal therefrom to a Judge of the High Court in Chambers : Appeal to Judge

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Rule 846.

(*a*) Such appeal may be made notwithstanding that the order or decision was in respect of a proceeding or matter as to which the Local Judge or officer aforesaid had jurisdiction only by consent;

(*b*) The appeal shall be by motion, on notice served within 4 days after the decision complained of, or within such further time as may be allowed by a Judge of the High Court or by the Local Judge or officer aforesaid whose decision is complained of;

(*c*) The motion shall be made within 9 days after the decision has been made which is appealed against, or within such further time as may be allowed as aforesaid;

The original *Rule* named eight days. The notice is to be served within four days, and the motion to be made returnable within nine days from the decision complained of: see *Steedman* v. *Hakim*, 22 Q. B. D. 16, under an Eng. R. in different terms.

(*d*) In such case, the Deputy Registrar, Deputy Clerk of the Crown or Local Registrar, shall, on a præcipe being filed in this behalf, transmit to the proper officer of the High Court of Justice all documents filed in his office and required for disposing of the appeal; and the same shall be transmitted by mail, prepaid and registered except where all parties interested in such documents file a consent to any other mode of transmission. The said documents shall be returned in like manner when the appeal has been disposed of;

(*e*) The appeal shall be no stay of proceedings unless so ordered by a Judge of the High Court or by the Judge or officer whose decision is complained of. J. A. Rule 427.

Compare Eng. R. 1883, R. 410.

In *Laidlaw* v. *Miller*, 11 P. R. 335, it was held that an appeal might be made to a Judge without reference to the Division to which an action is assigned. The contrary was held in *Re Christie, Christie* v. *Christie*, 12 P. R. 15, and in practice the latter case is followed, though in case of necessity a Judge of any Division would have jurisdiction to hear the appeal; his leave should, however, be first obtained.

This *Rule* governs appeals from the Master in Chambers and the County Judges, and Local Masters, acting under *Rules* 41 and 138: *Lowson* v. *Canada Farmers, etc.*, 9 P. R. 188.

There is no power to vary an order except in the manner provided by the Act, or *Rule*, *e.g.*, by way of appeal or motion to discharge under sec. 69 of the Act or *Rule* 536: see *Atty.-Gen.* v. *Llewellyn*, 58 L. T. N. S. 367; and *Re Adam Eyton, Limited*, 36 Ch. D., at p. 301, and notes to *Rule* 780.

(*x*) Any person affected by an order may appeal, and therefore an appeal lies from an *ex parte* order by a person affected thereby: *Wigle* v. *Harris*, 9 P. R. 276; *G. T. Ry. Co.* v. *Ont. & Que. Ry. Co.*, 9 P. R. 420; but an application to set aside an order made *ex parte*, and without knowledge of the facts, is not an appeal, and not within this *Rule*: *Hughes* v. *Field*, 1 C. L. T. 702.

Rule 846.

The time for appealing runs from the pronouncing of the order, and not from the day upon which it was issued: *Miller* v. *Stillwell*, 21 C. L. J. 98, following *Dayer* v. *Robertson*, 9 P. R. 78. The contrary was at one time decided in *McNeil* v. *McGregor*, 3 C. L. T. 309; see *Heatley* v. *Newton*, 19 Ch. D. 326; *Gibb* v. *Murphy*, 2 Chy. Ch. 132; see also *Lowson* v. *Canada Farmers, etc.*, 9 P. R. 185.

Where the time expires on a Sunday or holiday, *Rule* 476 applies: see that *Rule* and *Taylor* v. *Jones*, 45 L. J. C. P. 110.

Some difference exists also between the practice of the Chy. Div. and that of the other Divisions, in regard to bringing on the appeal within the time. The Judges in the Q. B. D. and C. P. D. have sometimes over-ruled objections that the appeal is too late, and treated the motion as a substantive motion to rescind an order improperly made.

An appeal from a decision of a Master refusing to rescind a former order was held tantamount to an appeal from the first order, and dismissed as too late under this *Rule*: *Jamieson* v. *Prince Albert Colonization Co.*, 11 P. R. 115.

Extending appealing.

Orders extending the time should not be made *ex parte*: *Hamilton* v. *Tweed*, 9 P. R. 448. It has been held that leave to serve short notice of appeal should not be obtained from the Master in Chambers; he has no power to shorten the time on a motion not returnable before himself: *Donovan* v. *Boultbee*, 2 C. L. T. 501; *sed quære*, see clauses (*b*) and (*c*): see 1 C. L. T. 614, 645. time for

Where an order was made on Friday, so that two clear days' notice of appeal could not be given for the next Chamber day (Monday), application was made *ex parte* within four days, for leave to bring on the appeal on the following Thursday, but leave was given instead for the following Monday, and no order was taken out extending the time. It was held not an application for an extension of time, and an objection that the appeal could not be heard as eight days' notice (the time named under the original *Rule*), had expired, was over-ruled: *Standard Bank* v. *Wells*, 10 P. R. 159.

The time was extended where there was the intention to appeal, but by misapprehension of the new practice, the time was allowed to pass: *Dayer* v. *Robertson*, 9 P. R. 78; also where it was supposed Christmas vacation did not count in computing the time: *Sievewright* v. *Leys*, 9 P. R. 200. But in *Snowdon* v. *Huntington*, 12 P. R. 1, notice of appeal given Dec. 24 for Jan. 10, the first day after vacation when a Judge sat in Chambers, was held not good notice. The notice should have been given for a day within the eight (now nine) days, and then an extension of the time for bringing on the appeal should have been applied for on an *ex parte* application as of course: see also *Wallingford* v. *Mutual Soc.*, 5 App. Cas. 685; see also *Lowson* v. *Canada Farmers, etc.*, 9 P. R. 185; *Carter* v. *Stubbs*, 6 Q. B. D. 116; *Gibbons* v. *London Financial Association*, 4 C. P. D. 263. The motion by way of appeal must be served within four days, and be made returnable within the nine days: see *Bell* v. *N. Staffordshire Ry. Co.*, 5 Q. B. D. 205. The application to enlarge the time should in general be made within the nine days: *Stirling* v. *Du Barry*, 5 Q. B. D. 65.

Setting down.

Appeals in the Chancery Division must be set down as formerly, not later than the preceding Saturday: *Rand* v. *Rolph*, 2 C. L. T. 151. This is not required in the other Divisions, but the appeal is brought on like an ordinary motion.

If an appeal is not properly set down, a motion to strike it out must be made instead of objecting, when the appeal comes on: *McCaw* v. *Pontpn*, 11 P. R. 328.

Appeals from a Judge in Chambers to a Divisional Court are governed by *Rule* 847.

The Master's discretion is open to review on an appeal under this *Rule*: *Christie* v. *Conway*, 9 P. R. 529.

Waiver.

A right to appeal may be waived by acting upon the order appealed from: *International Wrecking Co.* v. *Lobb*, 12 P. R. 207, or otherwise recognizing it, *e.g.*, by obtaining an extension of time for complying with it: *Pierce* v. *Palmer*, 12 P. R. 308, where a motion by defendant to set aside a judgment for irregu-

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Rule 847. larty was refused, but defendant was let in to defend on terms, and he was held to have waived the right to appeal from the refusal to set aside the judgment by obtaining an extension of the time for compliance with the terms. See also *Re Smart*, 12 P. R. at p. 638; *Boyle* v. *Sacker*, 39 Ch. D. 249.

Fresh evidence on appeals.

Under the English Judicature Act an appeal is in all cases a rehearing, and fresh facts may be gone into: *Anon, per* Lush, J., 60 L. T. Jour. 67; 1 Charl. Ch. Ca. 128. "Every appeal is now a rehearing, and therefore fresh affidavits may be used on all appeals from a Master to a Judge in Chambers": *per* Quain, J., *Anon*, W. N. 1875, 250; 1 Charl. Ch. Ca. 129. "This ruling has been held by other Judges and confirmed by the Court" (Coe's Practice in the Judge's Chambers, p. 6.) It may be doubted whether this is the case in Ontario. Fresh evidence may be given by leave only under *Rule* 585; see *Taylor* v. *Sisters, etc., of Ottawa*, 11 P. R. 496. *In Re Neath Harbour etc., Works*, 20 Sol. Jour. 26, it was said that each case must in this respect depend upon its own circumstances; fresh evidence was there allowed, also in *Robinson* v. *Bradshaw*, 32 W. R. 95.

In *Re Munns* v. *Longden*, 32 W. R. 675; 50 L. T. N. S. 356, it was held that the Court will not receive further evidence on a motion to discharge an order made in Chambers, where the motion has been fully argued and disposed of: see also notes to *Rule* 585.

Where it is intended to apply for leave to use fresh affidavits or documentary evidence, notice should be given to the opposite party that such leave will be applied for on the hearing of the appeal: *Hastie* v. *Hastie*, 1 Ch. D. 562; see *Bigsby* v. *Dickinson*, 4 Ch. D. 24; and *Dicks* v. *Brooks*, 13 Ch. D. 654.

Costs of affidavits in answer to fresh affidavits were refused where the fresh affidavits were not allowed to be read: *Mitchell* v. *Condy*, W. N. 1881, 83.

Appeal to Div. Court.

847. Every appeal to a Divisional Court from any decision of a Judge at Chambers shall be by motion, which shall be set down at latest on the day before the sittings, and shall be made at the first sittings of a Divisional Court which takes place after the decision complained of unless otherwise ordered. *See* J. A. Rule 414.

Not the same as the Eng. R. 1875, O. 54, r. 6, amended by *Rule* 8, of March, 1879, (1883, R. 757).

This *Rule* applies only to appeals under sec. 69 of the Act to the Court from a Judge in Chambers, not from the Master in Chambers, or Local Judges. Appeals of the latter kind are governed by *Rule* 846: *Lowson* v. *Canada Farmers, etc.*, 9 P. R. 185.

The original *Rule* required that the motion should be made within eight days and difficulties arose in consequence, as it was held in England not to be sufficient to give notice of motion within that time: see *Fox* v. *Wallis*, 2 C. P. D. 45; see also *Jackson* v. *Gardner*, 15 Gr. 425; *Harris* v. *Meyers*, 16 Gr. 117: *McIlroy* v. *Hawke*, 3 Chy. Ch. 66; *Taylor* v. *Jones*, 45 L. J. C. P. 110; *Hewson* v. *Macdonald*, 2 C. L. T. 348; *McLaren* v. *Marks*, 10 P. R. 451; *Steadmean* v. *Hakim*, 22 Q. B. D. 16.

The present *Rule* makes entirely different provision. An appeal from a Judge in Chambers is to be brought on at the next following sittings of a Divisional Court of the proper Division, unless otherwise ordered. Notice must be served two clear days before the first day of the sittings, and the motion must be set down, at latest, the day before the sittings.

An order made at the Assizes on a motion referred from Chambers to change the venue, was held to be in Chambers. The Judge may treat the Court-room as his Chambers if he chooses: *Sarnia Agricultural Implement, etc., Co.* v. *Perdue*, 11 P. R. 224.

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A solicitor knowing of a preliminary objection to an appeal which he intends to raise ought, as a matter of professional courtesy, to inform his opponent, but the omission to do so is not a sufficient ground for depriving the respondent of the costs of the appeal: *Ex p. Sheed, re Mundy*, 15 Q. B. D. 338, not following *Re Speight*, 13 Q. B. D. 42; and *Ex p. Blease*, 14 Q. B. D. 123. **Rule 848.**

The Court on appeal will, in general, not interfere on a question which is by the practice purely within the discretion of the Judge: *McDonnell* v. *McKay*, 2 Chy. Ch. 243; *Neill* v. *Travellers' Ins. Co.*, 9 Ont. App. 54.

3. Appeals from Masters and Referees.

848. Every report shall become absolute at the expiration of fourteen days from the day of filing the same, including such day, unless notice of appeal is served within that time. *See* Chy. O. 252. Report when absolute.

This *Rule* is considered to apply to all reports including those of commissioners to admeasure dower under R. S. O. 1887, c. 56, s. 12.

The heading of this group of *Rules* would seem to indicate that the procedure therein laid down is intended to apply to reports made by Official Referees, as well as to those made by Masters. This and the two following *Rules* apply only to appeals from reports, made by Masters, and Referees. Where they are exercising jurisdiction in Chambers under *Rules* 31, 138, appeals from their decisions are regulated by *Rule* 846.

Reports which require Confirmation.—All reports and certificates, which are the subject of appeal, are, as a general rule, required to be confirmed before they can be acted on: *Scott* v. *Livesey*, 2 Sim. & S. 300; or any application can be made to the Court founded thereon: *Hayes* v. *Hays*, 8 P. R. 546; *Nichols* v. *McDonald*, 6 Gr. 594; *Craven* v. *Ingham*, 58 L. T. N. S. 486. There are, however, some reports, and certificates, which may be acted upon without confirmation, on their being filed. Reports which require confirmation, may be confirmed by special order before the expiration of the time limited for appealing therefrom, upon consent of all parties interested. An order confirming a report may be made by the Master in Chambers. Reports requiring confirmation.

Reports which do not require to be Confirmed.—All reports, or certificates, of mere calculation: *Lewis* v. *Talbot St. Road Co.*, 10 P. R. 15; and of matters of opinion, which do not require any further order from the Court to give effect to, or sanction them,—except reports on sales,—do not require confirmation. Under this head are included certificates of compliance, or non-compliance, with any order of the Master, or of the Court, (but not certificates of insufficient compliance; *e.g.*, that accounts filed are insufficient in substance and form: *Foster* v. *Morden*, 9 P. R. 70). Certificates for commissions to take evidence; certificates of scandal, or impertinence, in pleadings, or affidavits, referred to the Master; reports appointing trustees, or committees: but see *Finkle* v. *Date*, 7 P. R. 413; *Foster* v. *Morden*, *supra*;) reports on passing the accounts of receivers, or committees; reports computing subsequent interest, or of apportionment of a fund on principles and in proportions, declared by the Court: reports approving of conveyances; and other certificates and reports of a like description; see Sm. Pr. 2nd ed., Vol. II., 357-8. Reports not requiring confirmation.

No Appeal After Confirmation without Leave.—After a report requiring confirmation has been confirmed, no appeal from it will be entertained without leave first given, on special application: *Thomson* v. *Luke*, 10 Gr. 281. No appeal after confirmation without leave.

After the cause or matter has been heard on further directions, the Court has no power to permit an appeal from the report upon which the order or judgment on further directions is founded: *Re Dingman* v. *Hall*, 13 P. R. 232. Effect of confirmation.

Effect of Confirmation.—After confirmation, the parties are concluded by the report; yet the Court in its discretion may refuse to act upon it, and may refer the cause back to the Master, or require additional information to be furnished: *Taylor* v. *Craven*, 10 Gr. 488; *Baldwin* v. *Crawford*, 1 Gr. 202; *Harrison* v. *McSheehan*, 80 L. T. Jour. 79.

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Rule 848.

Clerical errors may be corrected notwithstanding.

Notwithstanding confirmation, clerical errors, and accidental slips, in a report, may be corrected at any time upon motion in Chambers, without appeal: *Morley* v. *Matthews*, 12 Gr. 453; *King* v. *Connor*, 10 Gr. 364; *Watson* v. *Moore*, 1 Chy. Ch. 266; and where the error was apparent on the face of the report, the application was granted *ex parte*: *White* v. *Courtney*, 1 Chy. Ch. 11. But although the error be apparent, it does not follow that the proper correction is apparent, and the motion therefore is usually required to be on notice, or consent: *Simpson* v. *Ottawa*, 2 Chy. Ch. 12. Mistakes in a report, however, cannot be corrected by the Master *mero motu*, on any subsequent reference in the action: *Crooks* v. *Street*, 1 Chy. Ch. 78; but on a reference back upon an appeal, when the Court enunciates a principle, which is applicable to other parties, and other points, than those expressly concerned in the appeal, it is the duty of the Master so to apply that principle in all cases to which it is applicable in making his new report, even though it involve the readjustment of an account not appealed from: *Denison* v. *Denison*, 17 Gr. 306; and see *Gilbert* v. *Jarvis*, 20 Gr. 478.

Report stands confirmed, as to matters not appealed.

Even though an appeal be had, the report will stand confirmed as to matters not objected to by the appeal, and which the decision on the appeal does not affect: *Denison* v. *Denison*, 17 Gr. 308; *Ross* v. *Perrault*, 13 Gr. 206. And when the report is referred back, an appeal will not lie from the further report, for matters disposed of by the first report, and not objected to on the first appeal: *Ross* v. *Perrault*, *supra*, or affected thereby: *Denison* v. *Denison*, 17 Gr. 308.

Waiver of objection that appeal too late.

When notice of appeal is delivered, without leave, after a report is confirmed, the delivery of notice of cross-appeal is a waiver of the objection: *Larkin* v. *Armstrong*, 1 Chy. Ch. 31.

Report not to be dated before costs revised, made in vacation, is irregular.

The report should not be dated before the costs have been revised, where revision is necessary: *Waddell* v. *McColl*, 14 Gr. 211. A report made in vacation without the consent of all parties is irregular: *Anderson* v. *Thorpe*, 12 Gr. 542; and as to parties who have no notice, it is a nullity: *Fuller* v. *McLean*, 8 P. R. 549; but parties having notice of the proceedings before the Master in vacation, must move against them, or they will be confirmed: *Mitchell* v. *Mitchell*, 22 Gr. 23.

Confirmation of report.

Notice.

Confirmation of Report.—A report requiring confirmation now becomes absolute at the expiration of fourteen days from the filing, unless in the meantime motion of appeal is served. An application to extend the time for appealing from a report, even before confirmation, must be made on notice: see *Hamilton* v. *Tweed*, 9 P. R. 448; as also an application for leave to appeal after the time has expired: *Peterborough* v. *Ireton*, before Proudfoot, J., Nov. 11th, 1883.

Special order confirming report, when made.

Where it is desired to confirm a report before the expiration of the 14 days, a special application in Chambers may be made for that purpose, but such applications are granted only where all parties entitled to appeal consent: *Patterson* v. *Gilbert*, 12 P. R. 652, and it is considered undesirable that an officer should make an order confirming his own report: *Ib.*

Filing report; time for.

Filing Report.—The report must be filed before an appeal will lie: *Hayes* v. *Hayes*, 8 P. R. 546. If it appoint a day for payment of money, it should be filed before the day of payment: *Mills* v. *Dixon*, 2 Chy. Ch. 53; and confirmed: *Mountain* v. *Porter*, 1 Chy. Ch. 207, if it is a report requiring confirmation. No proceedings can properly be taken on a report until filed, either by the issue of process, or otherwise: Beames' Ord. 293; *Jellett* v. *Anderson*, 8 P. R. 38; even though the report or certificate be one not requiring confirmation: *Ib*; but such reports can be acted on, immediately on filing, it is not necessary to wait fourteen days: *Re Yaggie*, 7 U. C. L. J. 293.

In cases of references to Local Masters the report is to be filed in the office of the Local Master. In all other cases the report is to be filed in the proper office at Toronto, *i.e.*, to say in the Queen's Bench and Common Pleas Division in the office of the Registrar, and in the Chancery Division in the office of the Clerk of Records and Writs: see *Rule* 84.

No appeal after con-

Leave to Appeal after Confirmation.—After a report is confirmed, leave to appeal from it may be granted on motion in Chambers. The application must

be made on notice, or consent: *Cozens* v. *McDougal*, 1 Chy. Ch. 29; *Cade* v. *Newhall*, 1 Chy. Ch. 200; *Peterborough* v. *Ireton*, before Proudfoot, J., 11th November, 1883; all parties are entitled to notice even though they be in the same interest as the party seeking to appeal: *Larkin* v. *Armstrong*, 1 Chy. Ch. 31. Where leave has been granted *ex parte*, the objection to the order may be taken on the appeal coming on for argument: *Peterborough* v. *Ireton*, *supra*. On such application it is necessary to account for the delay, and to show a *primâ facie* ground of appeal: *Dickson* v. *Avery*, 3 Chy. Ch. 222; *Rowe* v. *Wert*, 13 C. L. J. 326; *Caisse* v. *Burnham*, 6 P. R. 201; *Dudley* v. *Berczy*, 3 Chy. Ch. 81; *Chard* v. *Meyers*, 3 Chy. Ch. 120. It is not absolutely necessary that the grounds of the proposed appeal, should be stated in the notice of motion for leave to appeal: *Romanes* v. *Herns*, 1 Chy. Ch. 363; but reasonable, and probable, grounds of appeal, must be shown by the affidavits: *Ib.*, and a mere statement of the proposed grounds of appeal in the notice of motion will not suffice: *De Blaquiere* v. *Armstrong*, 9 C. L. J. 363; but costs unnecessarily incurred in making out a case on the merits were disallowed: *Nash* v. *Glover*, 6 P. R. 267. The Master in Chambers has jurisdiction to entertain the application: *Russel* v. *Brucken*, 3 Chy. Ch. 488; *Sievewright* v. *Leys*, 9 P. R. 200.

Rules 849, 850.

Confirmation without leave.

What necessary to be shown on application.

Master in Chambers may grant leave.

Leave to appeal was refused with costs, where it appeared that the object of the appeal, was to fix executors with interest upon a sum which they had invested, and upon which a loss had been incurred: *Coates* v. *McGlashan*, 2 Chy. Ch. 218; so also when the matter had been heard on further directions, and an order pronounced founded on the report: *Re Dingman and Hall*, 13 P. R. 232.

But leave was granted where time was allowed to elapse through the mistake of the solicitors in supposing that his clients would be entitled to the benefit of the appeal of their co-defendants: *Re Gabourie*, *Casey* v. *Gabourie*, 12 P. R. 252; and see *Sievewright* v. *Leys*, 9 P. R. 200; but see *Blackstock* v. *McFarlane*, 15 C. L. J. 137.

849. The notice of appeal shall be a seven clear days' notice, shall set out the grounds of appeal, and shall be returnable within one month from the date of the report, unless otherwise ordered. *See* Chy. O. 642.

Notice of appeal.

As to the time for appealing, see notes to *Rule* 82, p. 187.

As to whether appeals now lie from a ruling of a Master, see *Markle* v. *Ross*, and note thereon in the notes to *Rule* 82, p. 187. In *Maclennan* v. *Gray*, 12 P. R. 431, it was held that the time for appealing from a ruling runs from the date of the ruling irrespective of the date of the certificate of such ruling.

850. The appeal shall be set down for argument before a Judge in Court for the day on which the motion is returnable. *New.*

Setting down.

Formerly appeals from reports were required to be set down for hearing before a Judge in Chambers; and the Judge in Chambers might, if he saw fit, adjourn the appeal into Court. Under this *Rule* the appeal is to be set down to be heard in Court in the first instance.

A Divisional Court has no power to hear an appeal from a Master's report, except by consent; the appeal is to a single Judge: *Clarke* v. *Jamieson*, 9 C. L. T. 97.

Costs of Appeals from Master's Reports.—When some grounds of appeal are allowed with costs, and others disallowed with costs, the appellant is entitled to all the costs of the appeal that are exclusively applicable to the objections allowed, and to a proportionate share of those costs common to all the objections, according to the number of really distinct grounds of appeal on which he succeeds; and the same rule applies to the costs of a respondent: *Bank of Montreal* v. *Ryan*, 13 Gr. 204; *Trinity College* v. *Hill*, 8 Ont. 286.

Costs of appeals from reports, how awarded.

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Rule 851. Sometimes, instead of giving costs to each party of so much of the appeal as to which he succeeds, the general costs of the appeal are awarded to one of the parties, subject to the deduction of a proportionate part of the gross amount, in respect of the partial success of the other party. Thus, when there were four distinct grounds of appeal embraced in eleven objections, of which objections only two were allowed, the Court gave the general costs of the appeal to the respondent, deducting therefrom one-fourth in respect of the partial success of the appellant: *Ferguson* v. *Frontenac*, 21 Gr. 188.

General rule is, that costs follow the event.

In the disposition of the costs of appeals from Master's reports, the Judges will probably continue to follow the rules of the Court of Chancery. The general rule is, that the costs should follow the event of the appeal: *Downey* v. *Roaf*, 6 P. R. 89; *Huntington* v. *Van Brocklin*, 8 Gr. 421; and the word "event" is to be understood distributively: *Bank of Montreal* v. *Ryan*, 13 Gr. 204. But where the appeal fails on the principal point involved, and succeeds only as to a comparatively insignificant one, the whole costs of the appeal may be given to the respondent: *Brownlee* v. *Cunningham*, 13 Gr. 586. And where the Court is of opinion, that the finding of the Master was a fit subject for discussion under the circumstances, although the appeal be dismissed, costs may be refused: *Secord* v. *Terryberry*, 14 Gr. 172, and costs have also been refused of a successful appeal, where the report was defective, and the solicitors appeared to have been negligent: *Clouster* v. *McLean*, 10 Gr. 576.

But *secus* when appeal successful only on a trifling point.

Costs, when appeal dismissed or allowed on point, not adjudicated upon by Master.

When an appeal was dismissed on a ground raised for the first time on the appeal, and not adjudicated upon by the Master, the Court refused costs: *Heward* v. *Wolfenden*, 14 Gr. 188; *McDonald* v. *Wright*, *Ib.*, 284, and the same rule applies when the appeal is successful on a ground not taken before the Master: *Goddard* v. *Jeffreys*, 46 L. T. N. S. 904. Where an appeal by an executrix was allowed without costs, on the hearing on further directions, the Court refused to order costs of the appellant to be paid out of the estate: *Story* v. *Dunlop*, 13 Gr. 375.

4. Appeals from Taxation.

Review of taxation by Judge.

851. Any party who may be dissatisfied with the certificate of the taxing master; as to any item or part of an item which may have been objected to, as provided by Rules 1230 and 1231, may apply to a Judge at Chambers for an order to review the taxation as to the same item or part of an item, and the Judge may thereupon make such order as to the Judge may seem just; but the certificate of the taxing master shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid. J. A. Rule, 449.

Same as the Eng. R. 1875, Aug. 12th, R. 32 [1883, O. 65, r. 27 (41)] except as to the time for appealing.

The Master in Chambers had, under this *Rule* and Rules of Feb., 1870, no jurisdiction to review taxations: see note to *Rule* 30; but an appeal now lies to him, or the Master in Ordinary, under *Rule* 854, from the Taxing Officer in Toronto, pending a taxation.

This *Rule* applies both to appeals from the Taxing Officer in Toronto and the Local Taxing Officers: *Rule* 196. Before the Act on which *Rule* 196 is founded, there was no direct appeal from the Local Officers. The old practice of revision in their cases was continued, except as to the length of notice of revision: see *Crowe* v. *Steeper*, 2 C. L. T. 88; *Exchange Bank* v. *Newell*, 9 P. R. 528.

Matters in discretion of T.O.

Where questions of taxation are in the Master's discretion, his discretion will not be interfered with, unless it be manifest that he has failed to exercise it in

a reasonable manner: *The Neera*, 5 P. D. 118; *Hargreaves* v. *Scott*, 4 C. P. D. 21; and will not in general interfere with the decision of the Taxing Officer as to items in regard to which he has exercised a discretion left to him by the *Rules*: *Smith* v. *Wills*, 34 W. R. 30; 53 L. T. N. S. 386; see also *Boswell* v. *Cooke*, 36 Ch. D., 444; *Re Hillyard and Royal Ins. Co.*, 12 P. R. 285; *Gall* v. *Collins*, 12 P. R. 413. Rules 852, 853.

The Taxing Officer's decision, as to the amount of counsel's fees, will not be interefered with, unless a gross mistake is made: *Brown* v. *Sewell*, 16 Ch. D. 517; see also *Fox* v. *Toronto & Nipissing Ry.*, 7 P. R. 157; *Betts* v. *Cleaver*, L. R. 7 Chy. 513; *Re Bethune & Co.*, 4 C. L. T. 251; *Petrie* v. *Guelph, etc.*, 10 P. R. 600. The Court will slowly and reluctantly enter into all questions of quantum merely: *Smith* v. *Buller*, L. R. 19 Eq. 478: Morgan and Wurtzburg on Costs, 480.

The decision of the Taxing Officer, as to items placed by the tariff in his discretion, such as instructions for motions, letters, attendances, will not be reviewed: *McGannon* v. *Clarke*, 9 P. R. 555; see also *Turnbull* v. *Janson*, 3 C. P. D. 264.

An appeal from a taxation of costs in Appeal is properly made to a Judge of the High Court, *quære*: *Petrie* v. *Guelph, etc.*, 10 P. R. 600.

A memorandum at the foot of the bill shewing the result upon which execution had issued, was held to be a sufficient certificate, where filed in the proper office: *McCallum* v. *McCallum*, 11 P. R. 179; but an informal certificate written at the end of the bill, shewing that it was fixed at so much, initialed by the Taxing Officer, marked filed in his office, is insufficient: *Gall* v. *Collins*, 12 P. R. 413. It must be filed in the proper office for filing a report: see *Langtry* v. *Dumoulin*, 10 P. R. 44. Certificate.

Two clear days' notice of appeal is sufficient: *McCallum* v. *McCallum*, *supra*.

An appeal will not be allowed as to any items not included in the objections brought in under *Rules* 1230 and 1231: *Platt* v. *G. T. Ry. Co.*, 12 P. R. 273; and where no objections have been brought in under *Rules* 1230 and 1231, the appeal will be dismissed: *Snowden* v. *Huntington*, 12 P. R. 1; *Cameron* v. *Cameron*, 9 C. L. T. 196; see also *Hester* v. *Hester*, 34 Ch. D. 607; *Re Nation*, 37 L. T. N. S. 648.

Appeals from a Taxing Officer, in respect to a solicitor and client taxation, were formerly brought before the Court in the same way as other appeals from a Master: see *Exchange Bank* v. *Newell*, 9 P. R. 528, and *Rule* 848. It would seem now, however, that all appeals in respect to taxations are to be brought under this *Rule*. Sol. and client taxation.

852. No appeal shall lie unless a notice thereof is given within four days from the day of the date of the certificate, and is brought on for argument within ~~nine~~ days from the said day. *New.* When appeal lies.

This practice is similar to that on appeals from the Master in Chambers: see note to *Rule* 846.

This *Rule* is in affirmance of what was held to be the practice in *Stark* v. *Fisher*, 11 P. R. 235; *Ireland* v. *Pitcher*, *Ib.*, 403. The time may be enlarged by the Master in Chambers, or a Judge: *Quay* v. *Quay*, 11 P. R. 258.

The time runs from the date of the certificate of taxation, and not from the date of each ruling in the course of the taxation: *Re O'Donohoe*, 12 P. R. 612.

853. Such application shall be heard and determined by the Judge upon the evidence which shall have been brought in before the taxing master, and no further evi- Evidence thereon.

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Rules 854, 855.

dence shall be received upon the hearing thereof unless the Judge otherwise directs. J. A. Rule 450.

Identical with the Eng. R. Aug. 1875, r. 33 [1883, O. 65, r. 27 (42)]. See English Chancery Order 40, R. 36, Morgan Chy. Orders, 4th ed., 594.

It has been held to be a convenient practice on an appeal from a Local Officer as to numerous items, or on the ground of general exorbitancy, to refer the whole bill to the Taxing Officer in Toronto: *Quay* v. *Quay*, 11 P. R. 258; and in such case no costs of the revision and appeal are usually allowed, unless substantially entire success is with one party or the other: *Platt* v. *G. T. Ry. Co.*, 12 P. R. 273.

Appeal to J. C.

854. There may be an appeal by appointment without other notice from the taxing masters in Toronto to the Master in Chambers or to the Master in Ordinary pending the taxation in all cases. J. A. Rule 544 (1).

An appeal from the Master in Chambers or Master in Ordinary lies to a Judge as in other cases: *Re Monteith, Merchants Bank* v. *Monteith*, 11 P. R. 361.

The practice in appeals under this *Rule* is intended to be simple and inexpensive. The Master in Chambers hears the parties in the presence of the Taxing Officer or otherwise ascertains the reasons of the Officer for his decision, and announces to him verbally or by informal memorandum his decision on the points submitted. This procedure was approved of in *Re Nelson*, 13 P. R. 30. There is no need of a formal order and its attendant expenses: *Ib.*

It is not desirable that a taxation should come more than once by way of appeal before a Judge, and therefore where there had been an appeal to the Master in Ordinary pending a taxation and an appeal from his decision was taken, the latter was directed to stand over until the conclusion of the taxation: *Ib.*

5. Appeals to the Judicial Committee of the Privy Council.

The Privy Council will not advise Her Majesty to admit an appeal from the Supreme Court, save where the case is of gravity involving matters of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance, or of a very substantial character: *Prince* v. *Gagnon*, 8 App. Cas. 103; *Johnston* v. *St. Andrews*, 3 App. Cas. 159; it is not enough that the questions involved are of great importance to the parties or calculated to attract public attention: *Dumoulin* v. *Langtry*, 57 L. T. N. S. 317. Special leave to appeal was refused in a case involving only an issue of fact: *Canada Central Ry. Co.* v. *Murray*, 8 App. Cas. 574.

Where the Supreme Court of Canada has acted under a special reference to it, under an agreement between the parties and not in its ordinary jurisdiction as a Court of Appeal no appeal lies to the P. C.: *Atty.-Gen. of Nova Scotia* v. *Gregory*, 55 L. T. N. S. 270; 55 L. J. P. C. 40.

Security to be given on appeals to Privy Council.

855. The security to be given in cases of appeal to Her Majesty in Privy Council, shall be personal, and by bond to the respondent or respondents, such bond to be executed by the appellant or appellants, or one or more of them, and by two sufficient sureties, (except in special cases), as mentioned in Rule 808, in the penal sum of $2,000, the con-

dition of which bond shall be to the effect that the appellant or appellants shall and will effectually prosecute his and their appeal, and pay such costs and damages as shall be awarded in case the judgment appealed from shall be affirmed, or in part affirmed; and any application to the Court of Appeal to stay proceedings shall be made in like manner, and be upon the like terms as to security, as is provided in like cases upon appeals from the High Court to the Court of Appeal. App. O. of 8th Sept., 1871, O. 35. Rules 856, 857.

856. The bond referred to in the foregoing Rule shall be according to the Form No. 210 in the Appendix. App. O. of 8th Sept., 1871, O. 36. Form of appeal bond.

A bond according to the terms of this Form having the words "or pay" in the condition, instead of "and pay," the words used in *Rule* 855, is regular; and "effectually prosecute" means "successfully prosecute." But to secure the amount found due to the respondents a bond with the condition in the form of Form 211 in the App., is not sufficient. A bond for that purpose must be conditioned in the same way as a bond under *Rule* 804, (4): *International Bridge Co.* v. *Canada Southern Ry. Co.*, 9 P. R. 250.

857. In every case of appeal to Her Majesty in Council, the obligors, parties to any bond as sureties, shall justify their sufficiency by affidavit in the manner and to the same effect as is required upon appeals from the High Court to the Court of Appeal. App. O. of 8th Sept., 1871, O. 37. Affidavit of justification required from obligors.

The Orders of the Privy Council which are applicable in appeals from Ontario and may be useful, are here printed:

Rule issued by the Judicial Committee

Directing Judges of the Courts in the Colonies and Foreign settlements of the Crown to give their reasons in writing for the judgment appealed from, and to transmit the same with the Record. Rule of P. C. of 12th Feb., 1845.

At the Council Chamber, Whitehall, the 12th Feb. 1845.

By the Judicial Committee of the Privy Council:

Whereas, by an Act passed in the eighth year of Her Majesty's reign, intituled, etc, [Here follows a recital of 7 & 8 Victoria, c. 69, s. 11.]

Now, therefore, the Lords of the said Judicial Committee of the Privy Council are pleased to order, as it is hereby ordered, that when any appeal shall be prosecuted from any judgment of any Court in the Colonies or foreign settlements of the Crown, the reasons given by the Judges of such Court, or by any of such Judges, for or against such judgment, shall be, by the Judge or Judges of such Court, communicated in writing to the Registrar of such Court, or other Officer, whose duty it is to prepare and certify the transcript record of the proceedings in the cause, and that the same be by him transmitted in original to the Clerk of Her Majesty's Privy Council, at the same time when the documents and proceedings proper to be laid before Her Majesty in Council upon the hearing of the appeal are transmitted.

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Rule 857. Whereof the Judges of all such Courts in the Colonies or foreign settlements of the Crown are to take notice, and govern themselves accordingly.

C. C. GREVILLE.

This *Rule* is still in force, and is to be observed: see 12 App. Cas. 133.

ORDERS OF THE PRIVY COUNCIL

Rule of P. C. of 13th June, 1853.

Passed at the Court at Buckingham Palace, the 13th of June, 1853.

Present:

THE QUEEN'S MOST EXCELLENT MAJESTY,
His Royal Highness Prince Albert.

Lord President,	Earl of Aberdeen,
Lord Steward,	Earl of Clarendon,
Duke of Newcastle,	Viscount Palmerston,
Duke of Wellington,	Mr. Herbert,
Lord Chamberlain,	Sir James Graham, Bt.

Whereas, there was this day read at the Board a report from the Right Honourable the Lords of the Judicial Committee of the Privy Council, dated the 30th May last past, humbly setting forth that the Lords of the Judicial Committee have taken into consideration the practice of the Committee with a view to greater economy, despatch, and efficiency in the appellate jurisdiction of Her Majesty in Council, and that their Lordships have agreed humbly to report to Her Majesty that it is expedient that certain changes should be made in the existing practice in appeals, and recommending that certain Rules and Regulations therein set forth should henceforth be observed, obeyed, and carried into execution, provided Her Majesty is pleased to approve the same:

Her Majesty, having taken the said report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and of the Rules and Regulations set forth therein, in the words following, *videlicet*:—

Appellant, when successful may recover costs of appeal.

I. That, any former usage or practice of Her Majesty's Privy Council notwithstanding, an appellant who shall succeed in obtaining a reversal, or material alteration, of any judgment, decree or order, appealed from, shall be entitled to recover the costs of the appeal from the respondent, except in cases in which the Lords of the Judicial Committee may think otherwise to direct.

Transcripts to be sent to the Registrar of the Privy Council.

II. That the Registrar or other proper officer having the custody of the records in any Court, or special jurisdiction from which an appeal is brought to Her Majesty in Council, be directed to send by post with all possible despatch, one certified copy of the transcript record in each cause to the Registrar of Her Majesty's Privy Council, Whitehall; and that all such transcripts be registered in the Privy Council office, with the date of their arrival, the names of the parties, and the date of the sentence appealed from; and that such transcript be accompanied by a correct and complete index of all the papers, documents and exhibits in the cause; and that the Registrar of the Court appealed from, or other proper officer of such Court, be directed to omit from such transcript all merely formal documents, provided such omission be stated and certified in the said index of papers; and that special care be taken not to allow any document to be set forth more than once in such transcript; and that no other certified copies of the record be transmitted to agents in England by or on behalf of the parties in the suit; and that the fees and expenses incurred and paid for the preparation of such transcript be stated and certified upon it by the Registrar, or other officer, preparing the same.

Transcripts may be printed abroad.

III. That where a record of proceedings or evidence in the cause appealed has been printed or partly printed abroad, the Registrar or other proper officer of the Court from which the appeal is brought shall be bound to send home the same in a printed form, either wholly or so far as the same may have been printed, and that he do certify the same to be correct, on two copies, by signing his name on every printed sheet, and by affixing the seal, if any, of the Court appealed from to these copies, with the sanction of the Court.

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And that in all cases in which the parties in appeals shall think fit to have the proceedings printed abroad, they shall be at liberty to do so, provided they cause fifty copies of the same to be printed in folio, and transmitted, at their expense, to the Registrar of the Privy Council, two of which printed copies shall be certified as above by the officers of the Court appealed from; and in this case no further expense for copying or printing the record will be incurred or allowed in England. **Rule 857.**

IV. That on the arrival of a written transcript of appeal at the Privy Council office, Whitehall, the appellant or the agent of the appellant prosecuting the same shall be at liberty to call on the Registrar of the Privy Council to cause it, or such part thereof as may be necessary for the hearing of the case, and likewise all such parts thereof as the respondent or his agent may require to be printed by Her Majesty's Printer, or by any other printer on the same terms, the appellant or his agent engaging to pay the cost of preparing a copy for the printer at a rate not exceeding one shilling per brief sheet, and likewise the cost of preparing such record or appendix, and that one hundred copies of the same be struck off, whereof thirty copies are to be delivered to the agents on each side, and forty kept for the use of the Judicial Committee; and that no other fees for solicitors' copies of the transcript, or for drawing the joint appendix, be henceforth allowed, the solicitors on both sides being allowed to have access to the original papers at the Council office, and to extract or cause to be extracted and copied such parts thereof as are necessary for the preparation of the petition of appeal, at the stationer's charge not exceeding one shilling per sheet. Written transcripts to be printed by Her Majesty's printer.

V. That a certain time be fixed within which it shall be the duty of the appellant or his agent to make such application for the printing of the transcript, and that such time be within the space of six calendar months from the arrival of the transcript and registration thereof in all matters brought by appeal from Her Majesty's Colonies and plantations east of the Cape of Good Hope, or from the territories of the East India Company, and within the space of three months in all matters brought by appeal from any other part of Her Majesty's Dominions abroad; and that in default of the appellant or his agent taking effectual steps for the prosecution of the appeal within such time or times respectively, the appeal shall stand dismissed without further order, and that a report of the same be made to the Judicial Committee by the Registrar of the Privy Council at their Lordships' next sitting. Transcripts to be printed within a certain time.

VI. That wherever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the agents of the parties, with the sanction of the Registrar of the Privy Council, may submit such question of law to the Lords of the Judicial Committee in the form of a special case, and print such parts only of the transcript as may be necessary for the discussion of the same; provided that nothing herein contained, shall in any way bar or prevent the Lords of the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit; and that in order to promote such arrangements and simplification of the matter in dispute, the Registrar of the Privy Council may call the agents of the parties before him, and having heard them and examined the transcript, may report to the Committee as to the nature of the proceedings. Appeals may be heard in the form of a special case.

And Her Majesty is further pleased to order, and it is hereby ordered, that the foregoing Rules and Regulations be punctually observed, obeyed, and carried into execution, in all appeals or petitions, and complaints in the nature of appeals, brought to Her Majesty, or to Her heirs or successors, in Council from Her Majesty's Colonies and plantations abroad, and from the Channel Islands, or the Isle of Man, and from the territories of the East India Company, whether the same be from Courts of Justice, or from special jurisdictions, other than appeals from Her Majesty's Courts of Vice-Admiralty, to which the said Rules are not to be applied.

Whereof the Judges and Officers of Her Majesty's Courts of Justice abroad, and the Judges and Officers of the Superior Courts of the East India Company, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

W. L. BATHURST.

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Rule 887. Rule of P. C. 31 May, 1855.

At the Court at Buckingham Palace, the 31st Day of March, 1855.

Present.

The Queen's Most Excellent Majesty in Council.

Judicial Committee may relax Rules.

Whereas doubts have arisen with reference to the power of the Judicial Committee of the Privy Council to suspend or relax, under certain special circumstances, the regulations in appeal causes established by Her Majesty's Order in Council of the 13th June, 1853; Her Majesty, by and with the advice of Her Privy Council, is pleased to order, and it is hereby ordered, that in appeal cases in which a petition of appeal to Her Majesty shall have been lodged, and referred by Her Majesty to the Judicial Committee, the said regulations shall be subject to any order or direction which, in the opinion of the Lords of the Judicial Committee, the justice of any particular case may seem to require.

C. C. Greville.

Rules to be observed.

Rule of P. C. 31 Mar., 1870.

By proctors, solicitors, agents, and other persons admitted to practise before Her Majesty's Most Honourable Privy Council, established by Order-in-Council of the 31st day of March, 1870.

I. Every proctor, solicitor, or agent admitted to practice before Her Majesty's Most Honourable Privy Council, or any of the committees thereof, shall subscribe a declaration to be enrolled in the Privy Council office, engaging to observe and obey the rules, regulations, orders, and practice of the Privy Council: and also to pay and discharge, from time to time, when the same shall be demanded, all fees or charges due and payable upon any matter pending before Her Majesty in Council; and no person shall be admitted to practice, before the Privy Council, without having subscribed such declaration in the following terms:—

Form of Declaration.

We, the undersigned, do hereby declare, that we desire and intend to practise as solicitors or agents in appeals and other matters pending before Her Majesty in Council; and we severally and respectively do hereby engage to observe, submit to, perform, and abide by all and every the orders, rules, regulations, and practice of Her Majesty's Most Honourable Privy Council and the committees thereof now in force, or hereafter from time to time to be made; and also to pay and discharge, from time to time, when the same shall be demanded, all fees, charges, and sums of money due and payable in respect of any appeal, petition, or other matter in and upon which we shall severally and respectively appear as such solicitors or agents.

II. Every proctor, solicitor, or attorney practising in London, and duly admitted in any of the Courts of Westminster, shall be allowed to subscribe the foregoing declaration, and to practice in the Privy Council, upon the production of his certificate for the current year; and no fees shall be payable by him on the enrolment of his signature to the foregoing declaration.

III. Persons not being certificated London solicitors, but having been duly admitted to practise as solicitors by the High Courts of Judicature in India or in the colonies respectively, may apply, by petition, to the Lords of the Judicial Committee of the Privy Council for leave to be admitted to practise in the Privy Council; and such persons, if admitted to practise by an order of their Lordships, shall pay annually, on the 15th of November, a fee of five guineas to the fee fund of the Council office.

This Rule is strictly construed, and persons who are not solicitors in the Colonial Courts will not be admitted to practice before the Privy Council: leave to practice was refused to a pleader of the High Court of Calcutta: *In re Tevidale*, 14 App. Cas. 328.

IV. Any proctor, solicitor, agent, or other person practising before the Privy Council, who shall wilfully act in violation of the rules and practice of the Privy Council, or of any Rules prescribed by the authority of Her Majesty, or

of the Lords of the Council, or who shall wilfully misconduct himself in prose- Rule 857.
cuting proceedings before the Privy Council, or any committee thereof, or who shall refuse or omit to pay the Council office fees or charges payable from him when demanded, shall be liable to an absolute or temporary prohibition to practise before the Privy Council, by the authority of the Lords of the Judicial Committee of the Privy Council upon cause shown at their Lordship's Bar.

At the Court at Windsor Castle,

the 26th day of June, 1873.

Rule of P. C. 26 June, 1873.

Present:

The Queen's Most Excellent Majesty In Council.

Whereas in many appeals now pending before Her Majesty in Council no effectual steps have been taken by the parties or their agents to set down their cases for hearing, although more than twelve months have elapsed since the arrival and registration of the transcript of appeal in this country, and it is expedient to make further provision in that behalf: Her Majesty, by and with the advice of Her Privy Council, and upon a recommendation of the Lords of the Judicial Committee of the Privy Council, is pleased to order, and it is hereby ordered, that the solicitors or agents for the party appellant in all such appeals now pending before Her Majesty in Council are hereby required to take effectual steps to set down their cases for hearing within six months from the date of this Order, and in all other appeals to Her Majesty in Council within a period not exceeding twelve months from the date of the arrival and registration of the transcript in this country.

And Her Majesty is further pleased to order, and it is hereby ordered, that it shall be the duty of the Registrar of the Privy Council to report to the Lords of the Judicial Committee the names of the parties and dates of the decrees in appeals in which no effectual steps have been taken within the aforesaid periods of time to set down the case for hearing; and the Lords of the Judicial Committee of the Privy Council shall be at liberty to call upon the appellant or his agent in such cases to show cause why the said appeal or appeals should not be dismissed for non-prosecution, and (if they shall so think fit) to recommend to Her Majesty the dismissal of any such appeal, or to give such directions therein as the justice of the case may require.

And Her Majesty is further pleased to order that nothing in the present Order shall prevent the dismissal of an appeal under the 5th of the Rules approved by Her Majesty on the 13th of June, 1853, in cases to which that Rule is applicable.

Whereof the Governors of Her Majesty's Plantations and Dominions abroad, and the Judges or Officers of Her Majesty's Courts of Justice from which an appeal lies to Her Majesty in Council, and all other persons whom it may concern, are to take notice, and govern themselves accordingly.

Arthur Helps.

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CHAPTER IX.

ENFORCEMENT OF JUDGMENTS AND ORDERS.

1. Writs of Fi. Fa., etc., 858-877.
2. Attachment and Sequestration, 878-884.
3. Issue and Form of Writs, 885-898.
4. Sale under Writ, 899-907.
5. Return of Writs, 908-924.
6. Discharge of Execution Debtors, 925.
7. Attachment of Debts, 926-948.

1. Writs of Fieri Facias, etc.

Meaning of "Writ of execution," and "issuing of execution."

858. In these Rules the term "writ of execution" shall include writs of fieri facias, capias, (*a*) sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the expression "issuing execution against any person" shall mean the issuing of any such process against his person or property as under these Rules shall be applicable to the case. J. A. Rule 344.

(*a*) The Eng. R. 1875, O. 42, r. 6, (1883, R. 586), has here the additional word "*elegit*." The Rules otherwise correspond.

As to whether "attachment" includes "attachment of debts"; see *Fellows* v. *Thornton*, 14 Q. B. D. 335.

Writs of *fi. fa.*, effect of.

859. Writs of *fieri facias* (*a*) shall have the same force and effect as the like writs have heretofore had, and shall be executed in the same manner as the like writs have heretofore been executed. J. A. Rule 362. R. S. O. 1877, c. 66, s. 18.

(*a*) The Eng. R. 1875, O. 43, r. 1, (1883, R. 613), has here the words "and of *elegit*;" it is otherwise the same as the above Rule.

See note to *Rule* 862.

A pawnbrokers's interest in redeemable pledges may be taken in execution under a *fi. fa.*: *Re Rollason*, 34 Ch. D. 495.

As to what may be taken under executions against goods and lands respectively, see R. S. O. 1887, c. 64, ss. 8-25.

Ven. ex.

860. Writs of *venditioni exponas* may be issued and executed in the same cases and in the same manner as heretofore. J. A. Rule 363.

The Eng. R. 1875 O. 43, r. 2 (1883, R. 617), so far as relates to writs of *venditioni exponas* is the same, but it embraces other writs, viz.: writs of "*distringas super vicecomitem, fieri facias de bonis ecclesiasticis, sequestrari facias de bonis ecclesiasticis*, and all other writs in aid of a writ of *fieri facias* or of *elegit*." Rules 861, 862.

The Sheriff should sell the goods under a writ of *fi. fa.* without the issue of a *ven. ex.*, but where he has seized, but for some reason not sold goods, he may be required to return the *fi. fa.* and thereupon a writ of *ven. ex.* may issue on præcipe. After the delivery of this writ to the Sheriff he is bound to sell the goods and have the money in Court immediately after its execution: Chit. Arch. 13th ed. 584; *Keighley* v. *Birch*, 3 Camp. 521.

861. A writ of possession shall have the effect of a writ of assistance as well as of a writ of *habere facias possessionem*. J. A. Rule 381. *Hab. fac. poss.*

Not in any Eng. R.

This, together with the abrogation of Chy. O. 294, makes clear what is also clear by decisions in England, that this writ supersedes the old Chancery writ of assistance so far as the recovery of land is concerned: *Hall* v. *Hall*, 47 L. J. Chy. 680; *Wyman* v. *Knight*, 39 Ch. D. 165; but in England it seems that in case of necessity the writ of assistance may still be used, *e.g.*, to recover possession of personal property which is in danger of being removed beyond the jurisdiction of the Court: *Wyman* v. *Knight*, *sup.* It may be doubted whether this is so in Ont. in view of *Rule* 3. A special order in the nature of an order of replevin, or a special form of writ of delivery might probably in such case be framed.

For form of writ of possession, see Form 191 in the Appendix.

The chief difference between a writ of assistance and a writ of *habere facias possessionem* is, that the former instructs the sheriff to "defend and keep" the plaintiff "and his assigns in peaceable and quiet possession when and as often as any interruption may or shall be given or offered to them or any of them": see Daniel's Forms 982; thus it is presumed, rendering unnecessary applications for a new writ where a defendant wrongfully resumes possession after being ejected by the sheriff: see *Doe d. Peck* v. *Roe*, 2 U. C. Q. B. 27; *Edwards* v. *Bennett*, 5 P. R. 161; *McDermott* v. *McDermott*, 4 P. R. 252. This is now the language of Form 191.

Where a plaintiff has been put in possession under a writ of possession and a defendant soon after regains possession after the return of the writ executed, the plaintiff, on motion, is entitled to an order for a new writ of possession: *Proctor* v. *Weller*, 3 C. L. T. 551: see *Stacpoole* v. *Walsh*, 6 L. R. Ir. 444.

862. A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree, for the payment of money, of any [of the Superior Courts,] might have been enforced prior to the passing of *The Ontario Judicature Act, 1881*. J. A. Rule 389. Enforcing judgment for recovery of money.

Instead of the words in brackets, the Eng. R. 1875, O. 42, r. 1 (1883 R. 581), has the words, "Court whose jurisdiction has been transferred by the same Act." The Rules are otherwise the same.

The effect of this *Rule* is to preserve the right to issue any process of execution which might formerly be adopted to enforce payment of money under a judgment or decree, and to make the same available in all Divisions of the High Court: see *London, etc.* v. *Merritt*, 32 C. P. 380.

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Rule 863. The principal of these were:

1. Writs of *fieri facias* and (in aid thereof) *venditioni exponas*: as to which see *Rules* 859 and 860), and *distringas*.

2. Writs of sequestration: *Rules* 883, and 884.

In aid of execution, proceedings might also be taken by way of,

(*a*) Attachment of debts and garnishee process: *Rules* 926, *etc.*

(*b*) Equitable execution: *Rules* 935, 1007.

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Fi. fa.

863. Every person to whom any sum of money or any costs is payable under a judgment, shall, immediately after the time when the judgment was duly ~~entered~~, be entitled to sue out one or more writ or writs of *fieri facias* to enforce payment thereof, subject nevertheless as follows:

(*a*) If the judgment is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period.

(*b*) The Court or Judge at the time of giving judgment, or the Court or a Judge afterwards, may give leave to issue execution before, or may stay execution until any time after the expiration of such period. J. A. Rules 352, 499.

The Eng. R. 1875, O. 42, r. 15 (1883, R. 595), has here the additional words "or one or more writ or writs of *elegit*." In other respects the Rules are to the same effect.

Semble, the jurisdiction here given to stay execution cannot be exercised by qualifying a judgment for recovery of money, so as to make it payable by instalments: *Brien* v. *Sullivan*, 14 L. R. Ir. 391.

Now, in all cases, judgment may be entered as soon as given by the Judge, unless otherwise ordered: *Rule* 767. Exceptions formerly existed in the case of actions tried by jury: orig. *Rule* 527; and judgments by default of appearance: orig. *Rule* 72. These exceptions are not continued in the present *Rules*: see *Rules* 767, 798, and 705.

The use of the word "immediately," in this *Rule*, probably sets at rest the question raised in *Cullen* v. *Cullen*, 2 Chy. Ch. 94, and *Coolidge* v. *Bank of Montreal*, 6 P. R. 73, as to whether the party to pay is entitled to any time to pay, without the issue of execution.

Notwithstanding this *Rule*, it would seem that a writ of execution against a Mutual Insurance Co. cannot, under R. S. O. c. 167, s. 136, issue, in the case of a policy issued on the premium note system, until after the expiration of sixty days from the recovery of judgment: see *Lowson* v. *Canada Farmers' Ins. Co.*, 9 P. R. 185; *Lount* v. *Canada Farmers' Ins. Co.*, 8 P. R. 433; but that provision in R. S. O. 1877, c. 161, s. 61, did not apply to a judgment recovered on a policy issued on the cash premium principle: *Lowson* v. *Canada Farmers' Mutual Ins. Co.*, 3 C. L. T. 452. The above section 136 now applies to a cash Mutual Co., except where more than fifty per cent. of the premium or premium note was paid in cash at the time of the insurance: and a Judge or Referee in Chambers may, on application of the judgment creditor, inquire into the question, whether fifty per cent. was paid, and, if he certifies that it was so paid, execution may issue forthwith: R. S. O. c. 167, s. 136 (2).

It has been held that the recovery of costs, payable under an order, will not be stayed by the Court of Appeal, pending an appeal to the House of Lords, if the solicitors to whom they are payable give their personal undertaking to refund, in case of the order being reversed: *Grant* v. *The Banque Franco-*

Egyptienne, 3 C. P. D. 203; *Morgan* v. *Elford*, 4 Ch. D. 352; *The Khedive*, 5 P. D. 1; but see *Atty-General* v. *Emerson*, 88 L. T. Jour. 87. Rules 864-866.

The Court of Appeal is the proper Court to which to apply to suspend any order which that Court has made, consequently the application should be made to it to stay proceedings under its own order, pending an appeal from that order: *The Khedive*, *supra*.

Murray v. *Infield*, 1 Charl. Ca. (Court) 142, was an action for libel; a verdict for the plaintiff for £100. "Huddleston, B., said that although he was now able to order immediate execution, he would adopt the old (English) practice, and give execution in fourteen days."

In *Taylor* v. *Skerley*, 1 Charl. Ca. (Court) 143. "Following the old practice," Pollock, B., gave execution in fourteen days.

See *Hodges* v. *Fincham*, 1 Ch. D. 9.

This *Rule* abrogates the old practice, under which if a judgment creditor issued execution before costs were taxed, he was held to have waived his right to costs: *Harris* v. *Jewell*, W. N. 1883, 216.

864. Any person who becomes entitled to issue a writ of execution against goods and chattels may, at or after the time of issuing the same, issue a writ of execution against the lands and tenements of the person liable, and deliver the same to the Sheriff to whom the writ against goods is directed, at or after the time of delivery to him of the writ against goods, and either before or after any return thereof. R. S. O. 1877, c. 66, s. 14. Writs against lands may issue at same time as writs against goods.

865. In case any action of the proper competence of a Division Court is brought in the High Court or in a County Court, no execution against lands shall issue unless the amount of the judgment exceeds $40. R. S. O. 1877, c. 66, s. 13. When lands not liable unless the judgment exceeds $40.

See *The Division Court Act*, (R. S. O. c. 51), s-s. 223, 224.

866. Every order of the Court or a Judge, whether in an action, cause, or matter, may be enforced (*a*) in the same manner as a judgment to the same effect. J. A. Rule 357. Execution on orders.

The Eng. R. 1875, O. 42, r. 20 (1883, R. 602), inserts at *(a)* the words against all persons bound thereby. Otherwise the *Rules* are the same.

The same effect was given by R. S. O. 1877, c. 66, s. 72; and c. 67, s. 12, as respects an order for the payment of money. But that Act provided that the order should be deemed a judgment. The present *Rule* only says that such an order may be enforced in the same way as a judgment. In England it has been held that it is not intended that all orders are to be equivalent to judgments: *Ex p., Chinery*, 12 Q. B. D. 342; and that the provisions respecting attachment of debts (*Rule* 935, *et seq.*) which apply to judgments may not be employed to enforce an order dismissing an action with costs for want of prosecution: *Cremetti* v. *Crom*, 4 Q. B. D. 225; see also *Ex p. Earl of Strathmore*, 20 Q. B. D. 512; *Ex p. Whinney*, 13 Q. B. D. 476; *Ex p. Grimwade*, 17 Q. B. D. 357; *Ex p. Moore Re Faithfull*, 14 Q. B. D. 627; see, however, *Nott* v. *Sands*, W. N. 1883, 74; *Whittaker* v. *Whittaker*, 7 P. D. 15.

As to the practice in this Province, see notes to *Rules* 926, and 935.

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Rules 867-869.

For payment into Court.

867. A judgment [or order] for the payment of money into Court may be enforced by [any mode by which a judgment for that purpose may be enforced (*a*) and the person having the carriage of the judgment or order for the time being, shall be deemed to be the person to receive payment for the purpose of enforcing the same.] J. A. Rule 340. *See* R. S. O., c. 66, s. 72 (3).

The Eng. R. 1875, O. 42, r. 2 (1883, R. 582) has not the words "or order." (*a*) What follows is taken from R. S. O., 1877, c. 66, s. 72 (3).

Instead of the other words in brackets, the Eng. R. has the following: "writ of sequestration; or, in cases in which attachment is authorized by law, by attachment." The original Ont. *Rule* 340 preserved the existing modes of procedure. In altering the language the meaning of the present *Rule* has not been made clear.

In *Stanger Leathes* v. *Stanger Leathes*, W. N. 1882, 71, payment of money into Court was enforced by the appointment of a receiver of the dividends of moneys invested in Court, of rents of lands, and of shares in a mining company, in which the party ordered to pay had an interest: so also in *Coney* v. *Bennett*, 33 W. R. 700; 29 Ch. D. 993, where money was payable by a trustee into Court, he being out of the jurisdiction.

The English R. of 1883, R. 582, enables an order for payment into Court to be enforced by writ of attachment in certain cases: see *Hutchinson* v. *Hartmont*, W. N. 1877, 29; but that process cannot be employed here: see notes to *Rules* 878, to 880.

For recovery of land.

868. A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession. J. A. Rule 341.

Identical with the Eng. R. 1875, O. 42, r. 3 (1883, R. 583).

A writ of possession was ordered to issue in an action by a landlord against a tenant, notwithstanding that the landlord's reversion terminated before the trial, the defendant not showing affirmatively that it would be unjust and futile to issue the writ: *Knight* v. *Clarke*, 15 Q. B. D. 294.

A final order of foreclosure is not a judgment for the recovery or delivery of possession of land within this *Rule*: see *Wood* v. *Wheater*, 22 Ch. D. 281 although the bringing of an action for foreclosure stops the running of the Statute of Limitations: *Heath* v. *Pugh*, 6 C. P. D. 345. Under the practice in Ontario, an order for the delivery of possession forthwith may be contained in the judgment in a foreclosure action: see *Rule* (341*a*) and Forms 82, 83; but where it has not been so obtained, an application for an order for delivery of possession may be made on or after obtaining the final order for sale, or foreclosure: *Rule* 341 (*a*). See notes to that *Rule*.

See *Rudd* v. *Frank*, 17 Ont. at p. 764.

For the purpose of recovering possession of land, the writ of possession supersedes the old writ of assistance: *Wyman* v. *Knight*, 39 Ch. D. 165.

Writ of possession.

869. Where by any judgment any person therein named is directed to deliver up possession of any lands to some other person [on or at any specified time after being served with the judgment,] the person prosecuting the judgment shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due

service of the judgment and that the same has not been obeyed. J. A. Rule 380. Rules 870-873.

Identical with the Eng. R. 1880, O. 48 r. 2 (1883 R. 645), except the words in brackets which are not in the English Rule, but seem implied therein.

In Chitty's Forms (12th ed.) p. 596 note, it is said that the affidavit is only necessary in cases within the words of the *Rule*, viz., where the judgment directs the defendant "to deliver up possession."

The judgment on an award is in this form and judgments in the Chancery Division are sometimes so drawn. In the other Divisions the form is "that the plaintiff do recover," etc.: see App. Forms 163 to 165.

The affidavit in support of a writ of assistance needed only to show that the order was not complied with within the time limited, and not an existing non-compliance: *Webster* v. *Taylor*, 18 Jur. 869.

See *Rule* 750 and note.

870. Upon judgment or order for recovery of any land and *mesne* profits or rents in respect of the premises claimed and costs, there may be either one writ or separate writs of execution for the recovery of possession, and for the *mesne* profits, rents and costs, at the election of the party entitled to recover the same. R. S. O. 1877, c. 51, s. 36. Execution for land and costs.

It is held in Ireland, under sec. 209 of the C. L. P. Act (16 & 17 V. c. 113) repeated in the Rules under the Ir. Jud. Act, that where a plaintiff has obtained a verdict for possession, mesne profits and costs, execution for possession cannot issue till the costs are taxed, unless he has waived them: *Beasley* v. *Chapman*, 6 L. R. Ir. 393.

That section is as follows:

"209. Upon any judgment in ejectment there may be either one or several writs of execution for the recovery of possession and for the damages, the rents ascertained to be due and costs, at the election of the plaintiff."

871. The writ of assignment of dower required to be issued after a judgment in an action for dower has been entered in favour of the plaintiff, shall be in the form hitherto in use in Ontario. C. L. Rules, 15th February, 1862. Form of writs of assignment of dower.

872. The writ of assignment of dower required to be issued under the third clause of the Dower Procedure Act, when the right of dower is acquiesced in by the owner of the estate, may be according to the form given in Form No. 201 in the Appendix. C. L. Rules, 15th February, 1862.

873. In all cases where specific goods, chattels, deeds, securities, valuable papers, or any property other than land or money, are demanded in an action, and the plaintiff has judgment to recover the same or their value, the Court or a Judge shall, at the request of the plaintiff, where a recovery or delivery of the property in specie is desired, direct a writ of execution to issue on the judgment, commanding the Execution for property other than lands.

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Rule 874.

defendant specifically to deliver up forthwith the property demanded, and in case of refusal, that the defendant be arrested and detained in prison until he complies with the terms of the writ, and also that the goods and chattels of the defendant to double the value of the property in question be taken and kept until the further order of the Court to ensure or enforce obedience to the writ, or that a writ of sequestration may issue; or, at the option of the plaintiff, the Court or Judge may order the Sheriff to make of the defendant's goods the value of such property; but the plaintiff shall, either by the same or by a separate writ or writs of execution (to be issued in the ordinary manner) be entitled to have made of the defendant's goods or lands, the damages, costs and interest in such action. R. S. O. 1877, c. 66, s. 56. *See* J. A. Rules 342, 382.

Option to the plaintiff.

Damages, costs, etc.

Not the same as the Eng. Rule 1875, O. 42, r. 4, and O. 49, (1883, R. 584), but substantially the same as Rule 649 of 1883.

The original *Rules* 342, and 382, in substance preserved the former practice at Law in actions of *detinue*.

The writs of execution in actions of *detinue* were the writ of *distringas* to compel the delivery of the goods by the party, and writ of *sci. fa.* to compel delivery by any third person in whose hands the goods might happen to be. The manner of issuing and enforcing these writs was expressed in R. S. O. 1877, c. 66, s. 56, from which the terms of the above *Rule* are taken.

The judgment for delivery of the property or payment of its value does not divest the plaintiff of the property in the chattel until the satisfaction of the value found by the judgment even though satisfaction is prevented by the bankruptcy of defendant: *Ex p. Drake*, 5 Ch. D. 866.

It is doubtful under the English Rules, whether an order for the writ is necessary: *Ivory* v. *Cruickshank*, W. N. 1875, 249. In Ont. it is probable that the direction of the Judge will be given in the judgment.

In *Ivory* v. *Cruickshank*, W. N. 1875, 249; 1 Charl. Ch. Ca. 123, an action for rent and for the return of specific goods, judgment having been signed for the amount of rent in default of appearance the plaintiff was allowed to sign judgment also for the return of the specific goods, and to then proceed under Eng. R. 584 as he might be advised by writs of delivery, attachment or sequestration. In *Battley* v. *Sears* (Times, 7th March, 1876, cited Charley's Jud. Act, 3rd ed. p. 669), it is stated that a rule *nisi* for an attachment was granted against a defendant for refusing to give up a diamond ring or pay for it, execution having proved futile, as the defendant was a married woman.

For Execution against Municipal Corporations: see R. S. O. 1887, 184, ss. 428 and 429.

Judgment requiring person to do or leave undone.

874. A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal. J. A. Rule 343.

Identical with Eng. R. 1875, O. 42, r. 5, (1883, R. 585).

Formerly where a writ of attachment on a *ca. sa.* was obtained, a *fi. fa.* could not be also issued, whereas proceedings for committal for disobedience of an order were no bar to proceeding also against the property of the contemnor:

Smith Chy. Pr., 7th ed., p. 185; see also *Harvey* v. *Harvey*, 26 Ch. D. 654; *Callow* v. *Young*, 56 L. T. N. S. 147. **Rules 875, 876.**

As to mode of obtaining a writ of attachment, see note to *Rules* 878, and 879.

On a notice of motion to commit the defendant, Malins, V.-C., ordered a writ of attachment to issue against him: *Piper* v. *Piper*, W. N. 1876, 202; but after obtaining an order for an attachment, a party cannot move *ex parte* for an order for committal instead: *Buist* v. *Bridge*, 43 L. T. N. S. 432; 29 W. R. 117. The distinction between attachment and committal, it would seem, still exists: *Callow* v. *Young*, 56 L. T. N. S. 147; see also note to *Rule* 879, p. 716.

The Court will not encourage motions where the object is not really to attach, but only to obtain an apology and costs, and therefore in *Plating Co.* v. *Farquharson*, 17 Ch. D. 50, no costs were given.

As to obtaining a writ of sequestration, where an attachment is ineffectual, see notes to *Rule* 881. Also in the case of a corporation: *Cook* v. *Credit Valley Ry. Co.*, 8 P. R. 167; *Demorest* v. *Midland*, 10 P. R. 82.

As to enforcing injunctions, and punishing a breach thereof, see further the notes to sec. 53 (8) of the Act.

875. Where a judgment (*a*) is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a Judge for leave to issue execution against such party. And the Court or Judge may, if satisfied that the right to relief has arisen according to the terms of the judgment, (*a*) order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried. J. A. Rule 345. Judgment for conditional relief.

Identical with the Eng. R. 1875, O. 42, r. 7. That of 1883, R. 587, has at (*a*) the words "or order."

In an action for specific performance of a contract for the purchase of leaseholds, judgment was obtained for the payment of purchase money on the delivery of deeds. The vendor tendered the deeds, but the purchaser refused to accept them or pay the money. On motion under this *Rule* the vendor was ordered to deposit the deeds in Court, and the purchaser was ordered to pay the money within four days: *Bell* v. *Denvir*, 34 W. R. 638; 54 L. T. N. S. 724; W. N. 1886, 113; see also *Morgan* v. *Brisco*, 31 Ch. D. 216; 32 Ch. D. 192.

876. Where a judgment is against partners in the name of the firm, execution may issue in manner following: Judgment against partners.

(*a*) Against any property of the partners as such;

(*b*) Against any person who (*x*) has admitted on the pleadings that he is, or has been adjudged to be a partner;

(*c*) Against any person who has been served as a partner with the writ of summons, and has failed to appear.

The service here contemplated would seem to be personal service; *sed quære*: see *Jackson* v. *Litchfield*, 8 Q. B. D. 478; 46 L. T. N. S. 519.

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Rule 877.

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave so to do; and the Court or Judge may give such leave if the liability be not disputed, or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined. J. A. Rule 346.

Identical with the Eng. R. 1875, O. 42, r. 8. That of 1883, R. 588, has at (z) the words, "who has appeared under his own name, under Order 12, Rule 15 (Ont. *Rule* 288) or."

This *Rule* provides the mode of realizing, against a firm or the individual partners, a judgment obtained against the firm: see *Rules* 265, and 288.

Where the writ is issued against partners, not individually, but in the name of the firm, service of the writ on one or more will be sufficient: *Rule* 265; but the judgment must follow the writ and be against the firm: *Rule* 288. Therefore, if no appearance is entered, judgment cannot be entered against any of the individual partners, even though they may have been served with the writ. Execution may, however, under this *Rule*, be issued, without leave, in the cases mentioned against individual partners, upon the judgment against the firm: *Jackson* v. *Litchfield*, 8 Q. B. D. 474.

This *Rule* shews that a judgment against a firm is not conclusive of the liability of a person who has neither admitted on the pleadings that he is, nor has been adjudged to be a partner, nor has been served with the writ. Execution in such case will not be allowed to issue without a trial of the liability under the last clause of the *Rule*: *ex parte Young*, 19 Ch. D. 124; 18 C. L. J. 119.

On an admission in the depositions of a person sought to be made liable under this *Rule*, taken on the motion it was held that the Master in Chambers might under *Rule* 756 determine that such person was a partner without directing the trial of an issue: *Tennant* v. *Manhard*, 12 P. R. 619.

The execution is not limited to partners carrying on business at the date of the writ, but it is a question of fact in each case whether the plaintiff intended to sue under the firm name those persons only who where partners at the date of the writ, or former partners as well: *Davis* v. *Morris*, 10 Q. B. D. 436.

The plaintiff is not confined to his remedy against the individuals by execution under this *Rule*, but may bring fresh actions against the partners individually upon the judgment obtained against the firm: *Clark* v. *Cullen*, 9 Q. B. D. 355.

See also notes to *Rules* 288 and 317.

On execution by infant, money to be paid into Court.

877. Where any money (other than for costs) is recovered by or on behalf of an infant, or a person of unsound mind by his guardian, next friend, or committee, the same shall, unless otherwise ordered, be paid into Court subject to further order; and no payment to the guardian, next friend, or committee, of moneys due to such infant or person of unsound mind, otherwise than for the costs of any such action, shall be a valid discharge to the party making such payment as against the infant or person of unsound mind. Every writ of execution for the levying of any such moneys is to be indorsed by the officer issuing the

same with the following notice: "All moneys made under this execution, other than costs, are to be paid into Court by the Sheriff, as required by Rule 877." J. A. Rule 589. Rule 878.

2. Attachment and Sequestration.

878. A writ of attachment [against the person shall be issued under the same circumstances and in the same manner and] shall have the same effect as according to the practice of the Court of Chancery, prior to *The Ontario Judicature Act, 1881.* J. A. Rule 364. Effect of attachment.

The Eng. R. 1875, O. 44, r. 1, (1883, R. 620,) has not the words which are in brackets; it is otherwise to the same effect.

R. S. O. 1887, c. 67, sec. 6, is as follows:

"10. Process of contempt for non-payment of any sum of money, or for non-payment of any costs, charges or expenses, payable by any judgment or order of the High Court or of a Judge thereof, or by any judgment or order of a County Court or a Judge thereof, is abolished; and no person shall be liable to arrest for non-payment of costs." Rev. Stat. c. 67, s. 6.

Chancery Order 288 provided as follows:

"288. If a party who is ordered, otherwise than by an order of course, to do any act, other than to pay money, in a limited time, refuses or neglects to obey the order according to the exigency thereof, the party prosecuting the order shall, at the expiration of the time limited, upon filing with the Registrar an affidavit of the service of the order, and of the non-performance thereof, be entitled, upon *præcipe*, to a writ or writs or attachment against the disobedient party." Ch. Ord. 288.

But *Rule* 879, requires a notice to be served and leave to be obtained before an attachment is issued. To this extent the former practice preserved by *Rule* 878 is varied.

Chy. Order 293, provided that every order requiring a party to do an act, other than the payment of money, should have indorsed upon the copy of the order served, a memorandum to the effect set forth in Schedule N to the Chy. Orders notifying the party as follows: Chy. O. 293.

"If you, the within named *(here insert the name of the party)*, neglect to obey this order by the time therein limited, you will be liable to be arrested by the sheriff; and you will also be liable to have your estate sequestered for the purpose of compelling you to obey this order without further notice. If you wish to apply to the Court to add to, vary, or set aside the said order, or to suspend the operation thereof, you must do so before the expiration of the time within limited." Schedule N.

This Chy. O. 293, is not consolidated in the Ont. *Rules*, but the corresponding Eng. O. is continued in the Eng. Rules of 1883, R. 573. Under the new practice it was held in England under the Rules of 1875, (but of course not under the Rules of 1883, R. 573: see *Hampden* v. *Wallis*, 26 Ch. D. 746, and *Treherne* v. *Dale*, 27 Ch. D. 66; 54 L. J. Chy. 83), that this indorsement was not necessary, as an attachment under the new procedure could not be obtained except upon notice: see *Rule* 879, but the rule might be different in the case of a sequestration: *Thomas* v. *Palin*, 21 Ch. D. 360; and see *Wallace* v. *Graham* 11 L. R. Ir. 369. In Ont. a sequestration does not issue on *præcipe* except where a party is already in custody under an attachment: see *Rule* 289; and in other cases, is not, under *Rule* 882, obtained without notice; so that the indorsement would seem to be not necessary in cases either of attachment or sequestration.

Eng. R. 573 has no application to a prohibitive order: *Selous* v. *Croydon*, 53 L. T. N. S. 210; 29 Sol. Jour. 485.

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Rule 879. Where default in complying with an order was not clearly enough shewn to justify an order for attachment, if the opposite party had not appeared, the defect was held to be cured by his appearing and resisting the motion on other grounds: *Treherne* v. *Dale*, 27 Ch. D. 66.

Leave to issue.

879. No such writ of attachment shall be issued without the leave of the Court or a Judge, to be applied for on notice to the person against whom the attachment is to be issued. J. A. Rule 365.

Identical with the Eng. R. 1875, O. 44, r. 2, (1883, R. 621).

This *Rule* introduced an important change in the Chancery Practice. A writ of attachment can now never issue as of right without an order, granted after notice to the party: *Baigent* v. *Baigent*, 1 P. D. 421; W. N. 1875, 218; *Abud* v. *Riches*, 2 Ch. D. 528; *Dallas* v. *Glyn*, 3 Ch. D. 190; see *Re Heiron's Estate, Hall* v. *Ley*, 12 Ch. D. 795; *Re Knight, Knight* v. *Gardiner*, 25 Ch. D. 297; *Re Chatham Harvester Co.* v. *Campbell*, 12 P. R. 666. This was the rule in the Common Law Courts, except in the case of an attachment against a sheriff for disobeying an order to return a writ; in which case the rule was made absolute *ex parte*: Reg. Gen. T. T. 1856, R. 140; see *Jupp* v. *Cooper*, 5 C. P. D. 26. In *Jupp* v. *Cooper*, all that the attention of the Court was called to was whether the order should be absolute in the first instance, or only an order *nisi*, and the latter was granted, as also was done in *Fowler* v. *Ashford*, 45 L. T. N. S. 46. An attachment against the Sheriff, like any other attachment, is now governed by the new *Rule*: *Eynde* v. *Gould*, 9 Q. B. D. 335: see also *Dallas* v. *Glyn*, *supra*; *Re Heiron's Estate*, *supra*. Rule 140 of T. T. 1856 is expressly abrogated by the Con. *Rules*.

The provisions of *Rule* 1170, *infra*, apply to an application for an attachment. The costs are therefore in the discretion of the Court: *Abud* v. *Riches*, *supra*, and should be asked for and disposed of on the application for the attachment: *Ib.*

A motion for attachment when made for non-compliance with rules of practice or orders of course, or orders in Chambers, may be made to a Judge in Chambers: see *Sahn Kyrburg* v. *Posnanski*, 13 Q. B. D. 218; *Amstell* v. *Lesser*, 53 L. T. N. S. 759; 34 W. R. 230; but when made for non-compliance with an order or judgment of the Court should be made in Court: *Klein* v. *Union Fire Ins. Co.*, 3 C. L. T. 602. The practice in England is not similar to that in Ontario: see *Davis* v. *Galmoye*, 39 Ch. D. 322; 40 Ch. D. 355.

Neither the Master in Chambers, nor a County Judge (acting under *Rules* 30 or 41), has jurisdiction to entertain a motion to attach or commit, as such matters are excepted from the powers conferred upon them: see *Rule* 30, and *Keefe* v. *Ward*, 9 P. R. 220.

Notice of motion.

Two clear days' notice of motion is sufficient. The practice laid down in *Abell* v. *Hilts*, 6 P. R. 122, and *Bryce* v. *McIntyre*, 7 P. R. 134, is not now in force: *Monaghan* v. *Dobbin*, 2 C. L. T. 215; see also *Cook* v. *Credit Valley Ry. Co.*, 8 P. R. 167.

Service of.

Where the order to be obeyed has been personally served it is nevertheless necessary, in case of disobedience, to serve personally any notice of motion for attachment or committal, except in the case provided for by *Rule* 521 of disobedience of an order to bring accounts into the Master's Office, or for production, or inspection of books and papers; in cases under *Rule* 521 it is not necessary to serve a notice of motion to attach personally upon the disobedient party, if he has a solicitor: see *Wilson* v. *Wilson*, 7 P. R. 57.

Where personal service of notice of motion to attach the defendant could not be effected, the order was made on affidavit of service of the notice on a solicitor who had appeared in the action for the defendant, although the solicitor had ceased to act for him: *Callow* v. *Young*, 55 L. T. N. S. 543.

There is no distinction, in regard to service of a notice of motion for attachment, between contempt in breach of an undertaking, and contempt in breach

of an injunction, knowledge of which is given by previous service of the order: *Ib.* Rule 879.

An order to deliver a bill of costs served on a solicitor's clerk at his office was disobeyed. On motion for attachment the solicitor swore that he had not been personally served. A letter from him giving reason for delay and promising to deliver bills was produced, but it was held that the necessity for personal service was not waived by the letter: *Re Cunningham*, 55 L. T. N. S. 766.

In *Mann* v. *Perry*, W. N. 1881, 4; 44 L. T. N. S. 248; 50 L. J. Chy. 252, it was held that notice of motion to commit must be served personally, unless some reason is shewn for dispensing with personal service. On a motion for an attachment however, it had previously been held that service of notice of motion upon the solicitors on the record of the party to be attached was sufficient though personal service was not shewn to be impracticable: *Browning* v. *Sabin*, 5 Ch. D. 511; *Richards* v. *Kitchen*, 25 W. R. 602: or by leaving the notice at the residence of the party affected thereby: *Re a Solicitor*, 14 Ch. D. 152. See also *Tilney* v. *Stansfield*, W. N. 1880, 77.

In Ontario it was held that *Mann* v. *Perry*, is to be followed: *Smith* v. *Marrin*, 4 C. L. T. 493; except where *Rule* 521, applies: *Re Harnden*, 11 P. R. 35.

In *Re Steele*, 23 Sol. Jour. 906, the question was raised whether the order to be obeyed need be personally served since an attachment can now only be had upon notice. It is submitted, however, that there is nothing to alter the former practice which required personal service of the order to be obeyed, (except in cases under *Rule* 522), more especially where the notice of motion to attach need not be personally served. Service of notice is waived by Counsel appearing and consenting to an enlargement: *Ex p. Alcock*, 1 C. P. D. 68. Service of the order to be obeyed.

The copy of order served must be an exact copy: *Re Holt*, 11 Ch. D. 168; see also *Ex p. Smith*, 28 W. R. 174.

The provisions as to substituted service have been held not to apply to an application for an attachment, but only to service of writs of summons: *Anon*, W. N. 1876, 105; but see cases *supra* p. 301, and *Williams* v. *Johns*, 2 Dick 477; 1 Mer. 303 (*d*); *Pulteney* v. *Shelton*, 5 Ves. 147; *DeMannerille* v. *DeMannerille*, 12 Ves. 202; *Lechmere Charlton's case*, 2 M. & C. 335; also *Hope* v. *Carnegie*, L. R. 7 Eq. 254; *Howarth* v. *Howarth*, 11 P. D. 95; and *Tilney* v. *Stansfield*, W. N. 1880, 77.

Service of notice made on the clerk of a solicitor at his office, his residence not being known, was held to be good service, but, notwithstanding, the order was stayed for a week, and notice thereof directed to be served on the solicitor: *Tilney* v. *Stansfield*, *supra*.

An interlocutory order, under *Rule* 1131, *et seq.*, may be enforced by attachment: *Hutchinson* v. *Hartmont*, W. N. 1877, 29. But a judgment or order, under those *Rules* or otherwise, if it be for the payment of money into Court, cannot be enforced by attachment.

An order should be drawn up and entered before being enforced by process: *Ballard* v. *Tomlinson*, 48 L. T. N. S. 515.

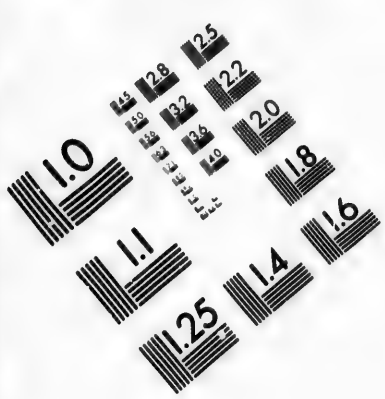
On a motion to commit for contempt, an attachment may issue: *Piper* v. *Piper*, W. N. 1876, 202; but on a motion for an attachment an order to commit cannot be obtained *ex parte*: *Buist* v. *Bridge*, 43 L. T. N. S. 432; 29 W. R. 117. Issue and execution of writ of attachment.

A writ of attachment may be issued against a party out of the jurisdiction, though it can only be enforced in the event of his coming within the jurisdiction: *Bloomfield* v. *Brooke*, 6 P. R. 264.

No particular return day is inserted in the writ (see form No. 194), but after a reasonable interval a return may be required: *Owen* v. *Pritchard*, W. N. 1876, 147.

The officer charged with the execution of the writ may break open the outer door of the house in order to execute it: *Harvey* v. *Harvey*, 26 Ch. D. 644.

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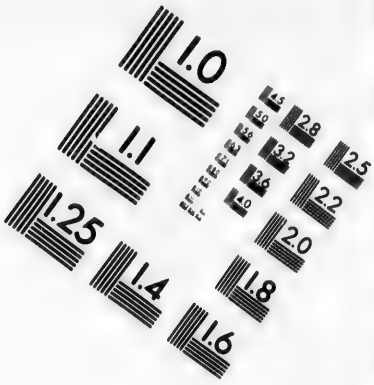
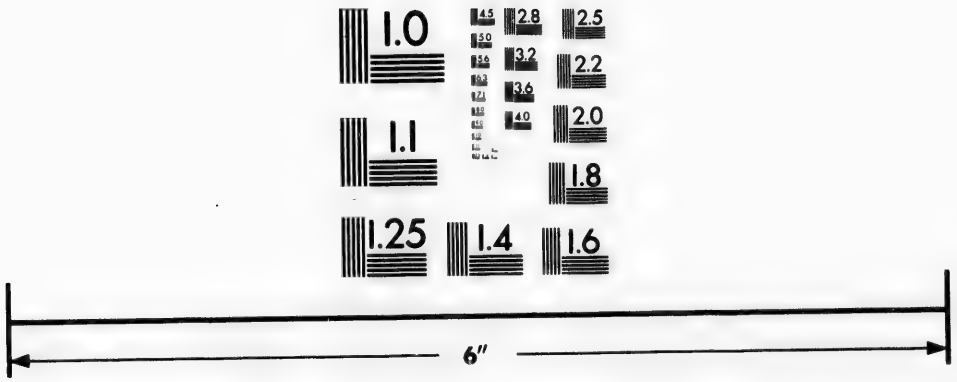
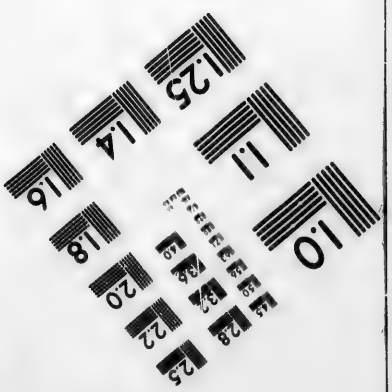


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Rules 880, 881.

A further opportunity to comply with the order may be given, or the order may be stayed, pending an appeal, in the discretion of the Judge: *Mellor* v. *Thompson*, W. N. 1883, 128.

A person attached for misconduct will not be detained for costs: *Jackson* v. *Mawby*, 1 Ch. D. 86; see also *Earl of Lewes* v. *Barnett*, 6 Ch. D. 252; and *Micklethwaite* v. *Fletcher*, 27 W. R. 793. But, in order to punish anyone who has been guilty of a contempt, he may be imprisoned for a stated period, and allowed to be discharged if he pays the costs before the expiration of such period: *Harris* v. *Meyers*, 1 Chy. Ch. 229; see also *Marris* v. *Ingram*, 13 Ch. D. 338.

Attachment against the President of a Company is not an available proceeding for default in performing an act which he could not by himself perform, but which could only be performed by a majority of the Board of Directors: *Demosthenes* v. *Midland Ry. Co.*, 10 P. R. 82. Sequestration is not the proper remedy for disobedience to a mandamus: *Ib.*

As to attaching a Member of Parliament, see *Re Anglo-French Co-operative Soc.*, 14 Ch. D. 533.

On a motion for attachment for contempt in committing a breach of undertaking contained in an order, a preliminary objection was raised that the proper remedy was committal. The objection was allowed and the plaintiff given leave to amend his notice of motion and serve it again: *Callow* v. *Young*, 56 L. T. N. S. 147; 56 L. J. Chy. 690. The distinction between attachment and committal still exists. "Committal was the proper remedy for doing a prohibited act and attachment was the proper remedy for neglecting to do something ordered to be done": *Ib.* See also *Harvey* v. *Harvey*, 26 Ch. D. 644, 654.

Where an attachment issued against a defendant for not complying with an order for discovery and compliance was then made, but the defendant was nevertheless thereafter arrested, it was held that the arrest was irregular and that it was the duty of the plaintiff's solicitor to have stayed the enforcement of the attachment: *Gay* v. *Hancock*, 46 L. T. N. S. 207.

Attachment for non-performance of an act.

880. If a person who is ordered, otherwise than by an order of course, to do any act other than to pay money, in a limited time, refuses or neglects to obey the judgment or order, according to the exigency thereof, the party prosecuting the same shall be entitled to a writ or writs of attachment against the disobedient party. Chy. O. 288.

A writ of attachment cannot issue as of course, because under the preceding *Rule* 879 no such writ is to issue without an order to be applied for on notice: *Thomas* v. *Palin*, 21 Ch. D. 360; 57 L. T. N. S. 207.

Upon attachment of contemnor. Sequestration may issue on *præcipe*.

881. In case a person is, under the preceding Rule, taken or detained in custody under a writ of attachment, without obeying the judgment or order, then upon the sheriff's return that the person has been so taken or detained, the party prosecuting the judgment or order shall be entitled, upon *præcipe*, to a commission of sequestration against the estate and effects of the disobedient party. Chy. O. 289.

Sequestration.—Originally the writ of sequestration was the last prerogative process, issued out of the Court of Chancery, for the purpose of enforcing obedience to its decrees. The right of the Court of Chancery to issue such writs, was at first contested by the Common Law Courts, on the ground that

the Court of Chancery could not enforce its decrees by process *in rem*, but only *in personam*. And it was even ruled at law, that to kill a sequestrator in the execution of such process was no murder. But the authority of the Court to issue such writs was ultimately established, in spite of the "bloody and desperate resolutions" of the common lawyers. See Gilbert's Chy. Pr. 77. **Rule 881.**

A sequestration is in "the nature of a grand distress." It is a process of contempt *in rem*: *Tatham* v. *Parker*, 1 Sm. & G. 506; (see, however, observations of Spragge, C., *Meyers* v. *Meyers*, 21 Gr. 216,) and may be issued to enforce either an interlocutory order, or a final judgment. It affects the personal estate, and the rents and profits of the realty, of the person whose estate is sequestered: *Jackson* v. *Jackson*, 1 Chy. Ch. 115; but it does not appear to bind the land itself: *Hyde* v. *Greenhill*, 1 Dick 107; in *Meyers* v. *Meyers*, 19 Gr. 191, Mowat, V.-C., expressed the opinion, that under 5 Geo. 2, c. 7, s. 4, in Ontario, lands were bound by the writ of sequestration from the time of its delivery to the sequestrator; and that the Court might order a sale of sequestered lands; but the full Court were of opinion that lands could not be sold under a sequestration: *S. C.* 21 Gr. at p. 218. According to English authorities, it is said that the writ binds from its date, and not merely from its execution: *Burdett* v. *Rockley*, 1 Vern. 58; but see *Angel* v. *Smith*, 9 Ves. 336; *Harris* v. *Meyers*, 3 Chy. Ch. 107.

"A grand distress."

Binds personalty, and rents and profits of realty.

From date of sequestration.

The writ of sequestration has been shorn of much of its original efficacy by the enlarged operation given here to the *fi. fa.* goods. It is now only to be employed as a last resource. The *fi. fa.* goods and proceedings for attaching debts, etc., are first to be used, and if by these the debtor's property cannot be reached, a writ of sequestration may be issued on application in Chambers, upon notice as a general rule, but it will in general only be granted when the debtor's lands are insufficient to satisfy the debt, and it therefore becomes of importance to enter upon the land and realize the profits thereof during the year which must elapse before they can be sold under a *fi. fa.* lands, or where the interest of the debtor is such that it cannot be taken under a *fi. fa.*: *Nelson* v. *Nelson*, 6 P. R. 194. The Court has however power to order a sequestration instead of a *fi. fa.*, if occasion should require (*ib.*) See note to *Rule* 883.

Where it was shown that a debtor had no effects which would be available in execution, a writ of sequestration was granted to enforce payment of costs which had been ordered to be paid: *Snow* v. *Bolton*, W. N. 1883, 73.

It is not necessary here to serve the judgment or order for payment, or a demand thereunder, as a condition precedent to an application for a sequestration: *Lony* v. *Long*, 6 P. R. 137.

Writ may issue without order, where contemnor in custody.

Formerly the writ could in no case issue except under special order. *Rule* 881 makes an exception to this rule, where the party is in actual custody for contempt, without obeying the judgment, or order, sought to be enforced. In such cases the writ may be obtained on *præcipe*, upon filing the sheriff's return.

A sequestration to enforce compliance by a Railway Co. with a peremptory mandamus was refused, and an attachment against the directors was held to be the proper remedy: *Demorest* v. *Midland, R. W. Co.*, 10 P. R. 82; but see *Rule* 882.

Property liable; goods and chattels.

Property Liable to Sequestration—All goods, and chattels, in the possession of the contemnor, are liable to be seized; and also any property belonging to him, which can be reached by the sequestrator without suit, or action. And if the keys are denied him, the sequestrator may open rooms, and boxes, that are locked, and schedule the contents; but may not remove property off the premises without the special order of the Court: *Pelham* v. *Newcastle*, 3 Sw. 290 n. A debtor's seat in the Stock Exchange is not exigible under sequestration: *London & Canadian L. & A. Co.* v. *Morphy*, 10 Ont. 86. By the Imperial Statute 11 Geo. 4. & 1 Wm. 4. c. 36, s. 15, r. 16, sequestrators have the same power over documents in the *custody* of a person committed for not delivering them, or depositing them in Court, as they have over the contemnor's own property. This provision is incorporated into the law of this Province by R. S. O. c. 44, ss. 21-23.

Documents in custody of contemnor.

Choses in action, how far bound.

Choses in Action.—At one time it was doubted whether choses in action could be reached by sequestration; the later authorities establish that they

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can; *Irving* v. *Boyd*, 15 Gr. 157; and see *McDowell* v. *McDowell*, 1 Chy. Ch. 140; *Wilson* v. *Metcalfe*, 1 Beav. 263; *Crispin* v. *Cumano*, L. R. 1 P. & M. 622. As regards *choses in action*, an order of the Court is necessary, to enable the sequestrators to sue for their recovery: *Irving* v. *Boyd*, 15 Gr. 157; or they may be reached by motion in the action in which the sequestration issued; see *Ward* v. *Booth*, L. R. 14 Eq. 195; *Ex parte Nelson, Re Hoare*, 14 Ch. D. 41.

But the *chose in action* is not bound by the writ of sequestration, until either the sequestrator, or the party prosecuting it, take steps to obtain payment: *McDowell* v. *McDowell*, 1 Chy. Ch. 140; 10 U. C. L. J. 48; *London and Canadian Loan and Agency Co.* v. *Merritt*, 32 C. P. 375.

How recovered under.

If the debtor admits the liability, and submits to the order of the Court, an order may be made, without further suit, authorizing the debtor to pay, and deliver, the fund, or property, to the sequestrator; or authorizing the latter to seize the property: *Wilson* v. *Metcalfe*, 1 Beav. 263; *Re Slade, Slade* v. *Hulme*, 18 Ch. D. 653, 45 L. T. N. S. 276; *Crispin* v. *Cumano*, 1 L. R. P. & M. 622. But such order cannot be made without the debtor's assent: *Ib.*

A claim to indemnity, which a surety has against his principal, before payment by the surety, is not a *chose in action*, which can be reached by sequestration: *Irving* v. *Boyd*, 15 Gr. 157.

The accrued dividend of a fund in Court, to the income of which a married woman is entitled for her separate use without power of anticipation: *Claydon* v. *Finch*, L. R. 15 Eq. 266; *Bryant* v. *Bull*, 10 Ch. D. 153; a deposit on appeal: *Conn* v. *Garland*, L. R. 9 Chy. 101; and a rent charge: *Wilson* v. *Metcalfe*, 1 Beav. 263, have been held liable to sequestration.

Pensions and salaries.

PENSIONS, AND SALARIES.—Pensions granted entirely for past services, may be sequestered: *Willcock* v. *Terrell*, 3 Ex. D. 323; *Dent* v. *Dent*, 1 L. R. P. & M. 366; *McCarthy* v. *Goold*, 1 Ba. & B. 387; but pensions and salaries for services, still being rendered, or which may be required *in futuro*, cannot be sequestered: *Fenton* v. *Lowther*, 1 Cox 315; *McCarthy* v. *Goold*, *supra*; *Collyer* v. *Fallon*, 1 T. & R. 459; *Spooner* v. *Payne*, 1 D. M. & G. 383; and see *Lloyd* v. *Cheetham*, 3 Giff. 171.

Rents and profits of realty bound, but land not saleable under.

RENTS, AND PROFITS, OF REAL ESTATE, including crops, or other natural produce, or rents paid in kind, are liable to sequestration, but land, whether freehold, or leasehold, cannot be sold under the writ, which only confers a right to the possession, but does not transfer any title to the land, or term, to the sequestrator: *Shaw* v. *Wright*, 3 Ves. 22; or confer any priority over prior specific charges: *Meyers* v. *Myers*, 20 Gr. 185; 21 Gr. 214. Tenants in possession should be notified to attorn to the sequestrator, and pay their arrears, and growing rents, to him: Danl. Pr. 5th ed. 916; and upon refusal, the sequestrator may obtain an order compelling them to attorn: *Rowley* v. *Ridley*, 3 Sw. 306; *Jackson* v. *Jackson* 1 Chy. Ch. 115.

Tenants to be notified. Order against.

Paying rents after attornment. Lease by sequestrator.

If a tenant attorns to the sequestrator, and afterwards pays his rent to another party, he may be compelled to pay it over again to the sequestrator: *Harris* v. *Meyers*, 2 Chy. Ch. 121. A sequestrator, with the sanction of the Court, can make leases, for any period during which the aggregate rents, will not exceed the amount for which the sequestration issued: *Harris* v. *Meyers*, 3 Chy. Ch. 89. But the sequestrator cannot, by his lease, affect the right of a person holding an incumbrance prior to the claim of the party issuing the sequestration: *Meyers* v. *Meyers*, 19 Gr. 541.

Disposition of property sequestered.

Disposition of Property Sequestered.—*Prima facie* a sequestration confers merely a right of detainer of the property sequestered. Where the sequestration, however, is issued for non-payment of money, the proceeds of the goods seized will be ordered to be applied in satisfaction of the demand: *Davis* v. *Davis*, 2 Atk. 24. The sequestrator should not, however, so apply them, but should pay the proceeds into Court upon leave obtained on motion in Chambers: Danl. Pr. 5th ed. 917.

The Court may, at the instance of the sequestrator, order payment into Court of the balance standing in a banker's books to the credit of the debtor upon notice to the banker: *Miller* v. *Huddlestone*, 22 Ch. D. 233.

Sale of Property.—Where necessary, a sale of personal property sequestered, may, on the application of the sequestrator, be ordered, *e.g.*, where goods are of a perishable nature: *Shaw* v. *Wright*, 3 Ves. 22; or it is necessary for the satisfaction of the claim for which the writ issued: *Ib*; *Mitchell* v. *Draper*, 9 Ves. 208; a defendant's reversionary interest in a fund in Court, has been ordered to be sold: *Cowper* v. *Taylor*, 16 Sim. 314. The application for leave to sell must be made on notice to the debtor: *Mitchell* v. *Draper*, *supra*; *Forbes* v. *Connolly*, 1 Chy. Ch. 6; but service of notice may be dispensed with: *Re Rush*, 19 W. R. 417. **Rule 882.** Sale, when ordered.

According to the *dictum* of Mowat, V.-C., in *Meyers* v. *Meyers*, 19 Gr. 185, sequestered land may now be ordered to be sold, as well as goods and chattels; but the full Court in *Meyers* v. *Meyers*, 21 Gr. at p. 218, expressed the contrary opinion, and stated that "all that the Court does is to direct the application of the rents and profits, and this, not by way of execution, but upon the ground that the party is in contempt for disobedience of some order of the Court." See also *Nelson* v. *Nelson*, 6 P. R. 194. Notice of application for sale must be given to debtor.

Adverse Claims.—Where property affected by a sequestration, or any interest therein, is claimed by some third person, the sequestrator, and possibly the claimant, may apply to the Court for relief, by a summary application in the cause: see *Rule* 1141 *et seq.* Parties having claims adverse to sequestration—proceedings by.

The claimant should not commence an action against the sequestrator, or disturb his possession without the leave of the Court. If he do so, he may be restrained by injunction.

Obstruction of Sequestrator, is a contempt of Court: *Angel* v. *Smith*, 9 Ves. 335; *Pelham* v. *Newcastle*, 3 Sw. 289 *n*, and see *Francklyn* v. *Colhoun*, 3 Sw. 276. But persons having claims on the property sequestered, adverse to the sequestrator, are not driven to bring actions, but may apply to the Court for relief in a summary way upon petition in the action; and see *Meyers* v. *Meyers*, 19 Gr. 541. Obstruction of sequestrator a contempt.

Death of Contemnor.—Where a sequestration has issued to compel payment of money, in case the contemnor die, an order may be obtained to continue proceedings against his real representative, where the lands descended, or devised, would be assets for the payment of the debt: *Hyde* v. *Greenhill*, 1 Dick, 107; but where the writ issues for personal contempt, on the part of the contemnor, on the death of the contemnor, no order to continue proceedings can be obtained: *Turley* v. *Meyers*, 3 Chy. Ch. 102; Gilbert's Chy. Pr. 86-87; except *perhaps* for the costs: see *Rule* 630. Death of contemnor; when proceedings may be continued against his representatives.

882. If an attachment cannot be executed against the person refusing or neglecting to obey the judgment or order, by reason of his being out of the jurisdiction of the Court, or of his having absconded, or that with due diligence he cannot be found, or if in any other case the Court may think proper to dispense with a writ of attachment, an order may be granted for a commission of sequestration against the estate and effects of the disobedient person; and it shall not be necessary for that purpose to sue out an attachment. *See* Chy. O. 290. Where attachment cannot be executed, etc.

An order for sequestration will not be granted against a defendant required to do an act, where an appeal is pending from the judgment directing its performance, and the defendant has perfected the security required by the Order of the appellate Court, entitling him to a stay of proceedings: *Dundas* v. *Hamilton & Milton R. Co.*, 19 Gr. 455; *McGarvey* v. *Strathroy*, 6 Ont. 138. Sequestration pending appeal.

Originally the sequestration only issued after an attachment, and all other process had been exhausted. Under this *Rule* in cases where it would be impossible to execute an attachment, it is unnecessary to go through the form of issuing one; and see *Snow* v. *Bolton*, W. N. 1881, 73. Attachment need not issue to found sequestration.

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An attachment may be ordered against a party who is out of the jurisdiction: *Bloomfield* v. *Brooke*, 6 P. R. 264, and see *Farewell* v. *Wallbridge*, 3 Gr. 628.

A writ of sequestration was issued against a person of unsound mind in *Robinson* v. *Galland*, W. N. 1889, 108; 37 W. R. 697.

Sequestration may issue for default in payment of money, on application in Chambers.

883. If a person who is ordered to pay money, neglects to obey the judgment or order according to the exigency thereof, the party prosecuting the same, may, at the expiration of the time limited for the performance thereof, apply in Chambers for a writ of sequestration against the defaulting party, and upon proof of due service of a notice of the motion, unless the Court thinks proper to dispense with such service, and upon proof by affidavit of such other matters, if any, as the Court requires, the Court may order a writ of sequestration to issue. Chy. O. 291.

Sequestration, when granted to enforce payment of money demand.

Where a writ of sequestration is sought, to enforce the payment of money, unless some special ground is made for proceeding *ex parte*, notice of motion must be given; and the ordinary procedure for recovering money demands, viz.: writs of *fi. fa.* etc., and attachment of debts, should be first resorted to, or shewn to be unavailing: *Nelson* v. *Nelson*, 6 P. R. 194; but see *Re Russell, Burnet* v. *Allen*, before Spragge, C., January 24, 1876, where the writ of sequestration was granted without such preliminary proceedings; and see *Snow* v. *Bolton*, W. N. 1881, 73 where the sequestration was granted on it being shown that the debtor had no effects exigible under execution.

An order for payment of money need not be personally served in order to found a motion for a sequestration: *Long* v. *Long*, 6 P. R. 137.

The writ cannot properly be issued, to enforce an ordinary judgment for the recovery of money, which does not expressly order payment, or limit a time therefor: *London and Canadian L. & A. Co.* v. *Merritt*, 32 C. P. 375; *Ex parte Nelson, Re Hoare*, 14 Ch. D. 41.

Commissions of sequestration to be directed to Sheriff.

884. Commissions of sequestration are to be directed to the Sheriff, unless otherwise ordered. Chy. O. 292.

For form of writ see App. Form No. 199.

3. Issue and Form of Writ.

Execution within six years.

885. As between the original parties to a judgment, execution may issue at any time within 6 years from the recovery of the judgment. J. A. Rule 355.

This is identical with the Eng. R. 1875, O. 42, r. 18 (1883 R. 600), and is in substance the same as R. S. O. 1877, c. 50, s. 322.

Garnishee process is not a form of *execution* within *Rule* 858 so as to be subject to *Rules* 885, and 886: *Fellows* v. *Thornton*, 14 Q. B. D. 335.

Execution by leave of Court.

886. (*a*) Where 6 years have elapsed since the judgment, or the date of the order, or where any change has taken place by death or otherwise in the parties entitled or liable to execution;

(*b*) Where a husband is entitled or liable to execution upon a judgment or order for or against his wife; Rule 886.

(*c*) Where a party is entitled to execution upon a judgment of assets *in futuro*;

the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly. And such Court or Judge, if satisfied that the party so applying is entitled to issue execution, may make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties, shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or Judge may impose such terms as to costs or otherwise, as shall seem just. J. A. Rule 556.

Same as the Eng. R. 1875, O. 42, r. 19.

Rule 601 of the Eng. Rules, 1883, includes the further case of a party entitled to execution against any of the shareholders in a joint-stock company upon a judgment against the company. Previously a writ of *scire facias* was necessary, and in Ont. *Rule* 887 will probably apply in such case.

The practice at Common Law in reviving pecuniary judgments for the purpose of execution, after the lapse of six years, or the death of parties, was formerly governed by C. L. P. Act, R. S. O. 1877, c. 50, ss. 322 to 330 (corresponding with Eng. C. L. P. Act, s. 128, *et seq.*) Under those provisions the party seeking execution could apply to the Court or a Judge for leave to enter a suggestion to the effect that such party was shown to be entitled to execution, and to allow execution to issue, and, if the case was made clear, the suggestion and the consequent execution were allowed. If the case was not made clear, the suggestion and execution consequent upon it were disallowed, and the party was left to his writ of revivor. This was a new action, in which by the ordinary processes of pleading the questions in dispute were brought to issue and decided.

The above Rule preserves alternative processes, according as the right to execution is, or is not, sufficiently clear to be enforced summarily by a Judge; but a somewhat simpler process is provided; if the case be clear, the Judge may order execution to issue; if it be not, he may direct an issue to try the right.

Where judgment is obtained by several executors and one of them dies after the entering of judgment, there is no "change" of parties within the meaning of this *Rule*. The surviving plaintiffs are entitled to issue execution in the name of all, and no order for leave to do so is necessary: *Baird* v. *Thompson*, 14 L. R. Ir. 497. So also in the case of partners the action survives: *Davies* v. *Andrews*, 28 Sol. Jour. 411; W. N. 1884, 94.

Successors in title are not bound by a decree against their predecessors restraining the continuance of a nuisance: *Atty.-Gen.* v. *Birmingham, etc., Board*, 17 Ch. D. 685.

An application for leave to issue execution may be made *ex parte*; *Mercer* v. *Lawrence*, 26 W. R. 506; *Lysaght* v. *McGrath*, 7 L. R. Ir. 532; but the Court or Judge may, if it seems proper, direct notice to be served.

Where writs had expired, leave was given, on notice to defendant, under this *Rule*, to issue new writs to include the costs of the former ones, and the costs of the motion: *McDougall* v. *McDougall*, 3 C. L. T. 42.

At Common Law, after 20 years without payment, a presumption arises that the judgment is satisfied: see Coke 2 Inst. 470, *Mortimer* v. *Piggott*, 2 Period of limitation.

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Dowl. 615. But this presumption may be rebutted: *Williams* v. *Welch*, 3 D. & L., 565, and possibly does not arise where execution has never been issued: see *Jenkins* v. *Kirby*, 2 C. L. J. 164.

As to the period of limitation for enforcing a judgment, and whether the limitation applies to proceedings under this *Rule*: see *Boice* v. *O'Leane*, 3 Ont. App. 167; *Caspar* v. *Keachie*, 41 U. C. Q. B. 601; *McDonald* v. *Elliott*, 12 Ont. 98; *Macdonald* v. *McDonald*, 11 Ont. 190, and *McCullough* v. *Sykes*, 11 P. R. 337.

Leave to issue execution was given where a judgment recovered in 1856 was revived in 1869, twenty years not having elapsed: *McCullough* v. *Sykes*, 11 P. R. 337.

In case of persons not parties.

887. In cases other than those mentioned in Rule 885, any person, not being a party in an action, who obtains any order or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the action; and any person not being a party in an action, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to the action. J. A. Rule 358.

Same as the Eng. R. 1875, O. 42, r. 21. The Eng. Rule of 1883, R. 604, is applicable in the case of a "a cause or matter," and corresponds with Chy. O. 297.

See note to *Rule* 886.

Præcipe for writ.

888. No writ of execution shall be issued without the party issuing it, or his solicitor, filing a *præcipe* for that purpose. The *præcipe* shall contain the title of the action, (*a*) the date of the judgment, and of the order, if any, directing the execution to be issued, the names of the parties against whom, or of the firms against whose goods, the execution is to be issued; and shall be signed by or on behalf of the solicitor of the party issuing it, or by the party issuing it if he do so in person. The forms in Part VII. of the Appendix hereto may be used, with such variations as circumstances may require. J. A. Rule 347.

(*a*) The Eng. R. 1875, O. 42, r. 10, (1883, R. 590), has here the additional words, "the reference to the record." The above *Rule* corresponds otherwise with the English Rule as it now stands; see *Bolton* v. *Bolton*, 3 Ch. D. 276.

Indorsement of name and address.

889. Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same; and when the solicitor actually suing out the writ sues out the same as agent for another solicitor, the name and place of abode of such other solicitor shall also be indorsed upon the writ; and in case no solicitor is employed to issue the writ, then it shall be indorsed with

a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town or [(*a*) other place,] and also the name of the (*b*) street and number of the house of such plaintiff's or defendant's residence, if any such there be. J. A. Rule 348. Rule 890.

(*a*) Instead of "other place" the Eng. R. 1875, O. 42, r. 11, (1883, R. 591), has the word "parish."

(*b*) The English Rule has here the additional word "hamlet." The two Rules are otherwise identical.

Where the Sheriff, being misled by an indorsement made on a writ by the plaintiff's solicitor, seized the goods of a wrong person, the plaintiff was held liable in an action of trespass: *Morris* v. *Salbery*, 22 Q. B. D. 614. See also *Smith* v. *Keal*, 9 Q. B. D. 340.

890. Upon every execution there may be levied, in addition to the sum recovered by the judgment, the poundage, fees, expenses of execution and interest upon the amount recovered. J. A. Rule 350. R. S. O. c. 66, s. 44. Poundage, etc.

Identical with the Eng. R. 1875, O. 42, r. 13, (1883 R. 593), and to the same effect as R. S. O. 1877, c. 66, s. 44.

The mere delivery of the writ, without an actual or virtual seizure, does not entitle the Sheriff to poundage: *Nash* v. *Dickinson*, L. R. 2 C. P. 252; *Morris* v. *Boulton*, 2 C. L. Cham. 60; but the receipt of money by the Sheriff under a writ is a virtual execution of the writ though there is no actual seizure or sale: *Consolidated Bank* v. *Bickford*, 7 P. R. 172; *Bissicks* v. *Bath Colliery Co.*, 2 Ex. D. 459; *Ex p. Lithgow*, 10 Ch. D. 169. Where there has been a seizure the Sheriff is entitled to poundage, though there be no sale, if by compulsion of the writ the debt is recovered directly through the Sheriff: *Mortimore* v. *Cragg*, 3 C. P. D. 216, overruling *Roe* v. *Hammond*, 2 C. P. D. 300, or indirectly by means of some compromise which is the consequence of the seizure, subject to *Rule* 1233, *Mortimore* v. *Cragg*, *supra*; *Thomas* v. *Cotton*, 12 U. C. Q. B. 148; *Gillespie* v. *Shaw*, 10 U. C. L. J. 100; *McRoberts* v. *Hamilton*, 7 P. R. 95; but not where the writ is withdrawn by direction of law: *Mortimore* v. *Cragg*, *supra*; *Walker* v. *Fairfield*, 8 C. P. 95; or where before sale an order is made for delivery of the goods to a receiver: *Re Ludford*, 33 W. R. 152; see 51 L. T. N. S. 240; *Re Ludmore*, 13 Q. B. D. 415. Poundage on fi. fa. goods.

Where the money levied has to be restored to defendant in consequence of some act of the plaintiff, the Sheriff may recover poundage from the latter: *Henry* v. *Commercial Bank*, 17 U. C. Q. B. 104; see *Morrison* v. *Taylor*, 9 P. R. 390.

A Sheriff upon arresting a judgment debtor under *ca. sa.* thereby becomes at once entitled as against execution creditors to full poundage on the amount of the execution: *McNab* v. *Oppenheimer*, 11 P. R. 348.

The Sheriff is only entitled to poundage on the sum paid over, not on what he retains for himself: *Michie* v. *Reynolds*, 24 U. C. Q. B. 303. If he makes part only by force of the execution, the poundage is only on such part; and if a seizure is not followed by a sale by reason of satisfaction having been otherwise obtained, and no money is actually made by the Sheriff on or by force of the execution, the poundage is only on the goods seized, and a Judge may on application award such less sum as may be reasonable: *Rule* 1233, and see *Wadsworth* v. *Bell*, 8 P. R. 478; *Bowman* v. *Masson*, 1 C. L. T. 109; *Morrison* v. *Taylor*, 9 P. R. 390; *Hamilton, etc.*, v. *Gore Bank*, 20 Gr. 202: *Re Ludford*, 51 L. T. N. S. 240. If no such application is made, the Sheriff would seem to be entitled to full poundage on the goods seized: see *Brockville, etc.* v. *Canada Central*, 7 P. R. 372, 376.

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The Sheriff was held entitled to poundage, on three several writs issued by the same solicitor and placed in his hands at the same time: *Grant* v. *Grant*, 10 P. R. 40.

For the proper mode of computing poundage, see *Fleming* v. *Hall*, 9 P. R. 310.

Poundage on *fi. fa.* lands.

A Sheriff is not entitled to poundage upon an execution against lands, unless there has been an actual sale: *Merchant's Bank* v. *Campbell*, 32 C. P. 170.

The plaintiff's solicitors are not liable to the Sheriff for his fees in the absence of any contract, and no contract is implied from lodging the writ in the Sheriff's office: *Royle* v. *Bushy*, 6 Q. B. D. 171.

For the Fees to which Sheriff's are entitled, see Tariff C., *infra*.

Indorsements on writ.

891. Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 6 per cent. per annum from the time when the judgment was entered up; provided that in cases where there is an agreement between the parties that more than 6 per cent. interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed. J. A. Rule 351.

Same in effect as Eng. R. 1875, O. 42, r. 14, (1883, R. 594), except that the rate of interest therein named is four per cent. instead of six, and provides for the case of money payable under a judgment or order.

It is not quite clear how far the last clause is intended to alter the former rule that a contract for payment of a higher rate of interest than six per cent. when sued on, becomes merged in the judgment under which six per cent. only will be recoverable: see *St. John* v. *Rykert*, 4 Ont. App. 213. At all events, in the absence of any agreement operating subsequently to judgment, interest is limited to six per cent., though the debt on which the judgment was recovered bore a higher rate: *Re European Central Ry. Co.*, 4 Ch. D. 35; *Ex p. Fewings*, 25 Ch. D. 338.

In indorsing a writ to levy interest upon the amount of the judgment, the interest is to be computed from the day of pronouncing the judgment; that, and not the day of formal entry thereof, is the day from which the judgment takes effect: *Rule* 764, and is, therefore, the day upon which it is entered up within the meaning of this *Rule: Kelcher* v. *McGibbon*, 10 P. R. 89; see *Rule* 764, and *McLaren* v. *Canada Central* there noted.

The date from which interest is to be computed has been further made clear by sec. 88 of the Act.

As a general rule, interest cannot be allowed on untaxed costs though awarded out of a fund in Court: *West* v. *West*, 17 L. R. Ir. 49.

Where costs of all parties of an action for the construction of a will were ordered to be paid out of an estate and were taxed, but no estate was available for their payment for five years, interest on the costs was not allowed out of the estate: *Archer* v. *Severn*, 12 P. R. 648.

Where an appeal is brought against a judgment, which is affirmed on the appeal, interest is allowed for such time as execution is delayed by the appeal; but where the plaintiff refrained from entering judgment till after the appeal, the Court of Appeal on motion refused to order interest on the verdict, leaving the plaintiff to apply to the Court below to enter judgment *nunc pro tunc*:

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McEwan v. *McLeod*, 10 Ont. App. 96; see *St. John* v. *Rykert*, 10 S. C. R. 278; 20 C. L. J. 247. **Rules 892-894.**

Interest on costs runs from the date of the certificate of taxation, that being the date given in the form of writ No. 175 in the App.: *Schroeder* v. *Cleugh*, 46 L. J. C. P. 365; *Trinity College* v. *Hill*, 8 Ont. 286. Formerly at Common Law interest ran from the date of entering judgment; and this is the date under English Rules of 1883: *Landowners of W. England*, 33 W. R. 41; *Re London Wharfage and Warehouses Co.*, 33 W. R. 836; 53 L. T. N. S. 112; *Boswell* v. *Coaks*, 36 W. R. 65, although judgment issued before 1883, and the taxation was afterwards. The form of writ under those Rules (App. H, Form 1) and note thereto now so provide, differing in this respect from the forms of 1875: *Pyman* v. *Burt*, 28 Sol. Jour. 428; W. N. 1884, 100; 76 L. T. Jour. 425.

892. It shall be the duty of every officer issuing a writ of execution, or renewal thereof, to indorse upon the same a memorandum signed by him of the amount or amounts respectively hereinafter mentioned, which the party issuing such writ is entitled to receive for suing out such writ or renewal and placing it in the Sheriff's hands, including all attendances, indorsements, letters, etc., and for his costs of any prior, or other writs, or renewals, specifying the amount allowed for each writ or renewal; and no sum not so indorsed is to be collected for such costs. J. A. Rule 594. Indorsement of amounts to be paid for costs of writs.

The amounts which may be collected were mentioned in the original *Rule* 594 but are now contained in the Tariff of Costs, Item 15.

893. Every writ of execution shall bear date of the day on which it is issued. The forms in Part XI. in the Appendix may be used, with such variations as circumstances may require. J. A. Rule 349. Date.

Identical with the Eng R. 1875, O. 42, r. 12, (1883, R. 592).

Where a plaintiff had given notice to the defendant of discontinuance of the action, and the costs had been taxed, it was held that no further order of the Court was necessary to enable the Chief Clerk to issue a writ to enforce payment, and that the writ might, be varied to suit the circumstances of the case: *Bolton* v. *Bolton*, 3 Ch. D. 276; see also *Pyman* v. *Burt*, W. N. 1884, 100; 1 Cab. & El. 207; *Boswell* v. *Coaks*, 36 W. R. 65.

See note to *Rule* 641.

894. A writ of execution if unexecuted shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, (*a*) be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ—either by being marked [(*b*) in the margin with a memorandum signed by the proper officer who issued such writ, or by his successor in office, stating] the date of the day, month, and year of such renewal, or by such party Currency of writ.

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giving a written notice of renewal to the sheriff, signed by the party or his solicitor, and [(*c*) having the like memorandum :] and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof. J. A. Rule 353.

(*a*) The Eng. R. 1875, O. 42, r. 16, (1883, R. 598), has here the words "by leave of the Court or a Judge." The renewal under this *Rule* does not require leave.

(*b*) The method of marking under the English Rule is directed to be "with a seal of the Court bearing," etc., instead of the mode provided by the passage in brackets.

(*c*) Instead of the words here in brackets, the English Rule has "bearing the like seal of the Court."

With these exceptions, the English Rule is the same as the above. The method of marking provided for in the present *Rule* is taken from R. S. O. 1877, c. 66, s. 11, with which the present *Rule* corresponds in substance.

A writ is for the purpose of renewal necessarily taken out of the actual possession of the sheriff without affecting the position of the party who so withdraws it; but where more than a reasonable time for renewal elapsed and by mistake a writ was not returned renewed for more than six months, though there was no intention of withdrawing it except for purposes of renewal, it was held that a mortgage registered before the withdrawal had gained priority, and that it made no difference that no new rights had intervened : *Re Hime* v. *Ledley*, 13 P. R. 1; and see other cases noted p. 222.

There is no power to enlarge the time for renewing writs where, by an accident, they have not been returned in time for renewal within the year: *Lowson* v. *Canada Farmers' Ins. Co.*, 9 P. R. 309.

A writ of assistance was held to be a writ of execution within R. S. O. 1877, c. 66, s. 11, and to be not in force for more than one year from the *teste* unless renewed : *Adamson* v. *Adamson*, 12 P. R. 21.

Proof of renewal.

895. The production of a writ of execution, or of the notice renewing the same, purporting to be marked with the memorandum in the last preceding Rule mentioned, shewing the same to have been renewed, shall be sufficient *prima facie* evidence of its having been renewed. J. A. Rule 354.

The Eng. R. 1875, O. 42, r. 17, (1883, R. 599), has the words "such seal as," instead of the words "the memorandum," and has not the words "*primâ facie*"; but is otherwise the same as the above *Rule*, and is the same as sec. 12 of R. S. O. 1877, c. 66. It has been said that the expression "sufficient evidence" probably means *primâ facie* evidence : *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612.

Teste and date of writs of *ca. sa.*

896. Every writ of *capias ad satisfaciendum* shall continue in force two months from the day of the date thereof, inclusive, and no longer; but on the expiration thereof another writ may be obtained upon a Judge's order, in the manner directed by section 9 of *The Act respecting Arrest and Imprisonment for Debt.* R. S. O. 1877, c. 66, s. 53.

The Act referred to in this *Rule* is R. S. O. 1887, c. 67.

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897. Writs of execution to fix bail may be tested and returnable in vacation. R. S. O. 1877, c. 66, s. 54. Rules 897-901. Writs to fix bail.

898. Where it is necessary to sue out process of execution against the person into any particular county in order to charge bail, the same shall continue to be necessary notwithstanding anything contained in these Rules. R. S. O. 1877, c. 66, s. 9. It shall still be necessary to sue out execution in the proper county to charge bail.

4. Sale under Writ.

899. Where any goods or chattels are seized in execution under a writ issued out of the High Court or out of any County Court, the Sheriff, his Deputy, or officer, who seized the same, shall, on request, deliver to the owner, his agent or servant, an inventory thereof before they are removed from the premises on which they have been so seized; and no Sheriff or other officer shall sell any effects under a writ of execution until he has, previously thereto, given at least 8 days' public notice in writing of the time and place of sale in the most public place in the Municipality where such effects have been taken in execution. R. S. O. 1877, c. 66, s. 19. Sheriff to deliver inventory to the owner, etc.

900. It shall be the duty of the Sheriff, in every case where goods seized by him under execution remain unsold in his hands for want of buyers, to state and specify in his return of "goods on hand," the time and place when and where such goods were offered for sale by him, and the names of at least three persons who were present at the time of such attempted sale, if so many were present, but if so many were not present, then the names of those who were present, if any, and that there were no others, and if no person was present then to state that fact. R. S. O. 1877, c. 66, s. 34. Return where goods remain in Sheriff's hands unsold.

901. The Sheriff shall not expose the lands for sale under a writ against lands, or sell the same within less than 12 months from the day on which the writ against the lands is delivered to him. R. S. O. 1877, c. 66, s. 14. Lands not to be sold within a year.

Where a *fi. fa.* lands has been in the Sheriff's hands for a year and is returned, nothing having been done under it, the Sheriff may nevertheless sell under an *alias fi. fa.* lands issued thereon, without waiting a year: *Campbell* v. *Delihanty*, 24 U. C. Q. B. 236; *Nickall* v. *Crawford*, Tay. 277; *Ruttan* v. *Levisconte*, 16 U. C. Q. B. 495.

A sale of lands under an expired writ is void: *Doe Burnham* v. *Simmonds*, 9 U. C. Q. B. 436; *Gardiner* v. *Juson*, 2 E. & A. 188; *Doe Greenshields* v. *Garrow*,

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5 U. C. Q. B. 237; *Reynolds* v. *Streeter*, 3 P. R. 315; *Lee* v. *Howes*, 30 U. C. Q. B. 292; but where there has been an inception of execution during its currency, *e.g.*, by advertising the land for sale under it, the sale may be made and carried out after the writ has become returnable: *Hall* v. *Goslee*, 15 C. P. 101; *Rule* 907. Though the advertisement may be published during the currency of the writ, yet by the express terms of this *Rule* the day named for the sale must not be earlier than twelve calendar months: see *Rule* 4; R. S. O. c. 1, s. 8, (15,) from the day on which the writ was delivered to the Sheriff. Advertisements of sale under the writ, first published after the writ has expired, are invalid, and a sale in pursuance of such advertisement is void: *Gardiner* v. *Jason*, *Reynolds* v. *Streeter*, *Lee* v. *Howes*, *supra*; and a return of "lands on hand" made after the writ has expired, and without any previous inception of execution under it, is invalid, and will not authorize the issue of a *venditioni exponas*, and if issued, and a sale be made under it, the sale may be set aside: *Lee* v. *Howes*, *supra*. The Sheriff's telling the execution debtor that he has a *fi. fa.* against his lands, and that his lands will be sold, unless he pays up, is not an inception of execution: *Bradburn* v. *Hall*, 16 Gr. 518; neither is the mere sending of a list of lands for sale under an execution to the *Gazette* for publication an inception of execution; there must be an actual publication of the advertisement during the currency of the writ: *Reynolds* v. *Streeter*, *supra*.

The selling of land by the Sheriff before the proper period has expired is not a mere irregularity, but renders the sale void: see cases *supra*; whereas defects in the advertisement of sale to which the purchaser is no party will not affect the validity of the sale: *Paterson* v. *Todd*, 24 U. C. Q. B. 296; *Ross* v. *Malone*, 7 Ont. 215, 397, unless the circumstances are such that the purchaser's taking the deed can be said to amount to a fraud: *McDonald* v. *Cameron*, 13 Gr. 84; but where irregularities are committed by the Sheriff by instructions of the execution creditor's solicitor, and the execution creditor himself becomes the purchaser, the Court may, if the sale has been prejudiced, refuse to maintain the Sheriff's deed, if attacked, except as a security for the debt: *Ib.*; and see *In re Davis*, 17 Gr. 603; *Kerr* v. *Bain*, 11 Gr. 423; and where land has been sold under execution at a gross undervalue, owing to the title being in dispute, the Court may refuse to give effect to the Sheriff's deed, except as a security: *Chalmers* v. *Pigott*, 11 Gr. 475; and see *Molloch* v. *Plunkett*, 11 Gr. 439; but the inadequacy of price must be very excessive to induce the Court to refuse to maintain a Sheriff's deed: *Laing* v. *Matthews*, 14 Gr. 36.

Where the sale has been improperly conducted, the Sheriff may be restrained by injunction from executing a conveyance: *Jones* v. *Jones*, 15 Gr. 40.

Fi. fa. lands against absconding debtor.

902. When a writ against lands is issued in an action against an absconding debtor in which an order for attachment has issued, the Court or a Judge may order the Sheriff to sell the lands before the expiration of the twelve months, but in like manner as in other cases. 50 V. c. 7, s. 7.

Time for Sheriff's sales in Algoma and Thunder Bay limited.

903. No Sheriff, Deputy Sheriff or other officer shall sell, or expose for sale under execution, any lands or tenements in the Provisional Judicial Districts of Algoma or Thunder Bay, except between the 1st day of July and the 1st day of November. 42 V. c. 15, s. 4.

No sale of lands until return of *nulla bona*.

904. No sale shall be had under any execution against lands until after a return of *nulla bona*, in whole or in part, with respect to an execution against goods in the same

action or matter by the Sheriff of the same county. R. S. O. 1877, c. 66, ss. 15, 16. Rules 905, 906.

The omission to make a return of *nulla bona*, as required by this *Rule*, before selling land, is an irregularity only, and will not render the sale of the lands void: *Ross* v. *Malone*, 7 Ont. 215, 397; *Doe d. Spafford* v. *Brown*, 3 O. S. 92. So also a return of *nulla bona*, where there are in fact goods liable to execution, is only an irregularity: *Ontario Bank* v. *Kerby*, 10 C. P. 35, 41; *Molson's Bank* v. *McMeekin*, 15 Ont. App. 535.

905. If the amount authorized to be made and levied under the writ against goods is made and levied thereunder, the person issuing the writ against lands shall not be entitled to the expenses thereof, or of any seizure or advertisement thereunder; and the return to be made by the Sheriff to the writ against lands shall be to the effect that the amount has been so made and levied as aforesaid. R. S. O. 1877, c. 66, s. 17. If the debt is realized under writ against goods.

906. Before the sale of real estate under execution against lands and tenements, the Sheriff shall publish an advertisement of sale in the *Ontario Gazette*, at least six times, specifying: Notice of sale of lands in execution.

(*a*) The particular property to be sold;

(*b*) The names of the plaintiff and defendant;

(*c*) The time and place of the intended sale;

and he shall, for three months next preceding the sale, also publish such advertisement in a public newspaper of the county in which the lands lie, or shall for three months put up and continue a notice of such sale in the office of the Clerk of the Peace, or on the door of the Court House or place in which the Court of General Sessions of the Peace of the county is usually holden; but nothing herein contained shall be taken to prevent an adjournment of the sale to a future day. R. S. O. 1877, c. 66, s. 41.

It would seem that the omission to advertise, where there is an uncertainty as to what has been sold, though it may give a right against the Sheriff, will not invalidate the sale as against a *bonâ fide* purchaser: *Osborne* v. *Kerr*, 17 U. C. Q. B. 134, 141; and see *Lee* v. *Howes*, 30 U. C. Q. B. 292. Defects in the advertisement will not invalidate the sale as against a third person, or even the execution creditor, who *bonâ fide* becomes the purchaser: *Paterson* v. *Todd*, 24 U. C. Q. B. 296; but where the execution creditor becomes the purchaser, if he has in any way by himself or his solicitor participated in the irregularities, his deed may be ordered to stand merely as a security: *McDonald* v. *Cameron*, 13 Gr. 84; *In re Davis*, 17 Gr. 603.

The want of regularity in giving public notice of an adjournment of the sale was held to be cured where the debtor attended the sale by his agent, and afterwards ratified what had been done: *Doe Dissett* v. *McLeod*, 3 U. C. Q. B. 207. But where a Sheriff refused to execute a deed on the ground of there

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having been an irregularity in the advertisement, but readvertised the lands and put them up for sale again, where they brought a price far exceeding that offered by the first purchaser, the Court refused to interfere summarily on the application of the first purchaser to compel the Sheriff to make a deed to him: *In re Campbell*, 10 U. C. Q. B. 641.

Notice in *Gazette* shall constitute incipient execution.

907. The advertisement in the *Ontario Gazette* of any lands for sale under a writ of execution, during the currency of the writ (giving some reasonably definite description of the land in such advertisement), shall be deemed a sufficient commencement of the execution to enable the same to be completed by a sale and conveyance of the lands after the writ has become returnable. R. S. O. 1877, c. 66, s. 42.

5. Return of Writs, etc.

Orders to return writs or bring in body, to be six day orders.

908. All orders against Sheriffs to return writs, or to bring in the bodies of defendants, shall be returnable in 6 days, and shall be issued from the same office whence the writ was sued out. Rules T. T. 1856, 101.

Before an order to return a writ is issued, it would seem that a demand for a return should be first made under *Rule* 914. The neglect to make the demand first would probably be held to disentitle the party issuing the order to the costs thereof: see *Rule* 916.

The order may be obtained on *præcipe*: see *Rule* 909.

An order to bring in the body upon a return of *cepi corpus* may be issued immediately after the time for putting in special bail has expired: *Poucher* v. *Lieven*, 4 Mo. & Sc. 427; *Hutchins* v. *Hind*, 5 T. R. 479; *Potter* v. *Marsden*, 8 East, 525. But the order should not issue until the day after the expiration of an order (if any) to return the order for arrest: see *Hutchins* v. *Hind*, *supra*. The order to bring in the body cannot be properly issued where the plaintiff has taken an assignment of the bond to the Sheriff: 2 Saund. 60b; or when he accepts a *cognovit* or other security from the defendant, without the privity of the Sheriff: *Rex* v. *Sheriff of Surrey* in *Brewer* v. *Clarke*, 1 Taunt. 159. The order should be issued and served promptly: *Rex* v. *Sheriff of Middlesex*, 1 Dowl. 53. It would seem that an order to return the writ or bring in the body need not be personally served on the Sheriff, if he cannot conveniently be found: see *Rule* 917.

Orders for return of writs, etc., to be on *præcipe*.

909. No Judge's order shall issue for the return of any writ, or to bring in the body of the defendant, but a *præcipe* order shall issue for that purpose, which shall be of the same force and effect as side bar rules formerly made for that purpose in Term. Rules T. T. 1856, 102.

This order may issue from the office whence the writ issued: see *Rule* 25.

Sheriff to file writ in office from which order to return issues.

910. The Sheriff shall file the writ in the office from which the order to return the same was issued, at the expiration of the order, or as soon after as the office shall be open, and the officer with whom it is filed shall indorse the day and hour when it was filed. Rules T. T. 1856, 103.

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Where the Sheriff disobeys the order to return the writ, he is liable to attachment for contempt; but an attachment can only be obtained on motion, of which the Sheriff is entitled to notice: see *Rule* 879. **Rules 911-914.**

911. Where any Sheriff, before his going out of office, arrests any defendant, and takes a bail bond and makes a return of *cepi corpus*, he shall and may, within the time allowed by law, be called upon to bring in the body by an order for that purpose, notwithstanding he may be out of office before the order is granted. Rules T. T. 1856, 105. Arrest by sheriff before going out of office; order to bring in body.

The order to bring in the body is obtainable on *præcipe* as against a Sheriff: see *Rule* 908; but where the order is required against one who has ceased to be Sheriff, it is possible that *Rule* 908 would not apply, and that the order must be obtained on motion.

912. Every Deputy Clerk of the Crown and Pleas, Local or Deputy Registrar, or Clerk of the County Court, may sign and issue orders on any Sheriff to return writs issued out of the office of such Deputy Clerk, Local or Deputy Registrar, or County Court Clerk and directed to such Sheriff; and the Sheriff shall, in case of his being served therewith, return the writs to the office from which the same issued. R. S. O. 1877, c. 66, s. 57. Deputy Clerks of the Crown and other officers may issue orders to return writs, etc.

913. In case a writ delivered to a Sheriff for service or execution has remained in his hands 15 days, and in case he has not been delayed from returning the same by an order in writing from the party from whom he received the writ, his solicitor or agent, and in case he is afterwards directed by order of Court to return such writ, he shall not be entitled to any fees thereon unless, within 4 days after being so directed, he returns or encloses the writ by post to such party, his solicitor or agent. R. S. O. 1877, c. 66, s. 58. Sheriff not entitled to fees on writs unless returned in four days after being ordered, if writ delivered fifteen days before such order.

914. In case the party who delivered any writ or process to any Sheriff to be executed, by himself or by his solicitor, or by the agent of such solicitor, requires, by a demand in writing, the Sheriff to return the writ either to the party or to his solicitor or solicitor's agent, or to the Court from which the writ issued, (and whether such requisition is made before or after the service or other execution thereof,) the Sheriff shall within 8 days, inclusive of the day of the service of the requisition, return the writ according to the terms of the requisition; and in case the sheriff wilfully refuses or neglects to do so, he shall be liable to be ordered to return Sheriff refusing to make return when demanded by party who delivered it to him. Order against Sheriff.

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the writ, and to be further proceeded against as in other cases of contumacy. R. S. O. 1877, c. 66, s. 59.

Other party entitled to return may proceed in like manner.

915. In all cases where the party to the writ or process who did not deliver the same to the Sheriff to be executed, is entitled, according to the practice of the Court, to call for a return of the writ or process, he may proceed in like manner to procure such return as is above provided in the case of parties who have delivered the writ or process to the sheriff for execution. R. S. O. 1877, c. 66, s. 60.

When Sheriff liable to costs for not returning writs.

916. In every case in which a Sheriff neglects or refuses to return any writ when so called upon, he shall be bound to pay the costs of any order taken out to compel the return, and all other costs consequent thereon, and also the costs of the previous requisition to make the return. R. S. O. 1877, c. 66, s. 61.

Personal service on Sheriff unnecessary.

917. In no case shall personal service on the Sheriff be necessary, if it appears by affidavit that inquiry was made for him, and that he could not conveniently be found, but service shall be deemed to have been made upon the Sheriff by serving the Deputy Sheriff if he can be conveniently found; and if the Deputy Sheriff cannot conveniently be found, then service may be made upon the Sheriff's clerk, or upon any bailiff of the Sheriff who may for the time being be present in, or have charge of, the Sheriff's office. R. S. O. 1877, c. 66, s. 64.

Certain sections to apply to Coroners and Elisors.

918. Rules 873, 912 to 915 inclusive, 917, 919, 925 and 1233 to 1237 inclusive, shall extend and apply to coroners and elisors employed in the service or executing of the process of the High Court, or of any of the County Courts. R. S. O. 1877, c. 66, s. 65.

Attachments for non-return of writs may be issued unless further time for return granted.

919. In case a writ is issued out of any Court of Record directed to a Sheriff, and is delivered to him for execution, and in case the Sheriff is ordered to return the same by any order of the court out of which the writ issued, and does not make the return within the time specified in the order, the plaintiff or defendant in the writ (as the case may be) may move for an order of attachment against the Sheriff, and the Court or a Judge may order the Sheriff to be

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attached, or limit a further period after which an order of attachment shall issue unless a return be made in the meantime, or may otherwise order as to him seems proper. R. S. O. 1877, c. 66, s. 66. Rules 920-923.

920. In case the writ is not returned at the expiration of any further time limited by the order mentioned in the last preceding Rule, and in case the service of the order and the failure of the Sheriff to return the writ is proved, the Court or Judge may order a writ of attachment to issue forthwith against the Sheriff. R. S. O. 1877, c. 66, s. 67. When attachment may issue.

921. Upon the return of "*cepi corpus*" to any such attachment, any Judge having jurisdiction as aforesaid may direct the issue of a writ of *habeas corpus*, and thereupon may exercise the same powers and discretion in committing the Sheriff to close custody, or in admitting him to bail, and in all other respects, as are possessed by the Court. R. S. O. 1877, c. 66, s. 68. Judge in Chambers may order issue of writs of *habeas corpus*.

922. All orders of attachment and writs of *habeas corpus* issued against a Sheriff may be returnable on a day certain to be fixed by the order of the Judge or Court; and the return day shall not be more than 30 days from the issuing of the order; the order when issued out of the High Court shall be made returnable before the presiding Judge in Chambers, and when issued out of any County Court, before the Judge thereof. R. S. O. 1877, c. 66, s. 69. Such writs may be returnable on a day certain.

923. Every Deputy Sheriff, Bailiff, or other Sheriff's officer or clerk entrusted with the custody of any writ or process, or of any book, paper or document belonging to the said Sheriff or his office, shall, upon demand upon him by such Sheriff, restore and return such writ, process book, paper or document to the custody of the said Sheriff, and in case of any neglect or refusal to return or restore the same as aforesaid, the party so neglecting or refusing may be required by an order of any Court of Record in Ontario, or of any Judge in such Court, to return and restore such writ, process, book, paper or document to such Sheriff, and may be further proceeded against by attachment, as in other cases of contumacy to orders of Court. R. S. O. 1877, c. 16, s. 32.

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924. If any Deputy Sheriff, Bailiff or Sheriff's officer has in his possession, custody, or control, any writ of summons, *fieri facias*, or other writ, or any bench warrant or process whatsoever, and, upon demand made by the Sheriff from whom the same was received, or his successor in office, or by any other party entitled to the possession of the same, neglects or refuses to deliver up the same, such Sheriff or his successor in office, or the party entitled to the possession of the same, may proceed before any Judge having jurisdiction in the Court out of which such writ or process issued, to compel the production thereof, and the order made thereupon may be enforced in the same manner as like orders for the return of writs against Sheriffs, and with or without costs or the motion may be refused with costs against the party applying, in the discretion of the Judge aforesaid. R. S. O. 1877, c. 16, s. 33.

6. Discharge of Execution Debtors from Custody.

On what authority Sheriffs may discharge debtors from custody.

925. A written order under the hand of the solicitor in the action by whom a writ of *capias ad satisfaciendum* has been issued, shall justify the Sheriff, gaoler or officer in whose custody the party is under such writ in discharging such party, unless the party for whom such solicitor professes to act has given written notice to the contrary to the said sheriff, gaoler, or officer; but such discharge shall not be a satisfaction of the debt unless made by the authority of the creditor; and nothing herein contained shall prejudice the solicitor in giving an order for discharge without the consent of his client. R. S. O. 1877, c. 66, s. 55.

7. Attachment of Debts.

Application for examination of judgment debtor.

926. [(*a*) Where a judgment is for the recovery by, or payment to, any person, of money, the party entitled to enforce the judgment] may [(*b*) without an order] examine the judgment debtor upon oath before a Master, or Local Master, or an Examiner, or before one of the Clerks or Deputy Clerks of the Crown, or before the Judge of the County Court of the County within which such debtor resides, or before any official referee [(*c*) or by the order of the Court or a Judge before any other person to be specially named in such order] [(*d*) touching his estate and effects, and as to the property and means he had when the debt or liability

Amended by rule

new rule also applies where [illegible]

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which was the subject of the action in which judgment has been obtained against him was incurred, and as to the property and means he still has of discharging the said judgment, and as to the disposal he has made of any property since contracting such debt or incurring such liability, and as to any and what debts are owing to him.] J. A. Rule 366, R. S. O. 1877, c. 49, s. 17; c. 50, s. 304. Rule 926.

This *Rule* varies from both R. S. O. 1877, c. 49, s. 17; c. 50, s. 304, and the Eng. R. 1875, O. 45, r. 1, (1883, R. 610-611).

(*a*) The words here in brackets are taken from the English Rule, and are more extensive than the corresponding words in the Rev. Stat.

(*b*) Both the Statute and the English Rule require an order which the present *Rule* dispenses with.

(*c*) The clause here in brackets was not in *Rule* 366, and is taken from R. S. O. 1877, c. 50, s. 304.

(*d*) Taken from R. S. O. 1877, c. 49, s. 17.

Before an examination can be had under this *Rule* there must be a return of *nulla bona* or the Sheriff must have notified the creditor that he is prepared to make such a return: *Ontario Bank* v. *Trowern*, 26 C. L. J. 190; 10 C. L. T. 137.

The fees are payable in stamps on an examination before a County Judge, or Local Master, under an order made by himself: see *Rule* 1192.

Debtor not examinable where judgment for costs only.

By *Rule* 934 it is provided that every judgment or order directing the payment of money or of costs, charges or expenses, shall be deemed a judgment, and that the person having the carriage of a judgment or order for payment of money into Court shall be entitled to enforce it under *Rule* 926.

The practice in England with regard to such cases, at any rate before the Rules of 1883, was different: *Re Frankland*, L. R. 8 Q. B. 18; *Cremetti* v. *Crom*, 4 Q. B. D. 225; *Best* v. *Pembroke*, L. R. 8 Q. B. 363; *Re Price*, L. R. 4 C. P. 155; *Horsely* v. *Cox*, L. R. 4 Chy. 92; see, however, *Nott* v. *Sands*, W. N. 1883. 74; and it was held that an order dismissing an action with costs was not a judgment within the *Rule* corresponding to *Rule* 926, and therefore not enforceable by attachment of debts: see notes to *Rule* 935.

Doubts were expressed under the original Ont. *Rule* as to whether R. S. O. 1877, c. 67, s. 12, 13, (now *Rule* 934) applied to extend the word "judgment" in this *Rule*, and *Rule* 935. In *McLachlin* v. *Blackburn*, 7 P. R. 287, it was held that the debtor was liable to examination though the judgment was only for costs: but in *Meyers* v. *Kendrick*, 9 P. R. 363, that case was disapproved of, and it was held that a defendant having a judgment for costs against the plaintiff, was not entitled to examine the plaintiff under this *Rule* as a judgment debtor: *Meyers* v. *Kendrick*, has been held by the Divisional Court, C. P. D., to have been correctly decided under the *Rules* and Statutes then in force and to still apply under the present *Rules*, notwithstanding *Rule* 934, which is merely a repetition of a clause of one of the former Statutes: *Troutman* v. *Fisken*, 13 P. R. 153.

Attachment of debts where judgment for costs only.

It was held that R. S. O. 1877, c. 66, s. 72, set such doubts at rest so far as the right to attach debts (see *Rule* 935) was concerned: *Re Irvine*, 12 P. R. 297; *Elliot* v. *Capel*, 9 P. R. 35. That section was more explicit than *Rule* 934, and expressly gave the right to attach debts in the case of a judgment or rule or order for costs, or for payment of money into Court.

Under the present *Rules*, though R. S. O. 1877, c. 66, s. 72, has not been continued in either the R. S. O. 1887, or the Consolidated *Rules*, it has been held by the Master in Chambers that *Troutman* v. *Fisken*, *supra*, does not qualify the right to attach, but that under *Rules* 934, and 935, that right continues as when *Elliot* v. *Capel*, and *Re Irvine*, were decided: *London Mutual* v. *Jacob*, (Mr. Dalton in Chambers, 30th October, 1889.) See also *Rule* 862.

Judgment for recovery of land and costs.

A judgment for the recovery of land, and awarding costs is within this *Rule*: *Lloyd* v. *Wallace*, 9 P. R. 335; such a judgment, and probably, as for-

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merly, an order for costs of an interpleader issue, will entitle the person to whom the costs are payable to attach debts: *Hartley* v. *Shemwell*, 1 B. & S. 1.

Who may be examined.

Not only the judgment debtor but by order, under *Rule* 938, his clerks or employees, and, in the case of a corporation debtor, its officers may be examined. The *Rules* in this respect are wider than those in England: see *Sewell* v. *Eden*, 18 Q. B. D. 588.

A debtor under arrest on final process may be examined: *Brown* v. *Bemmige*, 2 U. C. L. J. 213; or a garnishee who has been ordered to pay over: *Cowan* v. *Cartill*, 33 W. R. 583; 52 L. T. N. S. 431. A married woman may be examined as to her separate estate: *Standard Bank* v. *McQuaig*, 7 P. R. 356. See *McLeod* v. *Emigh*, 12 P. R. 450.

Though an examination may be had without an order in the first instance, yet, where a party wishes to examine a judgment debtor a second time, he must make a substantive motion for that purpose on notice to the judgment debtor, and shew grounds for the order: *London & Canadian Loan, etc.* v. *Merritt*, 2 C. L. T. 260.

The examination is intended to be a cross-examination of the strictest character: *Beattie* v. *Barton*, 2 C. L. T. 104; and any question "fairly pertinent to the subject matter of the inquiry, which means put with a view to ascertain so far as possible by discovery from a reluctant defendant what debts are owing to him, ought to be answered by the defendant." He must also "give all necessary particulars to enable the plaintiffs to recover under a garnishee order: *Republic of Costa Rica* v. *Strousberg*, 16 Ch. D. 8.

Where the person examined cannot speak as to the facts about which examination may be had, without referring to books, etc., the Examiner's duty is to require their production and they must be produced: *Russell* v. *Macdonald*, 12 P. R. 458.

Inquiry as to the means of the debtor is not restricted to the period of contracting the debt, but it may be shewn that at some anterior time the debtor had property as to which he may be required to give an account, and it is not a sufficient answer to say merely that it has all been disposed of before the debt was incurred: *Ontario Bank* v. *Mitchell*, 32 C. P. 73.

Application for examination of officers of corporations.

927. In case the judgment is against a body corporate, or an order for the payment of money has been obtained against a body corporate, the person entitled to enforce the judgment, or order, may in like manner examine any of the officers of such body corporate, upon oath, before the Judge of the County Court, or other officer referred to in the next preceding Rule, touching the names and residences of the stockholders in said body corporate, the amount and particulars of stock held or owned by each stockholder and the amount paid thereon, also as to any and what debts are owing to the said body corporate; and as to the estate and effects of the body corporate; and as to the disposal made by the body corporate of any property since contracting the debt or liability, in respect of which the said judgment or order was obtained. J. A. Rule 367; R. S. O. 1877, c. 49, s. 19.

The statute referred to required an order, which now under this *Rule* is dispensed with.

The corresponding provision in England, Rules of 1883, R. 610, is in substance the same. There was formerly no power to order the examination of an officer of the corporation in such case: *Dickson* v. *Neath, etc., Ry. Co.*, L. R. 4 Ex. 87. This *Rule* removes the defect.

928. Where judgment has been obtained as aforesaid, the Court or a Judge may, on the application of the party entitled to enforce the judgment, order any clerk or employee or former clerk or employee of the judgment debtor, or any person, or the officer or officers of any corporation, to whom the debtor has made a transfer of his property or effects since the date when the liability or debt which was the subject of the action in which judgment was obtained was incurred, to attend at the county town of the county in which such person resides, before a Master, or an Official Referee or Examiner, or a Local Master, a Deputy Registrar of the High Court or a Deputy Clerk of the Crown, or before the Judge of the County Court of the county, and to submit to be examined upon oath as to the estate and effects of the debtor, and as to the property and means he had when the debt or liability aforesaid was incurred, and as to the property or means he still has of discharging the judgment, and as to the disposal he has made of any property since contracting the debt or incurring the liability, and as to any and what debts are owing to him. The examination is to be for the purpose of discovery only, and no order is to be made on the evidence given on such examination.

Rule 928. Examination of certain persons as to a debtor's means.

An order under this *Rule* should not be made without notice to the transferee; nor without proof that the transfer was made after the date when the liability of the judgment debtor was incurred: *Blakeley* v. *Blaase*, 12 P. R. 565.

A chattel mortgage is a transfer of property and effects within this *Rule*: *Ib.*

Where a garnishee has been ordered to pay over, he becomes a judgment debtor, and may be examined under this *Rule*: *Cowan* v. *Carlill*, 52 L. T. N. S. 431; 33 W. R. 583.

(2) Any person liable to be examined under this Rule may be compelled to attend, testify, and to produce books and documents, in the same manner and subject to the same rules of examination and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as in the case of a witness. 49 V., c. 16, s. 12.

This provision being remedial, is to be construed so as to advance the remedy given by it, so far as the fair meaning of the words will permit: *Gowans* v. *Barnet*, 12 P. R. 330.

It has therefore been held that the word "transfer" in this *Rule* should not be limited to the transfer of the *title* to the property or effects, but should be regarded as equally applicable to the transfer of the *possession*, and therefore a solicitor to whom under a power of attorney to receive it, the consideration money on a sale of property had been paid, was held to be examinable: *Ib.*

But "transfer" in this *Rule* does not cover an "assignment" for the general benefit of creditors, as such an assignment virtually ends all litigation with respect to property and effects of a debtor, and this *Rule* is only to aid

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a judgment creditor in proceeding against the debtor's property, which he can no longer do after a valid assignment for all creditors: *British Com. L. & I. Co.* v. *Britnell* (Boyd, C., 3rd Dec., 1889).

If the original order is not shewn at the time of service of a copy, the person served cannot be brought into contempt for disobedience of it: *Blakeley* v. *Blaase*, 12 P. R. 565.

Compelling attendance.

929. Any person liable to be examined under any of the preceding Rules may be compelled to attend and testify, and to produce books and documents, in the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as in the case of a witness. J. A. Rule 368.

The procedure by this *Rule* directed to be followed is that provided in case of examination of parties generally: *Rules* 487, 490. In England there is no corresponding provision with reference to the present subject, but there, also, the debtor or other person to be examined is entitled to conduct money. An attachment was refused for disobedience to an order to come up to London for examination, without an affidavit shewing tender of conduct money, and reason for not examining the debtor at his own residence: *Protector Endowment Co.* v. *Whitlam*, 36 L. T. N. S. 467.

Service of appointment.

930. Any person liable to be examined under Rules 926 to 928 may be served with an appointment signed by the Judge or officer, and where the examination is to take place under an order, also with a copy of the order; such service to be made at least 48 hours before the time appointed for the examination; and the person to be examined is to be paid the same fees as a witness. J. A. Rule 369.

Insufficient service is waived by attending and submitting to be examined: *Dayfoot* v. *Byrens*, 7 C. L. T. 21.

An appointment signed by the Judge or officer is what is required to be served, not a copy, nor a subpœna, nor copy: *Meyers* v. *Kendrick*, 9 P. R. 363.

As an original appointment is required to be served, it would seem advisable, in order to prove service, that the appointment should be signed by the Judge or officer in duplicate.

An order to examine a defendant as a judgment debtor, and an appointment under it, are together equivalent to an order that the debtor should attend on the day mentioned in the appointment: *Re Chatham Harvester Co.* v. *Campbell*, 12 P. R. 666. Where he attends and offers to be examined, the force of the order is spent, and to obtain a fresh appointment a fresh order is necessary: *Ib.*

Mode of conducting examination.

931. The examination shall be conducted in the same manner as in case of an oral examination of an opposite party; and in the case of a judgment in any County Court, such County Court or the Judge or acting Judge thereof may exercise similar jurisdiction in relation to such judgment, and in like manner as might be exercised by the High Court. R. S. O. 1877, c. 50, s. 306.

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The examination should not be so conducted as to try to entrap the debtor, but it should be full, fair and searching: *Graham* v. *Devlin*, 13 P. R. 245. **Rule 932.**

Committal of debtor for non-attendance, refusal to answer, answering unsatisfactorily, etc.

932. In case such debtor does not attend as required by the said appointment, or appointment and order, as the case may be, and does not allege a sufficient excuse for not attending, or if attending, he refuses to disclose his property or his transactions respecting the same, or does not make satisfactory answers respecting the same, or if it appears from such examination that such debtor has concealed or made away with his property in order to defeat or defraud his creditors or any of them, the Court or Judge may order the debtor to be committed to the common gaol of the County in which he resides, for any term not exceeding twelve months; or the Court or Judge may, by order, direct that a writ of *capias ad satisfaciendum* may be issued against the debtor, and a writ of *capias ad satisfaciendum* may thereupon be issued upon the judgment, or in case the debtor is at large upon bail, the Court or Judge may make an order for the debtor's being committed to close custody; and the sheriff, on due notice of the order, shall forthwith take the debtor and commit him to close custody until he obtains an order of Court or a Judge's order for again allowing him to go out of close custody, on giving the necessary bond in that behalf, or until he is otherwise discharged in due course of law. R. S. O. 1877, c. 49, s. 18; c. 50, s. 305; J. A. Rule 369 (*a*).

Unsatisfactory answers.

The broad test to be applied in gauging the character of the answers, in order to determine whether they are satisfactory, is, having regard to the circumstances of each particular case, are the answers sufficient to satisfy the mind of a reasonable person that a full and true disclosure has been made: *Graham* v. *Devlin*, 13 P. R. 245.

Answers are not "unsatisfactory" because they do not account for the application of the debtor's assets in a proper manner: *Hobbs* v. *Scott*, 23 U. C. Q. B. 619: but see *Crooks* v. *Stroud*, 10 P. R. 131. The debtor must have contumaciously refused to answer, or so equivocated as to render his answer no answer at all: *Lemon* v. *Lemon*, 6 P. R. 184; see also *Merrill* v. *McFarren*, 1 C. L. T. 133; *Beattie* v. *Barton*, 2 C. L. T. 104, and the authorities fully reviewed in *Schneider* v. *Agnew*, 6 P. R. 138. Where the defendant, a widow, was shewn to have received $500 insurance money payable on the death of her husband, part of which she had lent to her brother, part she had expended on clothing for herself and children, and the remainder, $100, she still had, but refused to apply on the judgment, as she had no other means with which to support herself and three children, an order to commit for unsatisfactory answers was refused: *McKay* v. *Atherton*, 12 P. R. 464.

It is the debtor's duty to furnish such explanation about his affairs as will place his dealings in an intelligible shape, and not leave his creditors to find out as best they may, what it is the business of the debtor to make clear. It is not enough for the debtor to say, touching any transaction, that he does not know, or does not remember, if he has the means at hand to qualify himself to explain: *Foster* v. *Van Wormer*, 12 P. R. 597. He must produce books, etc., which will

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Rules 933, 934.

enable him to answer, and submit to examination upon them: see *Russell* v. *Macdonald*, 12 P. R. 458; and any question fairly pertinent, and properly asked with a view to ascertain full particulars of what debts there are and which of them may be attached, must be answered: *Rep. of Costa Rica* v. *Strousberg*, 16 Ch. D. 8; 43 L. T. N. S. 399.

Where particulars, wherein disatisfaction is felt, have been pointed out, an opportunity should be given to the debtor of reconciling what may be conceived to be contradictions, or supplying what may appear to be admissions: *Graham* v. *Devlin*, 13 P. R. 215.

Where answers were considered unsatisfactory the Judge allowed defendant a week to pay costs of examination and of the motion and attend again and give further information before making an order on the motion to meet the justice of the case: *Dyment* v. *Jerrett*, 9 C. L. T. 141.

Motion for committal.

An order for committal for a fixed period, is said to be the appropriate punishment authorized by this *Rule*; an order for a writ of attachment requiring the Sheriff to hold the debtor in custody for an indefinite period was held to be improper: *Re Chatham Harvester Co.* v. *Campbell*, 12 P. R. 666.

A notice of motion, seeking relief on the ground of unsatisfactory answers, should particularize the answers complained of: *Foster* v. *VanWormer*, 12 P. R. 597.

The application is to a Judge in Chambers: see *R. C. Bank* v. *Lockman*, 7 P. R. 102. It may be made at the time of the examination and without further notice, if the officer before whom the examination takes place has jurisdiction to entertain it, *e.g.*, in County Court cases, where the examination is before the Judge: *Ponton* v. *Bullen*, 2 E. & A. 379; *Baird* v. *Story*, 23 U. C. Q. B. 624.

An order to commit must be absolute not upon a condition, *e.g.*, unless the debtor forthwith gives a note: *Chichester* v. *Gordon*, 25 U. C. Q. B. 527.

A married woman is liable to be committed: *Metropolitan L. & S. Co.* v. *Mara*, 8 P. R. 355; *Dillon* v. *Cunningham*, L. R. 8 Ex. 23.

The committal is for a contempt, and the fact that the judgment is one for costs does not make the committal an imprisonment for non-payment of costs: *Pearson* v. *Essery*, 12 P. R. 466.

Committal of officer of corporation in like manner.

933. In case any such officer of a corporation as aforesaid does not attend as required by the said appointment or appointment and order, and does not show a sufficient excuse for not attending, or if attending, he refuses to disclose any of the matters in respect of which he may be examined, the Court or Judge may order the officer to be committed to the common gaol of the County in which he resides, for any term not exceeding 6 months. R. S. O. 1877, c. 49, s. 19.

Judgments for payment of money or costs to be within preceding Rules.

934. Every judgment or order of the High Court and of the County Court directing payment of money or of costs, charges, or expenses, shall, so far as it relates to such money, costs, charges, or expenses, be deemed a judgment, and the person to receive payment a creditor, and the person to make payment a debtor, within the meaning of the preceding Rules. R. S. O. 1877, c. 49, s. 20.

Notwithstanding the wording of this *Rule* it has been held that where judgment is recovered for costs only, the judgment creditor has no right to examine the judgment debtor: *Troutman* v. *Fisken*, 13 P. R. 153.

See notes to *Rule* 926, p. 735.

(*a*) In case a judgment or order directs the payment of money into Court, or to the credit of any cause, or otherwise than to any person, the person having the carriage of the judgment, or order, so far as relates to such payment, shall be deemed the person to receive payment within the meaning of the preceding clause of this Rule. R. S. O. 1877, c. 49, s. 20, (2). **Rule 935.** Person having carriage of the judgment, etc., to be deemed the person to receive payment.

See notes to *Rule* 926, p. 735.

935. The Court or a Judge may, upon the *ex parte* application of the judgment creditor, or the person entitled to enforce the judgment, either before or after the oral examination in the preceding Rules, and upon affidavit by himself or his solicitor, (*a*) [or some other person or persons aware of the facts respectively,] stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within Ontario, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor, (*b*) [~~and all claims and demands of the judgment debtor against the garnishee arising out of trust or contract, where such claims and demands could be made available under equitable execution,~~] shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a Judge or an officer of the Court, as the Court or Judge shall appoint, to shew cause why he should not pay the judgment creditor, or the person entitled to enforce the judgment, the debt, claim or demand due from the garnishee to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt. J. A. Rule 370. Court or Judge may order attachment of debts. Order that garnishee appear.

The passage in brackets at (*b*) is new.

The *Rule* otherwise corresponds with the Eng. R. 1875, O. 45, r. 2, (1883, R. 622), and also with R. S. O. 1877, c. 50, ss. 307 and 308, except that those sections did not contain the passage in brackets at (*a*) owing to the absence of which the affidavit was required to be by the creditor or his solicitor: *Builder* v. *Kerr*, 7 P. R. 323; *Boyd* v. *Haynes*, 5 P. R. 15.

Scope of the Rule.—The judgment creditor here mentioned is apparently a judgment creditor who may examine his debtor under *Rule* 926, and therefore whether process by attachment under this *Rule* can be employed where the judgment or order of the creditor is only for costs has been questioned: see *Ghent* v. *McColl*, 8 P. R. 428; *Meyers* v. *Kendrick*, 9 P. R. 368-9, and other cases cited under *Rule* 926, p. 735. See also *Rule* 862.

A judgment for recovery of land and awarding costs has been held to be within this *Rule*: *Lloyd* v. *Wallace*, P. R. 335, and also a rule giving costs of the day to the defendant: *Elliot* v. *Capell*, 9 P. R. 35; see also *Whittaker* v. *Whittaker*, 7 P. D. 15; and *Manchester, etc.* v. *Parkinson*, 22 Q. B. D. 173.

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Rule 935. The words "the person entitled to enforce the judgment" include an assignee of the judgment: *Goodman* v. *Robinson*, 18 Q. B. D. 332.

It will be seen that the scope of the original *Rule* 370 is intended to be very much enlarged by the new powers conferred by this *Rule* of attaching claims and demands not being debts, but being interests which could formerly have been made available under equitable execution. This extension of the *Rule*, thus includes a subject so different from the ordinary and tolerably well understood practice of attachment of debts that in working out the *Rule* it will probably be found to really include two distinct subjects:

(1) Attachment of *debts* as previously understood; and,

(2) Summary process of equitable execution in case of claims or demands not being *debts*.

In either case only such property can be attached as the debtor could deal with properly, and without violation of the rights of other persons, at the time the attaching order is served: see *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536; 38 Ch. D. 238; *Re General Horticultural Co.*, 32 Ch. D. 512; *Tyse* v. *Brown*, 13 Q. B. D. 199; *McCraney* v. *McLeod*, 10 P. R. 541; *Parker* v. *Howe*, 12 P. R. 351, and *Rule* 936.

Attachment of debts.

Attachment of Debts.—This *Rule* will be applied as formerly where the interest of the debtor is in the shape of a debt whether legal or equitable: see cases *infra* of matters held attachable, but the former cases in which interests were held to be not attachable must now be considered as merely authorities that such interests are not attachable as *debts;* they may under the present *Rule* sometimes be attachable as claims or demands which might formerly have been the subject of equitable execution.

Affidavit.

The affidavit for an attaching order need not state the amount of the debts: *Lucy* v. *Wood*, 28 Sol. Jour. 326; W. N. 1884, 58; and will be sufficient if it states that the deponent is informed and believes that the garnishee is indebted to the judgment debtor: *Coren* v. *Barne*, 22 Q. B. D. 249.

No distinction between legal and equitable debts.

Since *The Judicature Act* the power of garnishing debts has been very extensive. The word debt has a more extended meaning than it had at the time of the passing of the original garnishee clauses in the C. L. P. Act. Since the re-enactment of those clauses therefore in the *Rules* a creditor may attach any debt due by any other person to his judgment debtor, making no distinction between legal debts, garnishable under the C. L. P. Act, and equitable debts: *Leaming* v. *Woon*, 7 Ont. App. 42; *Wilson* v. *Dundas*, W. N. 1875, 232; *Summers* v. *Morphew*, 61 L. T. Jour. 140; *Re Cowan's Estate*, 14 Ch. D. 638; *Hamer* v. *Giles*, 11 Ch. D. 942; *Webb* v. *Stenton*, 11 Q. B. D. 518.

In the *Canada Cotton Co.* v. *Parmalee*, 13 P. R. 26, it was held that insurance moneys unadjusted, and not in respect of an admitted claim, were not attachable under the provisions of the present *Rule*, but an opinion to the contrary was given on appeal to the Divisional Court, C. P. D., which has been followed in *Young* v. *Young*, (Galt, C.J., 24th October, 1889). No order was, however, made by the Divisional Court, on the ground that it did not sufficiently appear that the garnishees, a foreign insurance company, were "within Ontario." (Dec. 1889.) Possibly, therefore, the point can not be considered to be settled, whether an immature legal claim, which has not ripened into a debt, and by possibility may never do so, would formerly have been a subject of equitable execution, and so can now be attached.

It was formerly held that money in the hands of a receiver could not be attached: *Russell* v. *East Anglian Ry. Co.*, 3 Mac. & G. 104; *Ames* v. *Birkenhead Docks*, 20 Beav. 332; *Re Hunter* v. *Greensill*, L. R. 8 C. P. 24; *Jones* v. *Brown*, 29 L. T. N. S. 79; see *French* v. *Lewis*, 16 U. C. Q. B. 547. But in *Re Cowan's Estate*, 14 Ch. D. 638, it was held by Hall, V.-C., to be otherwise under *The Judicature Act;* and a receiver in an administration action, who had been directed to pay money to a legatee was directed to pay the same to judgment creditors of the legatee. Hall, V.-C., held that the *Rules* as to attachment of debts "are applicable to a fund payable under an order of the Court, but in the hands of a receiver, just as much as if the fund were not in Court, but in the hands of a trustee whose duty it was to pay it over to the debtor."

Re Cowan's Estate was approved and followed in *Leaming* v. *Woon*, 7 Ont. App. 42, where money payable to G., as rents of real estate of which a receiver had been appointed, were held attachable in the hands of the receiver by execution creditors of G. In *Lloyd* v. *Wallace*, 9 P. R. 335, following some expressions of opinion in the two last cases (which do not seem to have been necessary for their decision), money in the hands of a trustee, though not yet due to the *cestui que trust*, was held to be attachable. In the later case, however, of *Webb* v. *Stenton*, 11 Q. B. D. 518, the Court of Appeal approved of *Re Cowan's Estate*, only so far as it decided that a debt due, whether it be legal or equitable, is attachable; and *Webb* v. *Stenton* has now in Ontario been followed in *Stuart* v. *Gough*, 15 Ont. App. 299. It is probable, however, that such an interest as was in question in *Re Cowan's Estate* or in *Stuart* v. *Gough* may be attached under the extended terms of the present *Rule*, though not as a debt. **Rule 935.**

Before the Judicature Acts, it was held that on a judgment against a company, money in the hands of an official liquidator might be attached: *Ex parte Turner*, 2 D. F. & J. 354; and though this was afterwards questioned in *Re Hunter* v. *Greensill*, L. R. 8 C. P. 24, *The Judicature Act* or the present *Rule* will probably be held to have removed any difficulty in holding the money to be attachable.

A fair test as to a debt being attachable has been said to be, whether the debt is capable of being the subject of a set-off: *Webster* v. *Webster*, 31 Beav. 393; *McNaughton* v. *Webster*, 6 U. C. L. J. 17; see also *Parker* v. *Howe*, 12 P. R. at p. 353.

The debts which the Court or Judge is empowered to attach under this *Rule* are debts owing or accruing to the judgment debtor, whether legal or equitable, which includes any money, or a fund in which he is interested, and for which he can sue, as well as debts ascertained to be so.

The debt must be an absolute and perfected debt, not merely a conditional one, *e.g.*, payable upon the execution of a conveyance: *Howell* v. *Metropolitan District Ry. Co.*, 19 Ch. D. 508, and must be owing to the judgment debtor alone. Where it is due to him jointly with another person it cannot be attached: *Macdonald* v. *Tacquah Gold Mines Co.*, 13 Q. B. D. 535.

The *Rule* applies to debts accruing as well as debts actually owing: see *Sparks* v. *Younge*, 8 Ir. C. L. 251; *Tapp* v. *Jones*, L. R. 10, Q. B. 591; *ex parte Joselyne*, 8 Ch. D. 327; but a future debt, *i.e.* a debt which has no present existence but can only arise on the happening of some future event *e.g.* moneys which may in the future come into the hands of a trustee for the benefit of his *cestui que trust*, could not be attached formerly: *Fellows* v. *Thornton*, 14 Q. B. D. 335; but such claims have been made available under equitable execution by the appointment of a receiver: *Block* v. *Cox*, before Robertson, J., see Judgment Book Chy. D. No. 12, fo. 28; and it is possible may now be attachable; and see *Nash* v. *Pearse*, and *Lloyd* v. *Wallace infra*. Debts due, but not payable till a future time, may be ordered to be paid at such future date; and it is not necessary to wait and obtain a fresh order for payment of each instalment as it becomes payable: *Tapp* v. *Jones*, L. R. 10 Q. B. 591; see also, *Re Cowan's Estate*, and *Leaming* v. *Wood*, *supra*; *Booth* v. *Trail*, 12 Q. B. D. 8, and *Rule* 938; but the garnishee cannot be compelled to pay before credit given to him has expired: *Harding* v. *Barratt*, 3 U. C. L. J. 31.

Where a cheque was given and duly paid, it was held that there was no debt between the time of giving it and the time of payment, and no duty upon the drawer of the cheque to stop payment on being served with a garnishee order: *Elwell* v. *Jackson*, 1 Cab. & El. 362.

Where, before an attaching order issued, a legacy was payable to the defendant, and he had made a settlement of it, it was held that no debt was due from the executor of the will to the defendant, as even if the settlement were set aside by the plaintiff, there was no ground for saying that the executor was obliged to pay over to the defendant. The defendant could not revoke the settlement, and even if it were set aside as void against creditors, it would be still valid as between the executor and the defendant: *Vyse* v. *Brown*, 13 Q. B. D. 199; 1 Cab. & El. 225.

Where the trustees of an annuity, payable to a judgment debtor half-yearly, had advanced to him more than was payable at the end of the last half-

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Rule 935. yearly period, it was held that nothing was attachable as either owing or accruing: *Webb* v. *Stenton*, 11 Q. B. D. 518; see *Booth* v. *Trail*, *supra*. So a salary which is not payable till earned is not attachable as a debt before the date when it is payable: *Hall* v. *Pritchett*, 3 Q. B. D. 215; *Shanley* v. *Moore*, 9 U. C. L. J. 264. But a debtor's interest in a trust fund not yet payable by the trustee has been held to be attachable: *Nash* v. *Pearse*, 47 L. J. Q. B. 766; *Lloyd* v. *Wallace*, 9 P. R. 335.

An order to attach a debt may be made, notwithstanding that six years have elapsed since the judgment was obtained by the judgment creditor: *Fellows* v. *Thornton*, *supra*.

The following have also been held to be attachable as debts:—

Attachable debts. Rent due by a tenant: *Mitchell* v. *Lee*, L. R. 2 Q. B. 259; but not rent not due: *Commercial Bank* v. *Jarvis*, 5 U. C. L. J. 66; *McLaren* v. *Sudworth*, 4 U. C. L. J. 233. But since the Act, now R. S. O. 1887, c. 143, s. 2, by which rent is made apportionable, it may be attached as a debt accruing between gale days; and the judgment creditor is entitled to be paid on the gale day such portion as had accrued due on the day of service of the attachment: *Massie* v. *Toronto Printing Co.*, 12 P. R. 12, but *quære* whether rent could be garnished as against a mortgagee of the landlord: *Ib.*

Money in the hands of a Sheriff, the proceeds of an execution levied by him: *Murray* v. *Simpson*, 8 Ir. C. L. App. xlv.; *Re Smart* v. *Miller*, 3 P. R. 385, or in the hands of a Division Court Clerk: *Bland* v. *Andrews*, 45 U. C. Q. B. 431, or Bailiff: *Lockhart* v. *Gray*, 2 C. L. J. 163, though the contrary has been held in England: *Dolphin* v. *Layton*, 4 C. P. D. 130.

Money in the hands of a receiver: *Re Cowan Estate*, 14 Ch. D. 638; *Leaming* v. *Woon*, 7 Ont. App. 42, *sed quære* whether now only under the extended powers given by this *Rule*, and not as a debt: see *Webb* v. *Stenton*, 11 Q. B. D. 530; *Stuart* v. *Grough*, 15 Ont. App. 299; or official liquidator: *ex parte Turner*, 2 D. F. & J. 354: see *Mack* v. *Ward*, W. N. 1884, 16; and *Stuart* v. *McKim*, 8 Ont. 739.

Rents due to a mortgagor before a notice given by the mortgagee to the tenant to pay subsequent rents to him: *Patterson* v. *O'Reilly*, in note to sec. 53, sub-sec. 4 of the Act.

Surplus money in the hands of mortgagees after sale under a power in mortgage: *Nicol* v. *Ewin*, 7 P. R. 331; see *McKay* v. *Mitchell*, 6 U. C. L. J. 61; See also *Chatterton* v. *Watney*, 16 Ch. D. 378; 17 Ch. D. 259, where it was held that a judgment debtor, who had obtained a garnishee order against a mortgagor debtor of his debtor, was not entitled to surplus proceeds of a sale by a prior mortgagee, which took place after his garnishee order, but the holder of a garnishee order obtained after the sale against the prior mortgagee was entitled.

Dividends on Bank stocks: *Salamon* v. *Donovan*, 10 Ir. C. L. R. App. xiii.

Money in the hands of Bankers: *Re United Eng. & Scot. Ins. Co.*, L. R. 5 Eq. 300; L. R. 3 Chy. 787; *Miller* v. *Huddlestone*, 22 Ch. D. 233.

Money payable under a contract for work done for a Municipal Corporation: *Alden* v. *Boomer*, 2 P. R. 339.

Money due to a Railway Company for the purpose of distribution among its shareholders under an agreement sanctioned by Act of Parliament, may be attached by a creditor of the Company: *Bouch* v. *The Seven Oaks, etc., Railway Company*, 4 Ex. D. 133.

Money in the hands of an agent in this Province may be garnished where the garnishee resides out of the jurisdiction: *Brown* v. *Merrills*, 3 U. C. L. J. 31; but not where the garnishee is a foreign corporation: *Bank of British North America* v. *Laughrey*, 2 C. L. J. 44; *Lundy* v. *Dickson*, 6 U. C. L. J. 92; and see *Canada Cotton Co.* v. *Parmalee*, *supra* p. 742.

Upon a judgment against an executor as such, a debt due to the testator's estate may be attached: *Burton* v. *Roberts*, 6 H. & N. 93; *Fowler* v. *Roberts*, 2 Giff. 226; *Tiffany* v. *Bullen*, 18 C. P. 91. The order in such case should show on its face that it is directed to the executor as such: *Stevens* v. *Phelps*, L. R. 10 Chy. 417.

After the analogy of a *fi. fa.* under which the goods of any one of those against whom it is issued may be taken, a debt due to one of several judgment debtors may be attached to satisfy the judgment against all: *Miller* v. *Mynn*, 1 E. & E. 1075; but a debt owing to two cannot be attached for the debt of one: *Re Smart* v. *Miller*, 3 P. R. 385; *McCormick* v. *Park*, 9 C. P. 330; *Macdonald* v. *Tacquah Gold Mines Co.*, 13 Q. B. D. 535. **Rule 935.**

As to pensions and superannuation allowances, see *Innes* v. *East India Co.*, 17 C. B. 351; *Dent* v. *Dent*, L. R. 1 P. & D. 366; *Ex parte Hawker*, L. R. 7 Chy. 214; *Willcock* v. *Terrell*, 3 Ex. D. 323; *Sansom* v. *Sansom*, 4 P. D. 69; *Birch* v. *Birch*, 8 P. D. 163; *Lucas* v. *Harris*, 18 Q. B. D. 127; 55 L. T. N. S. 658; *Crowe* v. *Price*, 22 Q. B. D. 429; *Booth* v. *Trail*, 12 Q. B. D. 8; *Re Webber*, 18 Q. B. D. 111.

Full pay of an officer in the Royal Navy on active service cannot be assigned or attached: *Apthorpe* v. *Apthorpe*, 35 W. R. 728; 12 P. D. 192; nor the pay of a retired officer in the Army: *Crowe* v. *Price*, 22 Q. B. D. 429.

A debt of an unascertained amount if only it be payable as soon as ascertained: *Re Sato* v. *Hubbard*, 8 P. R. 445; *Macpherson* v. *Tisdale*, 11 P. R. 261; where costs remained to be taxed: *Re Withrow, Poucher* v. *Donovan*, 19 C. L. J. 97, 114, where the amount to be found due to a plaintiff who had been declared entitled to a mechanics' lien, was attached.

The following are not attachable as debts, but as above mentioned may now be attached in many cases as "claims or demands formerly available under equitable execution." Not attachable as debts.

Unliquidated damages: *Johnson* v. *Diamond*, 11 Ex. 73; though secured by bond in a penal sum, *Ib: Griswold* v. *Buffalo, Brantford & Goderich Ry. Co.*, 2 P. R. 178; though the amount has been ascertained by the verdict of jury or award, but no judgment yet had been obtained to make the claim the debt: *Jones* v. *Thompson*, E. B. & E. 63; *Dresser* v. *Johns*, 28 L. J. C. P. 281; *In re Newman*, 3 Ch. D. 494; *Boyd* v. *Haynes*, 5 P. R. 15; *Tate* v. *Corporation of Toronto*, 3 P. R. 181; *Bank of Toronto* v. *Burton*, 4 P. R. 56; *Gwynne* v. *Rees*, 2 P. R. 282; *Roberts* v. *City of Toronto*, 16 Gr. 236. But see *Hollby* v. *Hodgson*, 61 L. T. N. S. 297, affirmed in appeal 88 L. T. Jour. 33, where money due under a judgment pronounced but not formerly entered was held to be attachable; and see *Canada Cotton Co.* v. *Parmalee*, 13 P. R. 26, reversed in appeal, (Dec. 1889), and *Young* v. *Young*, (Galt, C.J., 24th October, 1889), where insurance moneys unadjusted, and not in respect of any admitted claim, were held to be attachable under the new clause contained in the present *Rule:* see note *supra* p. 742.

Where a claim for work done under a contract, and one for unliquidated damages are referred, there could formerly be no garnishment of the latter until after award: *Tate* v. *The Corporation of the City of Toronto*, 10 U. C. L. J. 66; 3 P. R. 181. See also *Randall* v. *Lithgow*, 12 Q. B. D. 525.

So any claim which might or might not result in a debt, *e.g.*, a notice to treat under the English Lands Clauses Act, on which notice nothing had been done: *Richardson* v. *Elmit*, 2 C. P. D. 9; an unascertained balance due from one partner to another: *Campbell* v. *Peden*, 3 U. C. L. J. 68.

Salary not yet payable: *Hall* v. *Pritchett*, 3 Q. B. D. 215; *Re Shanley* v. *Moore*, 9 U. C. L. J. 264.

A negotiable promissory note not yet due: *Jackson* v. *Cassidy*, 2 Ont. 521; *Pyne* v. *Kinna*, 11 Ir. C. L. R. 40.

A legacy in the hands of an executor unless there has been such an account stated by the executors as would entitle the debtor to sue: *McDowall* v. *Hollister*, 25 L. T. N. S. 185.

Money deposited with a stock broker to secure any loss on speculations on stocks and shares, so long as the transactions in the stocks and shares are open: *Hutt* v. *Shaw*, 3 Times Rep. 354.

Money sent by a father to his son, the debtor, as a gift, through a bank, was garnished before the debtor was advised of the deposit; it was held not garnishable, as the father had till then power to revoke the gift: *Caisse* v. *Tharp*, 5 P. R. 265.

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Money in a bank at the credit of the judgment debtor, a stock broker, which was shewn to be wholly money of his clients: *Hancock* v. *Smith*, 41 Ch. D. 456.

A debt due by the garnishee to the judgment debtor as executor: *Macauley* v. *Rumball*, 19 C. P. 284; and a debt due to an administrator as such, cannot be attached to answer a private debt: *Bowman* v. *Bowman*, 1 Chy. Ch. 172.

Surplus, if any, after payment of the debts of A. by the terms of a trust deed to be paid to B.: *McKindsey* v. *Armstrong*, 10 Ont. App. 17.

Money was held not attachable under a contract which was not performed according to its terms, so that nothing was due at the time of the attaching order: see *McCraney* v. *McLeod*, 10 P. R. 539.

The income of trust funds payable to a wife for her separate use, subject to a restraint against anticipation, accrued since a judgment against her and her husband, was held not attachable, as otherwise it would be in substance to enable her to anticipate her income in violation of the restraint on anticipation: *Chapman* v. *Biggs*, 11 Q. B. D. 27; see also *Stanley* v. *Stanley*, 7 Ch. D. 589.

The allowance of a juror is not attachable in the hands of the County Treasurer: *Phillips* v. *Austin*, 3 C. L. T. 316.

Wages or salary of servants, etc., to the extent of $25, are not attachable under R. S. O. c. 64, s. 8. The salary of the secretary of a company amounting to £200, payable quarterly, was held not within the meaning of a similar Imperial protecting Act: *Gordon* v. *Jennings*, 9 Q. B. D. 45.

A garnishing order cannot be made attaching a debt due from a partnership firm described by its partnership name: *Walker* v. *Rooke*, 6 Q. B. D. 631. This is now otherwise in England under an express Rule, O. 45, r. 10: see Snow Ann. Prac. 1889-90, p. 702.

A debt which is attachable does not cease to be so because the debtor has brought an action to recover it; and the giving of a cheque by the garnishee to the debtor, payment of which was stopped on service of the order *nisi*, was held not to prevent the debt from being attached: *Cohen* v. *Hale*, 3 Q. B. D. 371; but it is otherwise where a cheque has been given and accepted in payment of a debt, though the cheque has not been presented: *Elwell* v. *Jackson*, 1 Times Rep. 454; 1 Cab. & E. 362, and it is not the duty of the garnishee to stop payment on being served with an order attaching debts: *Ib.*

Death of garnishee.

There was formerly at law no power to order or permit a suggestion to be entered of the death of a garnishee, so as to get execution against his representative: *Re Ward* v. *Vance*, 3 P. R. 323; but that end possibly may now be attained under *Rule* 622. An executor or administrator of a judgment creditor who has not made himself a party to the judgment cannot proceed under this *Rule* without making himself a party to the record: *Baynard* v. *Simmonds*, 5 E. & B. 59. The creditor must be one who is entitled to enforce immediate payment. Therefore the holder of a bond of a corporation containing a condition that all bondholders should be paid *pari passu*, was held not to be such a creditor, since an attachment would have given him priority over other bondholders: *Kennett* v. *Westminster Improvement Commissioners*, 11 Exch. 349.

Assignment of the debt garnished.

A garnishing order can only charge what the judgment debtor can honestly deal with himself: *Re General Horticultural Co.*, 32 Ch. D. 512: *Hancock* v. *Smith*, *supra*. A debt, therefore, *bonâ fide* assigned, before the judgment, is not attachable: *Hirsch* v. *Coates*, 18 C. B. 757; nor a debt so assigned before the attaching order: *Wise* v. *Birkinshaw*, 29 L. J. Ex. 240: even though the garnishee had no notice of the assignment: *Pickering* v. *Ilfracombe Railway Co.*, L. R. 3 C. P. 235; *Robinson* v. *Nesbitt*, L. R. 3 C. P. 264; *Brown* v. *McGuffin*, 5 P. R. 231; *Grant* v. *McDonell*, 39 U. C. Q. B. 412: or the assignment be attacked as a fraud on creditors: *Vyse* v. *Brown*, 13 Q. B. D. 199.

Set-off by garnishee.

The Judge has no power to go into the state of the accounts between the garnishee and the judgment creditor, or to allow the former to deduct any amount due to him from the latter, but must order execution to issue for the whole amount due from the judgment debtor to the judgment creditor: *Sampson* v. *Seaton & Beer Railway Co.*, L. R. 10 Q. B. D. 28. He may, however, go into the state of accounts between the judgment debtor and the

garnishee, and give effect to any set-off or cross debt arising before (*Ib*; see *Nathan* v. *Giles*, 5 Taunt. 558), but not after: (*Tapp* v. *Jones*, L. R. 10 Q. B. 591), the date of the attaching order. **Rule 935.**

Garnishee proceedings will not be set aside after great delay: *Re Gordon* v. *Bonter*, 6 U. C. L. J. 112, and should not in any case be opened without previous notice to all parties interested: *Bank of U. C.* v. *Wallace*, 2 P. R. 352.

An equitable charge given before a garnishee order is obtained takes priority of an order, even in the absence of notice of the charge: *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536; 38 Ch. D. 238.

Solicitor's lien.

An attachment of a judgment over-rides a solicitor's lien or control over it in respect of general costs: *Davidson* v. *Douglas*, 15 Gr. 347; *Reg.* v. *Benson*, 2 P. R. 350; *Bank U. C.* v. *Wallace*, 2 P. R. 352; *Cotton* v. *Vanstittart*, 6 P. R. 96; *Hough* v. *Edwards*, 1 H. & N. 171; *Burcnell* v. *Pugin*, 32 L. T. N. S. 495; but the special lien for costs of the action in which the debt attached has been recovered will be protected when the garnishee has notice of it: *The Jeff Davis*, L. R. 2 A. & E. 1; *The Leader*, *Ib.*, 314; *Canadian Bank of Commerce* v. *Crouch*, 8 P. R. 437; *Shippey* v. *Grey*, W. N. 1880, 99; 28 W. R. 877.

As to the effect of an attachment upon a solicitor's lien, see further *Hough* v. *Edwards*, 1 H. & N. 171; *Eisdell* v. *Coningham*, 28 L. J. Ex. 213; *Sympson* v. *Prothero*, 26 L. J. Chy. 671.

Where amount is within the jurisdiction of County or Division Court.

In an action in the High Court where the amount claimed from the garnishee is within the jurisdiction of a County or Division Court case the garnishee is to be directed to appear to shew cause before the County Court Judge of the County where he resides: *Rule* 940.

For similar procedure in actions in a County Court, see *Rule* 943.

Payment over.

The garnishee should not pay over without an order to do so, or he may also have to pay the judgment debtor: *Clark* v. *Clark*, 8 U. C. L. J. 107; *Turner* v. *Jones*, 1 H. & N. 878.

Claims and demands other than debts.

Equitable Execution.—Equitable execution is a mode of obtaining payment of a judgment by reaching, by means of the assistance of the Court, property of the debtor which the Sheriff, by reason of the imperfection of the statutes or *Rules* respecting execution, is unable to deal with: see *Kirk* v. *Burgess*, 15 Ont. 608; *Wills* v. *Luff*, 38 Ch. D. 260.

The principal mode of obtaining equitable execution was by the appointment of a receiver; and it has been said that even though other and ordinary remedies by way of execution are open, yet the Court has power to award a receiver by way of equitable execution in any and every case in which it is just or convenient so to do: *Kirk* v. *Burgess*, *supra*, at p. 610, *Re Pope*, 17 Q. B. D. 749; see also *Kincaid* v. *Kincaid*, 12 P. R. 462. As in other cases, however, where the auxiliary jurisdiction of Equity was invoked, the power to award equitable execution was only exercised, in general, where the remedy at law was ineffectual, and therefore a receiver was refused where an attaching order could be obtained: see *Trust & Loan* v. *Gorsline*, 12 P. R. 654; or a *fi. fa.* was sufficient: *Manchester, etc.* v. *Parkinson*, 22 Q. B. D. 173.

Before the Jud. Act, 1881, only a legal debt could be attached. By the Jud. Act and *Rules* the right to attach was extended, and where a judgment debtor had an equitable interest in personalty, if it assumed the shape of an equitable debt, this was held to be attachable: see *Webb* v. *Stenton*, 11 Q. B. D. 518; *Stuart* v. *Grough*, 15 Ont. App. 299; and other cases *supra*. There still, however, remained cases where the *Rules* respecting attachment of debts would not apply, by reason of the judgment debtor not being entitled to a debt either legal or equitable, though he, nevertheless, was entitled to some valuable equitable interest.

The mode in which such equitable interests were reached and made available was generally by the appointment of a receiver. Receivers have thus been appointed of a reversionary interest under a will: *Fuggle* v. *Bland*, 11 Q. B. D. 711; a legacy expectant on the death of a tenant for life: *Macnicoll* v. *Parnell*, 35 W. R. 773; the income of a trust fund: *Oliver* v. *Lowther*, 28 W. R. 381;

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Rule 935. 42 L. T. N. S. 42; *Webb* v. *Stenton*, 11 Q. B. D. 518, 530; an interest in a subsisting life insurance and in a charge upon land: *Beamish* v. *Stephenson*, 18 L. R. Ir. 319; moneys secured by mortgage held by the debtor, who resided abroad: *Parent* v. *Lortie*, 7. C. L. T. 195; the life interest of a married woman in stock: *Bryant* v. *Bull*, 10 Ch. D. 153; a fund in another Court: *Westhead* v. *Riley*, 25 Ch. D. 413; the interest of a debtor in a trust estate being a share of the proceeds of the estate when sold by the trustees: *Stuart* v. *Grough*, *supra*; see also other cases referred to *supra* pp. 60 and 61.

It is to such cases that the new provisions of this *Rule* seem to be directed. The principle of the *Rule* would seem to be that wherever there is a person who is the custodian of, or liable in respect of a fund or *chose in action* of the debtor under any trust or contract, and the right or interest of that debtor might formerly have been the subject of equitable execution, that person may in effect be converted into a *quasi* receiver by being served with an attaching order and may be made accountable for the fund or *chose in action*, to the extent of the debtor's claim or demand in respect thereto.

A special form of attaching order appropriate in the particular case may have to be framed in each case. The general form in the Appendix No. 142 is only applicable to the case of debts; but where it is desired to obtain a particular interest, or a *chose in action* of the debtor, some precise definition of it must be given and steps taken to assert a right to that particular interest or *chose in action*.

The terms of the clause in brackets at (*b*) in this *Rule* would only seem to extend to cases in which a money payment by the garnishee will discharge his liability in respect of the claim or demand. Where the judgment debtor's interest, is not of this nature it would seem to be necessary to resort to other modes of obtaining equitable execution, *e.g.*, under *Rules* 1007 *et seq.*, or by the appointment of a receiver, or by action.

Rule 938 provides for an order being made for payment at maturity of claims and demands not due at the time of the attachment. That *Rule* was acted on in *Young* v. *Young* (Galt. C.J., 24 Oct., 1889).

Equitable interests in land.

Where the debtor has an interest in land of such a nature that it cannot be sold under a *fi. fa.*, the judgment creditor may reach it, by application under *Rules* 1007 *et seq.*, or by action: see *Johnson* v. *Bennett*, 9 P. R. 337.

An equity of redemption in mortgaged lands is saleable under an execution, by virtue of R. S. O. 1887, c. 64, s. 22, only in the case of a simple equity arising upon a single mortgage of the land, or at most existing between one mortgagor and one mortgagee: see *Samis* v. *Ireland*, 4 Ont. App. 122; and cases in which an equity of redemption is not so saleable, furnish familiar examples of suits for equitable execution: see *Donovan* v. *Bacon*, 16 Gr. 472; *Kerr* v. *Styles*, 26 Gr. 309; *Johnson* v. *Bennett*, 9 P. R. 337, in which last case there were no writs of execution in the sheriff's hands, as to the which see *infra*, p. 749.

An order appointing a receiver was held to be "a process of execution" within the Imperial Act, 27 & 28 Vict. sec. 112: *Re Pope*, 17 Q. B. D. 743.

Receivers.

Since the Jud. Act the Court can grant equitable execution by the appointment of a receiver at the instance of the judgment creditor in cases where garnishee proceedings under this *Rule* are not applicable: see notes *supra* p. 60, and for the form of such orders see *Hewett* v. *Murray*, 52 L. T. N. S. 380; 54 L. J. Chy. 572.

An attaching order against a garnishee, and a receiver as against the debtor, were granted on the same application in *Whittaker* v. *Whittaker*, 7 P. D. 15; but the authority of that case has been doubted in *Manchester, etc.* v. *Parkinson*, 22 Q. B. D. 173.

The appointment of a receiver would seem to be an effective mode of procedure under circumstances such as existed in *Donovan* v. *Bacon*, *sup.* There the debtor was entitled to the equity of redemption in land, but the land was subject to two mortgages held by different persons, and the mortgagor was in possession and in receipt of the rents. See also *Webb* v. *Stenton*, *sup.*; *London and Canadian, etc.* v. *Merritt*, 32 C. P. 383, 384, 386.

A receiver was appointed on an interlocutory application in a fresh action by the judgment creditor in *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275; see also *ex parte Evans*, 13 Ch. D. 252. But a fresh action is unnecessary; the application for receiver may be in the original action after judgment: *Salt* v. *Cooper*, 16 Ch. D. 544; *Smith* v. *Cowell*, 6 Q. B. D. 75. Rule 936.

A receiver will, however, only be granted in cases where the amount of the judgment debt warrants the expense, and where there is a fair reason to suppose that there is something to receive: *I.* v. *K.*, W. N. 1884, 63. See also *Manchester, etc.* v. *Parkinson*, and other cases *supra* p. 61.

A judgment creditor who has obtained a receiver subject to existing incumbrances, cannot place himself in a better position than the debtor, and by giving notice to a trustee obtain priority: *Arden* v. *Arden*, 29 Ch. D. 702.

Where the interest of the judgment debtor is not one which is exigible under writs of *fi. fa.* goods or lands respectively, the issue of such writs is an unmeaning and needless formality, and is, therefore, an unnecessary preliminary to proceedings for equitable execution: *Stuart* v. *Grough*, 15 Ont. App. 309; see formerly *Shea* v. *Denison*, 14 Gr. 513; *Wilson* v. *Proudfoot*, 15 Gr. 103. The issue of such writs has also no effect to give priority. The equitable interest of the debtor is only bound by, and from the time of, the issue of the appropriate form of equitable execution: *Stuart* v. *Gough*, *supra*.

936. Service of an order that debts, claims or demands due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee in such manner as the Court or Judge shall direct, shall bind such debts, claims or demands in his hands [from the time of such service]. J. A. Rule 371. Order for attachment to bind debts from service.

The words in brackets are new. Otherwise this *Rule* is identical with the Eng.R. 1875, O. 45, r. 3, (1883, R. 623), and corresponds with part of R. S. O. c. 50, sec. 308.

Service of an attaching order does not create the relation of debtor and creditor between the garnishee and attaching creditor: *Wardrope* v. *Canadian Pacific Railway Co.*, 7 Ont. 321. It is otherwise, however, after an order to pay over has been made: *Cowan* v. *Carlill*, 32 W. R. 83; 52 L. T. N. S. 431.

Money paid into Court in an administration suit by an executor is not money "in the hands" of the executor, and a garnishee order *nisi* against the executor is not a charge on such money, although paid in after service of the order: *Stevens* v. *Phelips*, L. R. 10 Chy. 417; *Jones* v. *Brown*, 29 L. T. N. S. 79.

An order *nisi* does not create any charge till after service: *Hamer* v. *Giles*, 11 Ch. D. 942; *Re Stanhope, Ib.*, 160; *Holmes* v. *Tutton*, 5 E. & B. 65.

By the express terms of this *Rule* the debts are bound from the date of the service of the order of attachment, though, if nothing was attachable at the time the order was made, doubtless it cannot attach a debt or claim arising after the order, but before service: *McCraney* v. *McLeod*, 10 P. R. 539; *Parker* v. *Howe*, 12 P. R. 351. The *bonâ fide* payment by the garnishee to the judgment debtor before such service will protect the garnishee: *Cooper* v. *Brayne*, 27 L. J. Ex. 446; 31 L. T. N. S. 265. No set-off, and nothing affecting the state of the accounts between the garnishee and the judgment debtor, arising after that date, can be taken into account: *Tapp* v. *Jones*, L. R. 10 Q. B. 591; though a set-off existing at that date will avail: *Sampson* v. *Seaton and Beer Railway Company*, L. R. 10 Q. B. 28.

In *Fitzpatrick* v. *Warring*, 13 L. R. Ir. 2, two defendants, S. and W., each had an order against the plaintiff for costs. S. was indebted to the plaintiff for rent. W.'s costs were first taxed, and he obtained an order against S., attaching the rent due by S. to the plaintiff. When an order to pay over was applied for, S.'s costs had been taxed, but it was held that the rent could not be set-off against them as the order *nisi* had attached it, and S. had no claim until his costs were taxed. But see *Re Sato* v. *Hubbard*, 8 P. R. 445.

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Rules 937, 938.

Where a banker was served with the usual order attaching all debts, etc., he was held to be justified in refusing to honour any cheques even to the extent of the amount in his hands over and above the amount required to satisfy the judgment of the attaching creditor: *Rogers* v. *Whiteley*, 23 Q. B. D. 236.

In the case of several attaching orders, the creditors formerly ranked in the order in which their attaching orders are served: *Tate* v. *The Corporation of Toronto*, 3 P. R. 181; *Sweetnam* v. *Lemon*, 13 C. P. 534; see also *Salaman* v. *Donovan*, 10 Ir. C. L. R. App. xiii; but see now R. S. O. 1887, c. 65, s. 37.

Personal service is not indispensable if the service comes to the garnishee's knowledge: *Ward* v. *Vance*, 9 U. C. L. J. 214, 244.

The effect of the word "bind" has often undergone discussion, and under the earlier English Bankruptcy Act the assignee was entitled, and not the attaching creditor, if bankruptcy intervened before actual payment under an order to pay over: *Holmes* v. *Tutton*, 5 E. & B. 80; *Turner* v. *Jones*, 1 H. & N. 878; *Tilbury* v. *Brown*, 20 L. J. Q. B. 46; *Rylands* v. *Reardon*, 8 L. R. Ir. 1; but if the garnishee was compelled to pay under threat of execution after notice of the bankruptcy, he was discharged as against the assignee: *Wood* v. *Dunn*, L. R. 2 Q. B. 73. He was bound, however, to set up the bankruptcy, if he had notice of it before the order to pay over: *Ib.* The present English law gives the creditor a charge which is good against the trustee in bankruptcy: *Emmanuel* v. *Bridger*, L. R. 9 Q. B. 286; *Ex p. Joselyne*, 8 Ch. D. 327; see *Mayor of London* v. *Joint Stock Bank*, 6 App. Cas. 393.

The service does not effect a transfer of the debt or securities for it: *Chatterton* v. *Watney*, 16 Ch. D. 378; 17 Ch. D. 259; see also *Backhouse* v. *Siddle*, 38 L. T. N. S. 487.

Order for execution against garnishee.

937. If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon notice to him, then the Court or Judge may order execution to issue, and it may issue accordingly without any previous writ or process, to levy the amount due from the garnishee, or so much thereof as may be sufficient to satisfy the judgment debt. J. A. Rule 372.

This is identical with the Eng. R. 1875, O. 45, r. 4, (1883, R. 624), and is in substance the same as the provision of the C. L. P. Act (R. S. O., 1877, c. 50), s. 309.

Payment to the judgment debtor under stress of an execution discharges the garnishee from liability to the judgment creditor: *Turnbull* v. *Robertson*, 38 L. T. N. S. 389; but he cannot discharge himself by a voluntary payment: *Mayor of London* v. *Joint Stock Bank*, 6 App. Cas. 393; and where, before payment, a receiver of the fund is appointed, the garnishee should not pay, without first bringing the conflicting claims of the receiver and the attaching creditor to the attention of the Court: *Stuart* v. *Grough*, 15 Ont. App. 299; and see *Rule* 944.

After an order absolute, the garnishee may be examined as to his means under *Rule* 926: *Cowan* v. *Carlill*, 33 W. R. 583; 52 L. T. N. S. 431.

Execution for maturing claims.

938. If the claim or demand be not due at the time of the attachment, an order may be made for payment thereof at maturity, and execution may issue therefor when it matures. *New.*

The maturing claims here referred to would seem to be those in regard to which summary proceedings in the nature of equitable execution are authorized by *Rule* 935. See notes to that *Rule*. **Rule 939.**

939. If the garnishee disputes his liability, the Court or Judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined. J. A. Rule 373. Issue where garnishee disputes liability.

Identical with the Eng. R. 1875, O. 45, r. 5, (1883, R. 625), and gives a simpler machinery than R. S. O. 1877, c. 50, s. 310.

A garnishee order made absolute, and no motion made to set it aside, although no debt was at the time due, precludes the garnishee from afterwards questioning it: *Randall* v. *Lithgow*, 12 Q. B. D. 525.

A garnishee cannot set off against a judgment creditor a debt due to him (the garnishee) from the judgment debtor, if the garnishee was aware, from the commencement of the transaction which resulted in his becoming indebted to the judgment debtor, that the latter's right to such debt would only be as trustee for the judgment creditor: *Fitt* v. *Bryant*, 1 Cab. & El. 194.

A garnishee can set off against a judgment creditor costs incurred by him, but not paid at the time the issue is directed, against which the judgment debtor is bound to indemnify the garnishee: *Rymill* v. *Wandsworth Dist. Bd.*, 1 Cab. & El. 92.

The judgment creditor in the issue stands in the shoes of the judgment debtor, and the garnishee can assert against him all claims he could have asserted against the judgment debtor either as plaintiff or defendant in an action: *Nathan* v. *Giles*, 5 Taunt. 558; *Tapp* v. *Jones*, L. R. 10 Q. B. 591; 1 Cab. & El. 95; up to the time of the attaching order. See also notes to *Rule* 936.

This section does not render it obligatory on the Court or Judge to direct an issue. If the matter is clear upon the affidavits, the Court may refuse an issue: *Wise* v. *Birkenshaw*, 29 L. J. Ex. 240; and rescind the attaching order: *Johnson* v. *Moody*, 12 P. R. 203, where the plaintiff cannot suggest a plausible ground for supposing the money attached to belong to the debtor; but otherwise it would probably be proper to direct an issue, if the plaintiff so desired: *Ib.* On the other hand, execution may be ordered if the garnishee does not satisfy the Judge that he has real ground for disputing his liability for the debt: *Re Sato* v. *Hubbard*, 8 P. R. 445; *Newman* v. *Rook*, 4 C. B. N. S. 434; and is acting *bonâ fide* in making the dispute: *Wise* v. *Birkenshaw*, 29 L. J. Ex. 240.

Where an action is pending against the garnishee at the suit of the judgment debtor, and there is no collusion between them, the Court will not grant an issue: *Richardson* v. *Greaves*, 10 W. R. 45. The Court will, unless quite satisfied that the debt is not liable to attachment, allow the judgment creditor to have an issue with the garnishee: *Seymour* v. *The Corporation of Brecon*, 29 L. J. Ex. 243. If the garnishee disputes his liability, and the judgment creditor declines to proceed to try the question, the garnishee is entitled to have the attaching order discharged with costs: *Wintle* v. *Williams*, 3 H. & N. 288.

In *Wilson* v. *Dundas*, W. N. 1875, 232, Quain, J., ordered the liability to be tried by means of a special case; and where the question is one of law, this seems to be the most convenient course.

Where an issue is directed to a County Court, the action, nevertheless, remains in the High Court, and the County Court Judge has no authority to order production: *Cochrane* v. *Morrison*, 10 P. R. 606.

An order for cross-examination of the garnishee was refused in *Storer* v. *Simmons*, W. N. 1876, 40, on the ground that the English Rule corresponding with *Rule* 566 was not intended to apply to such a case; but *quære*, in Ontario.

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Rules 940-943.

When garnishee to appear before County Court Judge in cases in High Court.

940. In cases in the High Court, where the amount claim or demand claimed as due or accruing from any garnishee is within the jurisdiction of a County or Division Court, the order to appear made under Rule 935 shall be for the garnishee to appear before the Judge of the County Court of the County within which the garnishee resides, at some day and place within his County to be appointed in writing by such Judge; and written notice thereof shall be given to the garnishee at the time of the service of the order. R. S. O. 1877, c. 50, s. 311.

Execution from County or Division Court, if the garnishee does not dispute the debt.

941. If the garnishee does not forthwith pay the amount due by him, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear before the Judge named in the order at the day and place appointed by such Judge, then such Judge, on proof of service of the order and appointment having been made two clear days previous, may make an order directing execution to issue out of the County Court or out of a Division Court, according to the amount due, and such order shall, without any previous writ or process, be sufficient authority for the Clerk of either of such Courts to issue execution for levying the amount due from such garnishee. R. S. O. 1877, c. 50, s. 312.

Proceedings if he disputes the debt.

942. If the garnishee disputes his liability, then such Judge of the County Court may order that the judgment creditor shall be at liberty to proceed against the garnishee according to the usual practice of the County or Division Court, as the case may require, for the alleged debt or for the amount due to the judgment debtor if less than the judgment debt, and for costs of suit. R. S. O. 1877, c. 50, s. 315.

Proceedings in County Courts when amount within the jurisdiction of Division Courts.

943. In cases in the County Courts when the amount claimed as due from any garnishee is within the jurisdiction of a Division Court, the order to be made under Rule 935, shall be for the garnishee to appear before the Clerk of the Division Court within whose Division the garnishee resides, at his office, at some day to be appointed in the said order by the Judge of the County Court; and the said order shall be served on such garnishee, and if the garnishee does not

forthwith pay the amount due by him or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear before the Division Court Clerk named in the order at his office at the day appointed by such Judge, then such Judge, on proof of the service of the order having been made two clear days previous, may make an order directing execution to issue out of the Division Court of the Division in which such garnishee resides, according to the amount due, and such order shall, without any previous summons or process, be sufficient authority for the Clerk of the said Division Court to issue execution to levy the amount due from such garnishee, and the bailiff to whom such writ of execution is directed shall be thereby authorized to levy and shall levy the amount mentioned in the said execution towards satisfaction of the judgment debt, together with the costs of the proceedings to be taxed, and his own lawful fees; but if the garnishee disputes his liability, then such Judge may order that the judgment creditor in the said County Court shall be at liberty to proceed against the garnishee, according to the practice of the said Division Court, for the alleged debt or for the amount due to the judgment debtor if less than the judgment debt, and for costs of suit. R. S. O. 1877, c. 50, s. 316. Rules 944, 945.

944. Where in proceeding to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or Judge may order such third person to appear and state the nature and particulars of his claim upon the debt. J. A. Rule 374. Order for third person to appear.

This *Rule* is the same as the Eng. R. 1875, O. 45 r. 6, (1883, R. 626); and corresponds in substance with sec. 313 of R. S. O., c. 50.

A suggestion that the money attached is trust money and not belonging to the judgment debtor, should be listened to, and upon reasonable suspicion of such a fact, the Judge has power (even though no suggestion is made that the money belongs to some third person) to direct an issue to determine whether or not the money is trust money; and any person who has a claim to the money has a *locus standi* to point out the facts to the Judge: *Roberts* v. *Death*, 8 Q. B. D. 319; 30 W. R. 76. The judgment debtor may appear to inform the Court of any such material fact: *Lovely* v. *White*, 12 L. R. Ir. 381.

Where the garnishee neglects to bring to the notice of the Court the claim of any third party he may possibly have to pay the claim twice over: *Stuart* v. *Grough*, 15 Ont. App. 299.

945. After hearing the allegations of such third person under such order, and of any other person whom by the Proceedings as to claims of

Rules 946, 947. third persons.

same or any subsequent order the Court or a Judge may order to appear, or in case of such third person not appearing when ordered, the Court or Judge may order execution to issue to levy the amount due from the garnishee, or may order any issue or question to be tried or determined according to the preceding Rules, and may bar the claim of such third person, or may make such other order as the Court or Judge thinks fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as the Court or Judge thinks just and reasonable. J. A. Rule 375.

Same as the Eng. R. 1875, O. 45, r. 7, (1883, R. 627); and corresponds in substance with sec. 313, sub-s. 2 of R. S. O. 1877, c. 50. See *Mitchell* v. *Lee*, L. R. 2 Q. B. 259.

The Judge under this *Rule* has a discretion to direct, or refuse to direct, the trial of an issue, and his discretion was held properly exercised in refusing, where the plaintiff could not suggest a plausible ground for supposing that the money in the hands of the garnishee belonged to the judgment debtor, or to cast a suspicion upon the *bona fides* of the claim of the third party after examination of him. Had the plaintiff been able to do this, it would have been the duty of the Judge to direct an issue, if the plaintiff desired it: *Johnson* v. *Moody*, 12 P. R. 203.

The concluding part of this *Rule* authorizes an order for security for costs against either party to the issue if residing out of the jurisdiction: *Canadian Bank of Commerce* v. *Middleton*, 12 P. R. 121.

Garnishee discharged by payment.

946. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside or the judgment reversed. J. A. Rule 376, 500.

This *Rule* is identical with the Eng. R. 1875, 45 r. 8, (1883, R. 628); and corresponds in substance with R. S. O. 1877, c. 50, s. 317.

The mere issue of an attaching order, or order to pay over, is no defence to an action by the judgment debtor: *Lockwood* v. *Nash*, 18 C. B. 536; *Sykes* v. *Brockville and Ottawa Ry. Co.*, 22 Q. B. 459; *Blevins* v. *Madden*, 11 C. P. 195. Payment to the judgment creditor after an attaching order served, but before an order to pay over, is not a discharge, and the garnishee is liable to pay again to the judgment debtor: *Turner* v. *Jones*, 1 H. & N. 878; *Clark* v. *Clark*, 8 U. C. L. J. 107; *McGinnis* v. *Yorkville*, 21 Q. B. 163, 171. Payment into Court discharges the garnishee: *Clark* v. *Clark* and *Rule* 937; and the judgment creditor will be entitled to the fund, notwithstanding the subsequent execution of a composition deed: *Culverhouse* v. *Wickens*, L. R. 3 C. P. 295; and payment under an order to pay over, will not protect the garnishee, if before paying over he has notice of the fund being claimed by another, who proves to have had the better right: *Stuart* v. *Grough*, 15 Ont. App. 299.

As to the practice where orders are made in respect of the same debt in different Counties, see *Victoria Mutual Ins. Co.* v. *Bethune*, 1 Ont. App. 398.

Attachment book to be kept

947. There shall be kept by the proper officer a debt attachment book, and in such book entries shall be made

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of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered, and otherwise; and copies of any entries made therein may be taken by any person upon application to the proper officer. J. A. Rule 377. Rules 948, 950. by proper officer.

This is identical with the Eng. R. 1875, O. 45, r. 9, (1883, R. 629).

The book provided for by R. S. O. 1877, c. 50, s. 320, and the present *Rule*, has been duly kept in the Q. B. office; but since 1866 only on two occasions have persons required any entries to be made in it.

The effect of making entries or omitting to make entries therein is nowhere stated. The book would appear to be no more than a procedure book for this particular class of proceedings, and the neglect of the officer to make entries would not prejudice the litigants.

948. In case of any judgment or order other than for the recovery or payment of money, if any difficulty shall arise in or about the execution or enforcement thereof, any party interested may apply to the Court or a Judge, and the Court or Judge may make such order thereon for the attendance and examination of any party or otherwise as may be just. *New.* Examination in other cases.

Taken from Eng. R. 1883, 611.

CHAPTER X.

PETITIONS OF RIGHT.

949. A petition of right may be entitled in one of the Divisions of the High Court, and shall name the proposed place of the trial; and such petition shall be addressed to Her Majesty in the words or to the effect of Form No. 203 in the Appendix and shall state the Christian name and surname and usual place of abode of the suppliant and of his solicitor, if any, by whom the same is presented, and shall set forth with convenient certainty the fact entitling the suppliant to relief, and shall be signed by such suppliant, his counsel or solicitor. R. S. O. 1877, c. 59, s. 3. Form of petition of right.

950. The said petition shall be left with the Provincial Secretary, in order that the same may be submitted to the Petition to be submitted to

Rules 951-955. Lieutenant-Governor for his fiat.

Lieutenant-Governor for his consideration, and in order that the Lieutenant-Governor, if he thinks fit, may grant his *fiat* that right be done; and no fee or sum of money shall be payable by the suppliant therefor. R. S. O. 1877, c. 59, s. 4.

Proceedings after fiat is obtained.

951. Upon the Lieutenant-Governor's *fiat* being obtained, a copy of the petition and *fiat* shall be left at the office of the Attorney-General, with an indorsement thereon in the words or to the effect of Form No. 204 in the Appendix, praying for an answer on behalf of Her Majesty within 28 days. R. S. O. 1877, c. 59, s. 5.

Service on person in possession of real property.

952. In case the petition is presented for the recovery of any real or personal property, or any right in or to the same, which has been granted away or disposed of by or on behalf of Her Majesty or Her Predecessors, a copy of the petition, allowance and fiat shall be served upon or left at the last or usual or last known place of abode of the person in the possession, occupation or enjoyment of the property or right, indorsed with a notice in the words or to the effect of Form No. 205 in the Appendix, requiring such person to appear thereto within 8 days, and to file his statement of defence within 14 days after the same has been so served or left as aforesaid. R. S. O. 1877, c. 59, s. 6.

Appearance.

953. It shall not be necessary to issue any *scire facias* or other process to any person so served for the purpose of requiring him to appear and file his defence to the petition, but he shall, within the time so limited, enter an appearance to the same in the words or to the effect of Form No. 206 in the Appendix, and shall file his defence or demurrer to the said petition within the time specified in such notice, or within such further time as may be allowed by the Court or a Judge. R. S. O. 1877, c. 59, s. 7.

Time for pleading or demurring.

954. The time for filing a defence or demurrer to the petition, on behalf of Her Majesty, shall be the said period of 28 days after the petition has been left as aforesaid at the office of the said Attorney-General, or such further time as may be allowed by the Court or a Judge. R. S. O. 1877, c. 59, s. 8.

Pleadings in answer to petition.

955. The petition may be answered by statement of defence or demurrer, or by both statement of defence and

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demurrer, by or in the name of Her Majesty's Attorney-General, on behalf of Her Majesty, and by or on behalf of any other person who may be called upon to file his defence thereto, in the same manner as in an ordinary action, and without the necessity for any inquisition finding the truth of such petition or the right of the suppliant; and any sufficient ground of defence in point of law or fact to the petition on behalf of Her Majesty, may be alleged on behalf of any other person so called on to defend. R. S. O. 1877, c. 59, s. 9. Rules 956-959.

956. So far as the same are applicable, and except in so far as is inconsistent with these Rules, the laws and statutes in force as to pleading, evidence, trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off and appeal, in ordinary actions, and the rules, orders, practice and course of procedure therein for the time being, shall, unless the Court or a Judge otherwise orders, be applicable to petitions of right. R. S. O. 1877, c. 59, s. 10. Rules of pleading, etc.

957. In case of a failure on the behalf of Her Majesty, or of any other person duly called upon to defend in due time, at any stage of the proceedings, the suppliant shall be at liberty to apply to the Court or a Judge for an order that the petition may be taken as confessed; and the Court or Judge may order that such petition may be taken as confessed, as against Her Majesty, or other party so making default; and in case of default on behalf of Her Majesty, and any other person called upon as aforesaid to defend, judgment may be given by the Court in favour of the suppliant. In default of defence etc., applicant to take petition *pro confesso*.

(*a*) Such a judgment may be set aside by the Court or a Judge, upon such terms as may seem proper. R. S. O. 1877, c. 59, s. 11.

958. Any issue of fact or assessment of damages to be tried or had in respect of a petition of right, shall be tried or had by a Judge without a jury. R. S. O. 1877 c. 59, s. 13. Issues to be tried by a Judge without a jury.

959. The judgment of the Court, whether given upon demurrer, upon the pleadings, or upon default in pleading, The judgment.

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Rules 960-963.

shall be that the suppliant is or is not entitled either to the whole or to some portion of the relief sought by his petition, or that such other relief may be given, and upon such terms and conditions (if any) as the Court thinks just. R. S. O. 1867, c. 59, s. 14.

When judgment to be equivalent to *amoveas manus*.

960. In cases in which the judgment, commonly called a judgment of *amoveas manus*, was formerly in England pronounced upon a petition of right, a judgment that the suppliant is entitled to relief, as hereinbefore provided, shall have the same effect as a judgment of *amoveas manus*. R. S. O. 1877, c. 59, s. 15.

Costs against suppliant.

961. The costs of all proceedings under these Rules shall be in the discretion of the Court or a Judge, and shall be recovered in the same way as in ordinary actions, save when costs are ordered to be paid by Her Majesty. *New. See* R. S. O. 1877, c. 59, ss. 16, 17.

If judgment be for relief, etc., Judge to certify to Provincial Treasurer.

962. Upon any judgment or order for the payment of costs by Her Majesty, the Judge shall and may, upon application in behalf of the party entitled to costs, after the lapse of 14 days from the making, giving or affirming of the judgment, or order, certify to the Provincial Treasurer the tenor and purport of the same, in the words or to the effect of Form No. 207 in the Appendix; and such certificate may be sent to or left at the office of the Provincial Treasurer. R. S. O. 1877, c. 59, s. 18.

963. Nothing in these Rules shall prevent a subject from proceeding by petition of right in any manner in which he might have proceeded before the 23rd day of April, 1887; nor shall anything in these Rules be construed as entitling a subject to proceed by petition of right in any case in which he would not be entitled so to proceed under the Acts passed by the Parliament of the United Kingdom before the said date. *New.* See 50 V. c. 7, s. 6.

R. S. O. 1877, c. 59, s. 20, preserves to suppliants the right to proceed as before that Act. The date mentioned in this *Rule* is that of the passing of 50 V. c. 2 (O.) which provided for the coming into force of the R. S. O. 1887.

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CHAPTER XI.

PROCEEDINGS WITHOUT WRIT.

1. Petitions, 964.
2. Administration, 965-988.
3. Partition, 989-991.
4. Property of Infants, 992-1004.
5. Devolution of Estates, 1005, 1006.
6. Summary Inquiries into Fraudulent Conveyances, 1007-1012.
7. Quieting Titles, 1013-1037.
8. Contested Municipal Elections, 1038-1044.

1. Petitions.

Petition to be indorsed with notice of hearing.

964. There shall be indorsed on every petition a notice addressed to the parties concerned, stating the time and place at which the petition is to be heard, and informing them that if they do not appear on the petition at such time and place, the Court may make such order, on the petitioner's own shewing, as shall appear just. Chy. O. 265.

When petition to be made returnable.

The day to be named for the hearing of a petition to the Court or a Judge, must be one on which the Court, or Judge, sits for such business. In the Chancery Division, petitions to the Court are taken by a single Judge in Court on Tuesdays or Wednesdays, and petitions to a Judge in Chambers on Mondays. In the other Divisions, petitions to the Court, or a Judge in Chambers, are taken on Tuesday and Friday in each week, vacation excepted. During vacation a special day is named in each week for hearing matters of urgency.

Service of petition, how made.

When the petition is required to be served on a party to an action who has not appeared, leave to serve the petition is necessary if the time for appearance has not expired: *Rule* 533. But not if the time for appearance has expired: *Rule* 532.

2. Administration.

Creditors, legatees, next of kin, heirs or devisees, may apply on motion, in Chambers for administration.

965. Any person claiming to be a creditor, or a specific, pecuniary, or residuary legatee, or the next of kin, or one of the next of kin, or the heir, or a devisee interested under the will of a deceased person may apply to the Court or a Judge upon motion, without any action being instituted, or any other preliminary proceeding, for an order for the administration of the estate, real or personal, of such deceased person. Chy. O. 467.

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Rule 965.

Applications for administration under this *Rule*.

It was formerly considered that applications for administration by motion, under Chy. Ord. 467, from which this *Rule* is taken, should be confined to simple cases, and wherever misconduct was charged, a bill should be filed: *Re Babcock*, 8 Gr., at p. 410; *Eberts* v. *Eberts*, 25 Gr. 565; *Acaster* v. *Anderson*, 19 Beav. 161; *Rump* v. *Greenhill*, 20 Beav. 512; and it was considered that under an administration order obtained on motion against an executor, no inquiry could be made as to wilful neglect and default: *Harrison* v. *McGlashan*, 7 Gr. 531; although such an inquiry could be directed where the personal representative himself obtained the order: *Ledgerwood* v. *Ledgerwood*, 7 Gr. 584. It is, however, now settled, that the inquiry as to wilful neglect and default, may be made in all cases under an administration judgment granted on motion: *Re Allen, Pocock* v. *Allen*, 9 P. R. 277; 18 C. L. J. 242; *Carpenter* v. *Wood*, 10 Gr. 354; *Sullivan* v. *Harty*, 9 P. R. 500, 19 C. L. J. 234; and it would seem that any breach of duty which is practically a matter of account, may be effectually inquired into, and dealt with, under a judgment obtained under this *Rule*. Where, however, there is any question to be determined, before a judgement for administration can properly be pronounced, the action should be commenced by writ. Thus it was held a bill must be filed where the construction of a will was necessary: *Heywood* v. *Sievwright*, 8 P. R. 79; *Franks* v. *Worth*, 35 W. R. 663; 56 L. J. Chy. 779; *Carlyon* v. *Carlyon*, 35 W. R. 155; 56 L. T. N. S. 151; where the claim was for support of wife and children of deceased, raising substantially the same question as would be raised in an alimony suit: *Re Foster, Griffith* v. *Patterson*, 20 Gr. 345; *Groom* v. *Darlington*, 9 P. R. 298; where the claim arose out of a contract of suretyship, *Re Colton*, 8 P. R. 542; see also *Re Allan*, 9 P. R. 277; and *Re Arcedeckne*, 53 L. J. Chy. 102; or where the executor is charged with misconduct: *Re Babcock*, 8 Gr. 409, that is, misconduct which would entitle the plaintiff to apply at the outset for an injunction or a receiver: *Sullivan* v. *Harty*, 9 P. R. 500; not misconduct consisting merely in not having accounted for moneys received, and which would be shewn upon the taking of accounts: *Eberts* v. *Eberts*, 25 Gr. 565, *Re McMillan*, 8 C. L. J. 285; where the plaintiff claimed to be a creditor, and his claim appeared to be barred by the Statute of Limitations, but he claimed to avoid the operation of the Statute, on the ground of fraud on the part of the testator: *Re McDonald, Cameron* v. *McDonald*, 2 Chy. Ch. 29; and where a legatee claimed administration, and it appeared that an award had been made respecting the applicant's claim, but the applicant denied being party to the reference: *Nudel* v. *Elliott*, 1 Chy. Ch. 326; and see *Groom* v. *Darlington*, 9 P. R. 298; and *Re Munsie*, 10 P. R. 98; 20 C. L. J. 112. But where the facts are not in dispute, and there is only a question of law as to the right of the applicant to sue, it would seem that such a point would be decided on a motion without putting the parties to the necessity of bringing an action: *Re Powers, Lindsell* v. *Phillips*, 30 Ch. D. 291.

Wilful neglect and default may be inquired into under judgment obtained under this *Rule*.

When writ must issue.

In *Barry* v. *Brazill*, 1 Chy. Ch. 248, special inquiries as to what would be proper to be allowed to the applicant (the widow and administratrix) for improvements made on the property, and for the maintenance of the infant children of deceased were refused, and applicant left to file a bill.

Where the application is made on motion, in a case in which the Court is of opinion that a writ should be issued, an order is usually made giving the applicant a day to commence his action, in default, the motion to be dismissed; but if the action be commenced, reserving the costs of the motion until the trial of the action: *Re McDonald, Cameron* v. *McDonald*, *supra*. But where the plaintiff commences an action, instead of applying on motion, where the latter course is proper, he will be disallowed the extra costs occasioned thereby: *Sovereign* v. *Sovereign*, 15 Gr. 559; or if it is not clear that the action was unnecessary, the question of the additional costs will be reserved until after the Master has made his report: *Eberts* v. *Eberts*, 25 Gr. 565.

Application when to be made.

Applications under this *Rule* are made in Chambers, *Rule* 542; if, however, the motion is contested, the jurisdiction of the Master in Chambers is excluded, and the motion must be adjourned before a Judge in Chambers: see *Rule* 30, s-s. 8.

Local Masters.

Applications by adults may be made for the like purpose to the Local Master having jurisdiction in the county where the deceased died: *Rule* 972. A Local Master's jurisdiction is not ousted by the motion being opposed.

Rule 966 provides that, at least, fourteen days' notice of the motion must be given. Motions for administration seem, therefore, to constitute an exception to ordinary motions which only require two clear days' notice: *Rule* 479; and see *Exchange Bank* v. *Newell*, 19 C. L. J. 253. The words "at least" require that the fourteen days be clear days: see *Rumohr* v. *Marx*, 19 C. L. J. 10. **Rule 965.** Fourteen days' notice of motion to be given.

Parties.—The provisions of *Rules* 309, 320, 321, 322 apply to proceedings under this *Rule*. All parties from whom an account is sought, should be served with notice: see *Rule* 320 note. Parties.

Creditors.—A creditor whose debt is payable, may make application for administration of his deceased debtor's estate, without waiting a year from his decease. To an application by a creditor for the administration of the personal estate, no one but the personal representative need be made a defendant: but where an administration of the realty is also sought, unless the personal representative is also interested in the realty, some one must also be made a party who is interested in the realty: *Rule* 970. Under the *Devolution of Estates Act*, the personal representative now sufficiently represents both the real and personal estate of all persons dying since 1st July, 1886, and it is not proper to make the heirs or devisees of such persons parties. But when the letters of administration are limited to the personalty, it will be necessary to get letters of administration of the realty, in order to obtain proper representation of the realty. Applications for administration by creditors. Personal representative must be served.

Where there are several personal representatives all must be served, even though some be resident out of the jurisdiction: *Re Freeborn*, *Freeborn* v. *Carroll*, 6 P. R. 188; *Latch* v. *Latch*, L. R. 10 Eq. 464. A judgment for administration could not formerly be granted as against an executor *de son tort* where there was no legal personal representative before the Court: *Rowsell* v. *Morris*, 17 Eq. 10. Nor against an executor named in the will who had not proved the will: *Outram* v. *Wyckhoff*, 6 P. R. 150. But see now *Rule* 312, as to action against an executor *de son tort:* notwithstanding *Rule* 312, where the action is brought against an executor *de son tort*, it would seem to be the better practice to commence it by writ, etc., not under *Rule* 265. See further as to parties *Rules* 320-322 note. If more than one, all must be served.

On the motion, the applicant must be prepared with proof that the defendant is the personal representative: ordinarily, the letters of administration, or letters probate, should be produced: *Re Marshall*, *Fowler* v. *Marshall*, 1 Chy. Ch. 29; *Re Israel*, 2 Chy. Ch. 392. But where the plaintiff swore that the defendant was administrator, and the fact was not disputed, production of the letters was dispensed with: *Re Bell*, *Bell* v. *Bell*, 3 Chy. Ch. 397. It is sufficient if the letters of administration be granted at any time before the hearing of the motion, even though subsequent to giving the notice: *Edinburgh Life Assurance Company* v. *Allen*, 19 Gr. 593; *Re Masonic & G. L. A. Co.*, 32 Ch. D. 373; *Trice* v. *Robinson*, 16 Ont. 433. But letters of administration obtained *pendente lite* will not relate back to the commencement of the action so as to bar the running of the Statute of Limitations: *Chard* v. *Rae*, Boyd, C., 3rd Dec., 1889. Where the motion was refused on the ground that the personal representative was not a party, only the costs necessary to raise that objection were allowed: *Irwin* v. *Buck*, 6 P. R. 183. The creditor applying must also give *prima facie* evidence of his claim as creditor: *Re Clarke*, 2 Chy. Ch. 57; and where his claim is disputed, he must establish his claim by proper evidence—his own uncorroborated evidence, is insufficient: *Vivian* v. *Westbrooke*, 19 Gr. 461; see R. S. O. c. 61, s. 10; and as to nature of corroboration required: see *Stoddart* v. *Stoddart*, 39 U. C. Q. B. 203; *Sugden* v. *Lord St. Leonards*, L. R. 1 P. D. 154, 179; *McDonald* v. *McKinnon*, 26 Gr. 12; *McKay* v. *McKay*, 31 C. P. 1; *Adamson* v. *Adamson*, 28 Gr. 228; *Brown* v. *Capron*, 24 Gr. 91; *Halleran* v. *Moon*, 28 Gr. 319; *Re Laws*, *Laws* v. *Laws*, *Ib.*, 382; *Re Robbins*, 23 Gr. 162; *Re Ross*, 29 Gr. 385; 18 C. L. J. 11; *Parker* v. *Parker*, 32 C. P. 113; *Watson* v. *Severn*, 6 App. R. 559; *Watson* v. *Bradshaw*, *Ib.*, 666; *Cook* v. *Grant*, 32 C. P. 511; *Re Murray*, 29 Gr. 443; 9 Ont. App. 369; *Burn* v. *Burn*, 8 Ont. 237; *Tucker* v. *McMahon*, 11 Ont. 718; *Hogg* v. *Maguire*, 11 Ont. App. 507. Evidence required on application. Proof of grant of probate, or administration. Proof of applicant's claim. Corroboration must be given if contested.

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Rule 695.

A partnership creditor suing for the administration of the estate of a deceased partner must join the surviving partner as a party, even though he is insolvent: *Re McCrae, Forster* v. *Davis*, 25 Ch. D. 16; 49 L. T. N. S. 544.

Applicant must be creditor of the deceased.

The creditor must be a creditor of the deceased person whose estate is sought to be administered. Where the applicant was merely a creditor of the personal representative for advances made to him as such, the application was refused: *Campbell* [illegible], 16 Gr. 115; *Farhall* v. *Farhall*, L. R. 7 Chy. 123; *Re Pettee, McKinnon* [illegible], 6 P. R. 157; *Owen* v. *Delamere*, L. R. 15 Eq. 134; *Ewart* v. *Steven*, [illegible]; Seton, 916; and see *Henry* v. *Sharp*, 18 Gr. 16. Creditors, whose debts are incurred by the executor, in carrying on a business of his testator, are entitled to indemnity out of the deceased's estate to the extent, if any, which the executor is entitled: *Re Johnson, Shearman* v. *Robinson*, 15 Ch. D. 548; 43 L. T. N. S. 379; and a plaintiff, who had made advances to pay the debts of a deceased person, to save the estate the costs of suits to recover them, was held entitled to administration: *Glass* v. *Munsen*, 12 Gr. 77; see also, *Mills* v. *Cottle*, 17 Gr. 335; *Strickland* v. *Symons*, 48 L. T. N. S. 188; which were cases of advances to trustees.

A judgment for administration cannot be set aside on the ground that the applicant was not a creditor, after other creditors have proved under it: *Re Cannon, Oates* v. *Cannon*, 13 Ont. 70.

Effect of judgment for administration as to claims of other creditors.

A judgment for administration, is equivalent to a judgment in favour of all the creditors of the estate, but creditors who are not parties to the action, can only claim the benefit of it from its date, as to the claims of the latter, the running of the Statute of Limitations is not stopped, until the judgment is obtained: *Re Cannon, Oates* v. *Cannon*, 13 Ont. 705; *Re Greaves, Bray* v. *Tofield*, 18 Ch. D. 551; 45 L. T. N. S. 464; *Manby* v. *Manby*, 3 Ch. D. 101; but see *Crooks* v. *Crooks*, 4 Gr. at p. 619. The judgment, however, does not prevent the Statute from running in favour of debtors to the estate: *Archer* v. *Severn*, 12 Ont. 615; 14 Ont. App. 723.

Statute of Limitations.

The personal representative is not bound to set up the Statute of Limitations as a bar to a creditor's claim: *Lewis* v. *Rumney*, L. R. 4 Eq. 451; and if the personal representative, and such of the parties beneficially interested, as are parties to the suit, or who have come in under the judgment, do not set up the Statute, the Court is not bound, on behalf of absent parties benefically interested, to disallow claims against the estate which are barred by the Statute: *Alston* v. *Trollope*, L. R. 2 Eq. 205. But although the personal representative may refuse to set up the Statute as against the claim of a creditor of the estate, yet any party interested in the estate, whether as creditor, legatee, or next of kin, may set it up as a bar to the claim: *Shewen* v. *Vanderhorst*, 1 R. & M. 352. And though a personal representative may pay, or retain, debts barred by the Statute, though otherwise justly due, he cannot properly pay, or retain a debt due under a promise which cannot be enforced by reason of its not being in writing under the Statute of Frauds: *Re Rownson, Field* v. *White*, 29 Ch. D. 358; 52 L. T. N. S. 825. An order for the administration of the estate of the owner of the equity of redemption, does not stop the running of the Statute in favour of the mortgagee in possession: *Crooks* v. *Watkins*, 8 Gr. 340. Where a cause of action accrues in the lifetime of the creditor, the Statute begins to run against him, and continues to run against his estate, notwithstanding there is no executor, or administrator; but where the cause of action does not accrue until after his death, then the time does not begin to run until there is a personal representative: *Grant* v. *McDonald*, 8 Gr. 468; *Stevenson* v. *Hodder*, 15 Gr. 570. A claim cannot be kept alive by any acknowledgment or payment by an executor *de son tort*: *Ib.*, *Boatwright* v. *Boatwright*, L. R. 17 Eq. 71.

As to staying creditor's action when an administration order has been granted, see *Re Langtry* 18 Gr. 530; *Re Henderson*, 26 Gr. 297; *Bailey* v. *Monteith*, 3 C. L. T. 599; *Henderson* v. *Maxwell*, 19 L. R. Ir. 225; *Monteith* v. *Merchants Bank*, 4 C. L. T. 41; *Harrison* v. *Stubb*, W. N. 1878, 79; *Re Tims*, W. N., 1878, 141.

In *Re Womersley, Etheridge* v. *Womersley*, 29 Ch. D. 557, the Court refused to restrain a creditor who had recovered judgment previously to the administration order, from proceeding against the execution personally.

A personal representative cannot set up his own devastavit and claim that the Statute of Limitations bars any claim against him by reason of such devastavit; but if he is sued for a devastavit, he may rely on the Statute as a bar: *Re Hyatt, Bowles* v. *Hyatt*, 38 Ch. D. 609; 59 L. T. N. S. 297. **Rule 966.**

Proceedings by a creditor may be stayed on the application of any person interested in the estate, on payment of his claim and costs: *Fitten* v. *Dawson*, 3 Chy. Ch. 461; *Re Henderson*, 26 Gr. 297; 15 C. L. J. 132.

Where some defendants in an administration action by a creditor offered to satisfy the plaintiff's claim and the costs of the action, the Court refused to stay proceedings unless the rights of an infant defendant were provided for; *Clegg* v. *Clegg*, 17 L. R. Ir. 118.

After judgment for administration, a creditor cannot counter-claim in an action of trespass brought against him by the personal representative, for a debt due by the deceased to him: *Monteith* v. *Walsh*, 10 P. R. 162; 20 C. L. J. 71.

Legatees, Next of Kin, etc.—Applications by legatees, or next of kin, for administration cannot be made until the lapse of a year from the death of the deceased: 33 Geo. 3 c. 8 (Imp.) *Slater* v. *Slater*, 3 Chy. Ch. 1; *Vivian* v. *Westbrooke*, 19 Gr. 461; *Grant* v. *Grant*, 9 P. R. 211; but see *contra Wallis* v. *Wallis*, 9 Ir. Chy. 511; *Prosser* v. *Mossop*, 29 W. R. 430; which were not followed in *Re Morley, Tucker* v. *Morley*, Sept. 1882, by Proudfoot, J. When the action is brought unnecessarily, the legatee may be ordered to pay the costs of all parties: *Re Woodhall, Garbutt* v. *Hewson*, 2 Ont. 456. Wherever a legatee, if alive, may apply, his personal representative, in case of his death, can also apply: *Simpson* v. *Horne*, 28 Gr. 1. As to parties to application by legatees: see *Rule* 320 note. An application for administration by an infant, by his next friend, was granted on the mere suggestion that it would be for his benefit: *Re Wilson, Lloyd* v. *Tichborne*, 9 P. R. 89; but where the ground of motion was that strangers had got possession of most of the estate, an order was refused, there being no allegation that the executor refused to account or was colluding, and the Court thought he ought to apply for the order if it were necessary: *Re Dearing, Mitchell* v. *Dearing*, 12 June, 1882, Proudfoot, J.; see also *Re Blake*, 29 Ch. D. 913. But where it turned out that a suit had been brought unnecessarily by an infant, his next friend was ordered to pay the costs of it: *Hutchinson* v. *Sargent*, 17 Gr. 8; *McAndrew* v. *Laflamme*, 19 Gr. 193; *Moodie* v. *Leslie*, 12 Gr. 537; and see *Re Johnston, Johnston* v. *Hogg*, 25 Gr. 261; *Carroll* v. *Carroll*, 23 Gr. 438; *Re Blake*, 29 Ch. D. 913. Applications for administration by legatees, or next of kin, cannot be made until lapse of a year from death. Personal representatives of deceased legatee may apply.

An administration suit should not be instituted on behalf of infants, where the object is simply to obtain an allowance for their maintenance out of the estate, which can be as readily got by application under *Rule* 992 *et seq.*: *Fenwick* v. *Fenwick*, 20 Gr. 381; *Goodfellow* v. *Rannie*, *Ib.*, 425.

966. The notice of motion is to be served upon all proper parties at least 14 clear days before the day named for hearing the application, and is to be in the form or to the effect set forth in Form No. 12 in the Appendix, and must be served upon the executor or administrator. Chy. O. 468, 552, 561. Fourteen days' notice of motion. Form of notice.

Where the motion is to be made before the Master in Chambers, the notice should be varied to the following effect, *e.g.*, "Take notice that an application will be made to the Master in Chambers, on etc.; or, if opposed, then to a Judge in Chambers, as soon thereafter as a Judge shall be sitting in Chambers in the —Division, etc." See *Rule* 30, s. 8.

Where infants are intended to be served with notice of the motion, a guardian *ad litem* must be appointed to them. The procedure provided by *Rule* 258, for the appointment of guardians *ad litem* to infant defendants, made parties by writ, does not appear to be explicitly extended to applications for administration under these *Rules*. But see *Rule* 252, and *Re Pepper, Pepper* v. *Pepper*, *supra*, p. 288. It is possible, however, that under *Rule* 3 it may be Guardian *ad litem* to infant defendants, how to be appointed.

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Rule 967. held that the Official Guardian *ad litem* is to be served with the notice of the application and will thereupon become guardian *ad litem* to the infant on whose behalf he is served, by analogy to the practice prescribed by *Rule* 258, but until this is decided it would appear to be safer to obtain an order appointing a guardian *ad litem* to infant parties.

Heir and devisee when to be served.

Where the administration of the realty is sought, notice must be given to the heirs, or devisees, or one or more of them: *Rule* 970; unless under *The Devolution of Estates Act* the personal representative also represents the realty: next of kin, and legatees need not be served with the notice of the motion, but they must be served with an office copy of the judgment, as prescribed by *Rule* 322. See note to that *Rule*.

The words "at least," indicate that the notice is to be fourteen clear days: *Rumohr* v. *Marx*, 3 C. L. T. 31.

Upon proof of service of notice, or on appearance of personal representative, etc., order for administration may be granted.

967. Upon proof by affidavit of the due service of the notice of motion, or on the appearance in person, or by his solicitor or counsel, of the executor or administrator, and upon proof by affidavit of such other matter, if any, as the Court requires, the Court may make the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case require; and the order so made is to have the force and effect of a judgment to the like effect made at the trial of an action between the same parties. Chy. O. 469.

The affidavit on which the application is founded should be filed with the proper officer, before the notice of motion is served.

Evidence in support, how obtained.

The affidavits should establish the facts and circumstances necessary to entitle the applicant to the administration. As to obtaining oral evidence in support of the motion: see *Rule* 578; see further as to the evidence required: *Rule* 965. A commission may be issued after notice of motion served, for the purpose of obtaining evidence in support of the motion: *Farrell* v. *Cruikshank*, 1 Chy. Ch. 12.

Order for administration entered as a judgment.

The order for administration is now in effect a judgment, and is to be drawn up and entered, as required in the case of other judgments: see *Rule* 546. But in *McHenry* v. *Lewis*, 21 Ch. D. 202; 47 L. T. N. S. 549, an interlocutory order for an account without any declaration of right was held not to be a judgment. But that case it is apprehended does not interfere with the practice as above stated; because an order for administration can only be properly granted after an adjudication on the question of the applicant's right to the account claimed. Where any preliminary question has to be determined, as has been already pointed out, the Court will generally require an action to be brought: see *Rule* 965, note.

Where the personal representative has distributed the estate, after duly advertising under R. S. O. c. 110, s. 36, that is an answer to the application: see *Rule* 320, note, p. 348. *Re Brackin, Doughty* v. *Townson*, 61 L. T. N. S. 531.

Application refused when estate trifling.

The fact that the estate was small, and that no misconduct was imputed to the executors, and that it was unadvisable to incur expense, was held to be no ground for refusing the application of a legatee for administration: *Re Falconer*, 1 Chy. Ch. 273. Where, however, the executor swore that the personal estate did not exceed $50, the Court, before granting the order, required the applicant, who was one of the residuary legatees, to file an affidavit stating that he had reason to believe, and did believe, that the result of the proceedings would show a substantial balance to be divided among the legatees: *Foster* v. *Foster*, 19 Gr. 463; and see *Westbrook* v. *Browett*, 17 Gr. 339; *Shaw* v. *Freedy*, 8 C. L. J. 136; *Gilbert* v. *Braithwait*, 3 Chy. Ch. 413.

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Administration was refused on the application of a legatee whose claim only amounted to $28, although it was alleged that other claims to a considerable amount remained unpaid: *Reynolds* v. *Coppin*, 19 Gr. 627. And an application by a partnership creditor was refused, where it was shewn that the separate estate of the deceased was insufficient to pay his separate creditors: *Re Barnard, Edwards* v. *Barnard*, 32 Ch. D. 447; 55 L. T. N. S. 40. Rules 968, 969. Or claim of applicant under $40.

The reference should be *primâ facie* directed to the Master of the county where the person whose estate is to be administered resided: *Thompson* v. *Fairbairn*, 10 P. R. 533.

968. The Court is to give any special directions touching the carriage or execution of the order, which it deems expedient; and in case of applications for an order by two or more persons, or classes of persons, the Court may grant the same to such one or more of the claimants as it thinks fit; and the carriage of the order may be subsequently given to any party interested, and upon such terms as the Court may direct. Chy. O. 470. Special directions may be given respecting carriage of order, etc. Carriage of order may be subsequently changed.

Where two or more applications are made by different persons under this *Rule*, only one judgment for administration should be granted; and the Court may determine which of the applicants shall have the carriage of it. The rule being to give the conduct of the proceedings *ceteris paribus* to the party most interested in prosecuting them properly and economically: *Perrin* v. *Perrin*, 3 Chy. Ch. 452; *Re Adams, Adams* v. *Muirhead*, 6 P. R. 283; *Re Draygon*, 8 P. R. 330; *Re Prime*, 48 L. T. N. S. 208; *Penny* v. *Francis*, 7 Jur. N. S. 248; but see *Re Swire, Mellor* v. *Swire*, 46 L. T. N. S. 437. The conduct was given to the first applicant in *Re West, West* v. *Falkiner*, 7 C. L. T. 85. The carriage of the judgment may be changed in case of delay: *Patterson* v. *Scott*, 4 Gr. 145; and see *Rules* 45, 50, and notes. As between a separate creditor and a partnership creditor of the person whose estate is to be administered, the conduct of the proceedings is given to the former: *Re McRae, Forster* v. *Davis*, 25 Ch. D. 16; 48 L. T. N. S. 544. Several applications—only one judgment should be granted.

969. An order for the administration of the estate of a deceased person may be obtained by his executor or administrator, and all the provisions of the foregoing Rules are to extend to applications by an executor or administrator. Chy. O. 471. Order may be obtained by personal representative.

Where the application is made by the personal representative, it may be made *ex parte*: *Re Dunlevy*, Esten, V.C., 16th May, 1861, Ord. B. 11, fo. 778; *Re Ette*, 6 R. P. 159. But where no sufficient ground was shown for making the order, it was refused: *Barry* v. *Barry*, 19 Gr. 458; and it is clear that the personal representative cannot apply for administration merely to obtain an indemnity by passing his accounts: *White* v. *Cummins*, 3 Gr. 602; *Cole* v. *Glover*, 16 Gr. 392.

How far a deficiency of assets justifies a personal representative applying for administration is the subject of some doubt. In 1874 orders were made on that ground, on the application of the personal representative, in *Swetnam* v. *Swetnam*, 6 P. R. 149, and *Re Ette*, *Ib.* 159. But in the subsequent cases of *Re Shipman, Wallace* v. *Shipman*, 24 Gr. 177; Blake, V.-C., said that the reasons which existed for making the order in *Re Ette* no longer held good, and that the personal representative, on being sued at law, could set up the deficiency of assets, and claim administration under *The Administration of Justice Act*. That Act, however, was in force when *Swetnam* v. *Swetnam* and *Re Ette* were decided. In 1877 in *Marsh* v. *Marsh*, 7 P. R. 126, Spragge, C., held that the course pointed out in *Re Shipman* should be followed, and refused the order; Deficiency of assets, how far it justifies application by personal representative.

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Rule 970.

and in *Re Jack, Jack* v. *Jack*, 13 C. L. J. 358, Proudfoot, V.-C., did the same. On the other hand, in *Re Bromley*, before Blake, V.-C., 28th January, 1878, the order was granted, the applicant having been sued by one creditor in the Division Court, and another creditor having written to him, urging him to obtain the order.

As to the grounds justifying a personal representative obtaining administration, see further *Rule* 320 note.

An executor, who has suffered a creditor of the estate to recover judgment against him by default of appearance, cannot, on subsequently obtaining a judgment for administration, restrain the creditor from proceeding on his judgment, even though there be a deficiency of assets: *Doner* v. *Ross*, 19 Gr. 229; and see *Hutchinson* v. *Edmison*, 11 Gr. 477.

On deficiency of assets, personal representatives must distribute *pari passu* among creditors.

It is the duty of an executor, on a deficiency of assets, to pay all creditors *pari passu*; and even his right of retainer cannot be set up so as to give his own debt any preference, but the lien of any creditor on the real or personal estate, created in the lifetime of the deceased, is not to be prejudiced by this rule: R. S. O. c. 110, s. 32; *Meyers* v. *Meyers*, 20 Gr. 185; *Willis* v. *Willis*, 29 Gr. 296; *Re Ross*, 29 Gr. 385; foreign creditors are entitled to the same rights as creditors living within the jurisdiction: *Re Klabe, Kaunreuther* v. *Geiselbrecht*, 28 Ch. D. 175; 21 C. L. J. 155, a creditor who has recovered execution against the executor has no priority: *Bank of British North America* v. *Mallory*, 17 Gr. 102; and debts due by the deceased as trustee form no exception to the rule: *Brock* v. *Cameron*, 25 Gr. 369. And it would seem, notwithstanding what is said by Mowat, V.C., in *Doner* v. *Ross*, *supra*; that creditors who have been overpaid may be compelled to refund, on the application of a creditor who has not received his due proportion: *Chamberlain* v. *Clarke*, 1 Ont. 135; 9 Ont. App. 273. But a creditor's claim against a legatee or creditor, who has been overpaid, to compel him to refund, will be barred in six years from the time of the overpayment, notwithstanding that the creditor's claim against the testator's estate is not barred; *Blake* v. *Gale*, 31 Ch. D. 196. This case was subsequently affirmed by the Court of Appeal, however, on the ground that the creditor had acquiesced in the overpayment: 55 L. T. N. S. 234.

Creditors overpaid, may be compelled to refund.

Suit improperly brought, or occasioned by personal representatives, costs of.

Where an executor improperly institutes a suit for administration he may be ordered to pay the costs of it: *Sullivan* v. *Sullivan*, 16 Gr. 94; or he may be refused his costs and commission: *Graham* v. *Robson*, 17 Gr. 310; and where he improperly renders a suit necessary by a creditor, he may also be ordered to pay the costs of it: *McGill* v. *Courtice*, 17 Gr. 271.

No accounts to be ordered of realty, unless heir, or devisee served.

970. No accounts or inquiries in respect of the real estate are to be directed, unless notice of the application has been given to the heirs and devisees interested therein, or one or more of them. Chy. O. 472.

This *Rule* is merely declaratory of what has before been the practice of the Court: *Eccles* v. *Lowry*, 23 Gr. 172, *per* Proudfoot, V.-C.

In case of intestacy, one or more of heirs must be notified.

In case of an intestacy of a person who died before 1st July, 1886, the heir, or one or more of the heirs, must be a party, or parties, to the application, either as plaintiff, or defendant: *Tiffany* v. *Tiffany*, 9 Gr. 158; but it is not necessary, where there are several, that all should be joined as defendants: *English* v. *English*, 12 Gr. 441; and in case of a person who died before 1st July, 1886, leaving a will, it is sufficient to make one, or more, of the devisees, a party, or parties: *Tiffany* v. *Thompson*, 9 Gr. 244; where the executor was also devisee of part of the realty, it was held that he sufficiently represented the other parties interested in the realty: *Stewart* v. *Hunter*, 14 Gr. 132; where a devisee is a party, it is not necessary that the heir should be joined: *Fenny* v. *Priestman*, 1 Gr. 133.

Or in case of testacy, one or more of devisees.

On deficiency of assets, heir entitled to costs as between solicitor and client.

Where, in an administration action, it is necessary to make the heir a party defendant, he is entitled to be paid his costs as between solicitor and client, in priority to the costs and claims of creditors, although the estate may be insufficient for the payment of the debts: *Hartrick* v. *Quigley*, 21 Gr. 287; *Tardrew* v. *Howell*, 2 Giff. 530.

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Rules 971-972.

In the case of persons dying since the 1st July, 1886, the personal representative, who has obtained administration of both real and personal estate, sufficiently represents the real estate: see R. S. O. c. 50, s. 58; *Ib.* c. 108, s. 4.

A judgment for the administration of the realty alone will not be granted, unless the personal estate has been previously administered: *Rowsell* v. *Morris*, L. R. 17 Eq. 20; *Re Armour, Moore* v. *Armour*, 10 P. R. 448; but see *Dey* v. *Dey*, 2 Gr. 149.

Parties to be served with judgment.

Although it is not necessary to serve all the parties interested in the realty with notice of the application for administration, they must, nevertheless, all be served in the Master's office with an office copy of the judgment as prescribed by *Rule* 322: see note to that *Rule*; parties who are not served will not be bound by the accounts: *Norris* v. *Bell*, 9 Gr. 23; *May* v. *Newton*, 34 Ch. D. 347. A party improperly served may move to set aside the service: *Re Symons, Betts* v. *Betts*, 54 L. T. N. S. 501.

Accounts of realty may be directed by supplemental order.

971. After inquiries directed in respect of the personal estate, the Court may, in a proper case, after notice given to those interested in the real estate, or to one or more of them, make a supplemental order in respect of the real estate, upon such terms as the Court sees fit. Chy. O. 473.

Where administration of realty required, order may be made in first instance.

It is now customary, whenever an administration of the realty is likely to be required, to serve all the parties necessary to be served, in order to obtain an administration of both realty and personalty, and a judgment is then awarded for the administration of both the realty and personalty. And whenever the realty is the primary fund for the payment of debts, it is absolutely necessary that this should be done.

As to the parties to be notified in order to obtain an administration of the realty, see note to preceding *Rule*.

Adult person may apply to Local Master for administration of deceased person's estate. Notice requisite.

972. Any adult person entitled to apply, under Rules 965 or 969, for an administration order may apply to the Master in the County town of the County (other than the County of York) where the deceased person, whose estate it is desired to administer, resided at the time of his death; and the Master may, on 14 clear days' notice being given to the person or persons entitled to notice of such an application, make an order for the administration of, and proceed to administer such estate in the least expensive and most expeditious manner. Chy. O. 638.

Master cannot entertain applications by infants.

The jurisdiction of the Local Masters under this *Rule* is confined to applications made by adult persons: where an administration of an estate is sought on behalf of an infant, or where the person whose estate is to be administered died in the County of York, the application must be made in Chambers at Osgoode Hall; or in some cases it may be necessary to commence an action by writ for that purpose.

Personal representative when to be served.

When the application is made by persons claiming as creditors, or as specific, pecuniary, or residuary, legatees, or next of kin, notice must be served on the personal representative of the deceased person whose estate is sought to be administered; and where an administration of the realty is required, unless the applicant himself be entitled to some interest therein, some one or more of the heirs or devisees interested therein must be served with notice of the application: *Rule* 970.

In cases of estates in the County of York, there would seem to be no power given, even to a Judge in Chambers, to make the order contemplated by this *Rule* for the winding up of the estate without reserving further directions. In

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Rule 972. such case the order which may be made would seem to be an order for inquiries reserving further directions and costs: see App. Form 187, and it will be made under *Rules* 30 and 965, before the Master in Chambers unless opposed.

Application may be made, though wilful neglect and default charged.

Chy. Ord. 467, under which similar applications were authorized to be made, was formerly held to apply to simple cases only, and where executors were charged with misconduct, it was held that a bill must be filed, but a different construction was subsequently placed on that Order; the earlier cases proceeded to some extent on the ground that under the common order for administration, an inquiry as to wilful neglect and default could not be made, unless the order were obtained by the personal representative himself: *Harrison* v. *McGlashan*, 7 Gr. 531; *Ledgerwood* v. *Ledgerwood*, *Ib.* 584; but it is now held that the inquiry as to wilful neglect or default, may be made in all cases, and therefore it is no longer a sufficient reason for not proceeding by summary application instead of by action, that an inquiry as to wilful neglect and default is required: *Re Allen*, *Pocock* v. *Allen*, 9 P. R. 277; as to cases in which it is proper to commence an action for administration by writ: see note to *Rule* 965.

Writ of summons where necessary.

Costs, where writ issued unnecessarily.

When a plaintiff unnecessarily issues a writ for administration, instead of applying for a judgment on notice, he is not entitled to the extra costs thereby occasioned: *Sovereign* v. *Sovereign*, 15 Gr. 559; and where it is not clear whether the proceeding by writ is unnecessary the costs will be reserved until further directions: *Eberts* v. *Eberts*, 25 Gr. 565.

Administration when estate of trifling amount.

When the estate in question is small, a suit for administration should not be brought until all reasonable means of avoiding the suit have been exhausted; and where a next friend of an infant brought a suit for administration, without having taken steps to avoid litigation, and the suit afterwards appeared to have been unnecessary, he was ordered to pay the costs of the suit: *Hutchinson* v. *Sargent*, 17 Gr. 8; *McAndrew* v. *Laflamme*, 19 Gr. 193; *Mackie* v. *Leslie*, 12 Gr. 537; and see *Re Johnston*, *Johnston* v. *Hogg*, 25 Gr. 261; *Carroll* v. *Carroll*, 23 Gr. 438.

Where an executor in answer to an application for administration swore that the personal estate had not exceeded $50, the Court before it would make an order for administration, required the applicant to file an affidavit stating that he had reason to believe, and did believe, that the result of the proceedings would show a substantial balance of personal estate to be divided among the legatees: *Foster* v. *Foster*, 19 Gr. 463.

Administration was refused on the application of a legatee whose claim, including interest on his legacy, only amounted to $28, notwithstanding that it was alleged that other legacies remained unpaid, which amounted to a considerable amount: *Reynolds* v. *Coppin*, 19 Gr. 627; and see *Re Johnston*, *Johnston* v. *Hogg*, 25 Gr. 261.

Creditor, legatee, or next of kin, bringing unnecessary suit—costs.

And where a creditor brings an administration suit, after being informed that there are no assets applicable to the payment of his claim, if the information appear by the result to be substantially correct, he may have to pay the costs of the suit: *The City Bank* v. *Scatcherd*, 18 Gr. 185; and so also a next of kin, or residuary legatee, unnecessarily bringing a suit, may be ordered to pay the costs of it: see *Parsill* v. *Kennedy*, 22 Gr. 417; *Re Woodhall*, *Garbutt* v. *Hewson*, 2 Ont. 456; so also a trustee: *Re Cabburn*, 46 L. T. N. S. 848.

Legatee, or next of kin, cannot apply until lapse of a year from death.

A legatee, or next of kin, cannot apply for administration until the expiration of a year from the death of the person whose estate is sought to be administered: *Slater* v. *Slater*, 3 Chy. Ch. 1; *Vivian* v. *Westbrooke*, 19 Gr. 461; *Grant* v. *Grant*, 9 P. R. 211; but see *contra*, *Wallis* v. *Wallis*, 9 Ir. Chy. 511; *Prosser* v. *Mossop*, 29 W. R. 439.

Where land is devised subject to the payment of an annuity, so long as the annuity is promptly paid the annuitant cannot claim to have the land sold; *Re Potter*, *Potter* v. *Potter*, 50 L. T. N. S. 8; and where a will creates a life estate in chattels, the executor is discharged when he hands over the chattels to the tenant for life; the latter, and not the executor, then becomes liable to the remainderman: *Re Munsie*, 10 P. R. 98; 20 C. L. J. 112.

Rule 972. When the application is made by a creditor, whose claim is disputed, he must establish his debt by proper evidence, his own uncorroborated affidavit is not sufficient: *Vivian* v. *Westbrooke*, 19 Gr. 461.

Creditor must prove his claim.

Residuary legatee bringing unnecessary suit.

A suit unnecessarily brought by a residuary legatee claiming, but failing to establish himself, to be a creditor, was on further directions dismissed with costs: *Re Johnston, Johnston* v. *Hogg*, 25 Gr. 562; and see *Re Woodhall*, 2 Ont. 456; and a residuary legatee of money and stocks, subject to a prior estate for life, is not entitled, as of course, to have the property brought into Court to be administered; and where the fund is invested in the names of proper trustees, and in proper securities, the Court will refuse to interfere: *Re Braithwaite, B.* v. *Wallis*, 21 Ch. D. 121; 48 L. T. N. S. 857.

Application by personal reps.

Where the personal representative makes an application for the administration of the personal estate, the application may be granted *ex parte*: *per* Esten, V.C., *Re Dunlevy*, see Order Book 11, fo. 778: *Re Ette*, 6 P. R. 159; *Re Bromley*, before Blake, V.C., 28th January, 1878.

There appears to be some conflict of authority as to whether a deficiency of assets, for the payment of debts, is a sufficient ground for the personal representative to apply to the Court for administration; see cases cited *ante* in note to *Rule* 965.

Suit to obtain indemnity against covenants in lease.

The personal representative is entitled to bring a suit for administration in order to obtain an indemnity in respect to leasehold estates: *Re Bosworth, Howard* v. *Easton*, 45 L. T. N. S. 136; but he has no right to institute a suit for administration merely to obtain an indemnity by passing his accounts: *White* v. *Cummins*, 3 Gr. 602; *Cole* v. *Glover*, 16 Gr. 392; *Barry* v. *Barry*, 19 Gr. 458; and he may be refused his costs of a suit if unnecessarily brought: *Graham* v. *Robson*, 17 Gr. 318; *Springer* v. *Clarke*, 15 Gr. 664; but see *Farrow* v. *Austen*, 18 Ch. D. 58; 45 L. T. N. S. 227; *Re McClellan, McClellan* v. *McClellan*, 29 Ch. D. 495; 52 L. T. N. S. 741; or he may be ordered to pay the costs of the suit; *Sullivan* v. *Sullivan*, 16 Gr. 94; *Re Dineen, Hughes* v. *Dineen*, before Boyd, C., 13th May, 1884; or the costs of a suit brought by a creditor or legatee, rendered necessary by the action of the executor: *McGill* v. *Courtice*, 17 Gr. 271; *Re Radcliffe, Pearse* v. *Radcliffe*, 44 L. T. N. S. 96; 50 L. J. Chy. 317; *Killins* v. *Killins*, 29 Gr. 472. An application was held proper where one of the legatees was absent from the Province and the executor has taken proper steps to find him, and could not get a discharge without coming to the Court: *Re Wade*, 18 Gr. 485. So also executors have been charged with so much of the costs of the reference as were incurred in establishing charges against them which they disputed: *Stewart* v. *Fletcher*, 18 Gr. 21; *Smith* v. *Roe*, 11 Gr. 311; *Bald* v. *Thompson*, 17 Gr. 154; and see *Ashbough* v. *Ashbough*, 10 Gr. 433. But an executor may be allowed his costs though he have committed a breach of trust, if the estate has suffered no loss: *Wiard* v. *Gable*, 8 Gr. 458. But a personal representative in default was held not entitled to costs until he had made good his default: *Re Bashan, Hannay* v. *Basham*, 23 Ch. D. 195; 48 L. T. N. S. 476; *McEwan* v. *Crombie*, 25 Ch. D. 175; 49 L. T. N. S. 499. In *Tebbs* v. *Carpenter*, 1 Mad. 290, it was laid down that if the suit would have been proper, and the executor a necessary party, if the executor had not misconducted himself, he ought not to pay all the costs of the suit, though in the course of the suit it appears he has misconducted himself; but if the misconduct of the executor was the sole occasion of the suit, he ought then to pay the costs. This rule was approved in *Smith* v. *Rowe*, 11 Gr. 321; and *Simpson* v. *Horne*, 28 Gr. 1; but see remarks in the latter case at p. 9.

Personal representative may be ordered to pay costs of unnecessary suit, or of suit rendered necessary by his misconduct.

Where the guardian *ad litem* of an infant defendant had made no objection to the unnecessary proceedings, no costs were given either to the executors or the guardian, of such proceedings: *Springer* v. *Clark*, 15 Gr. 664.

All the personal reps. to be notified.

Where there is more than one personal representative all must be notified, notwithstanding that one of them be resident out of the jurisdiction: *Re Freeborn, Freeborn* v. *Carroll*, 6 P. R. 188. A judgment for administration formerly could not be made against an executor *de son tort*, where there was no legal personal representative before the Court: *Rowsell* v. *Morris*, 17 L. R. Eq. 20; *Outram* v. *Wyckoff*, 6 P. R. 150; *Re Colton, Fisher* v. *Colton*, 8 P. R. 542; but see now *Rule* 312. A creditor making an application must be a creditor of

Executor, *de son tort*.

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Rules 973, 974.

the deceased person, and not merely a creditor of his executor or administrator; thus, an application by a person who had made advances to the executor was refused: *Campbell* v. *Bell*, 16 Gr. 115; *Farhall* v. *Farhall*, 7 L. R. Chy. 123; *Re Pettee, McKinley* v. *Beadle*, 6 P. R. 157; *Ewart* v. *Steven*, 18 Gr. 35; *Mills* v. *Cottle*, 17 Gr. 335; *Hughes* v. *Hughes*, 6 Ont. App. 378; but see *Henry* v. *Sharp*, 18 Gr. 16, where a decree was made by consent. A plaintiff who had made advances to pay debts of a deceased person to save the estate the costs of suits to recover the same, was held entitled to administration: *Glass* v. *Munsen*, 12 Gr. 77.

In simple cases only one report necessary.

In simple cases, where all parties interested are represented before the Master, it would be possible, under this and the following *Rules*, for the Master to defer making any report until the accounts were taken and the estate realized, and then by one general report to wind up all matter connected with the estate, and this course is pursued wherever practicable.

Master may give special directions as to conduct of proceedings.

Under *Rule* 968 the Master would have power to give any special directions he might think proper respecting the carriage of the judgment, where there are conflicting claims, and also to transfer its carriage from one party to another, if occasion should require. The rule being to give the conduct of the proceedings *ceteris paribus*, to the party most interested in prosecuting them properly and economically: *Perrin* v. *Perrin*, 3 Chy. Ch. 452; *Re Draygon*, 8 P. R. 330; and see *Re Adams, Adams* v. *Muirhead*, 6 P. R. 283; *Lambier* v. *Lambier*, 9 P. R. 422; *Re Prime*, 48 L. T. N. S. 208; see, however, *Re Swire, Mellor* v. *Swire*, 46 L. T. N. S. 437; *Townsend* v. *Townsend*, 23 Ch. D. 100; 48 L. T. N. S. 694, *Re West, West* v. *Falkiner*, 9 C. L. T. 85, where it was held that the party first originating proceedings was entitled to the conduct.

The administration of two estates may be consolidated, where intimately connected: *Re Adams, Adams* v. *Muirhead*, 6 P. R. 283.

For form of judgment on applications under this *Rule*, see App. Form No. 185.

The order made on any application is to be drawn up and entered as a judgment: *Rule* 546.

Master to have full power to deal with realty and personalty, and dispose of costs, etc.

973. The Master shall have full power to deal with both the realty and personalty of the estate, the subject of administration, and shall dispose of the costs of the proceedings, and shall finally wind up all matters connected with the estate, without any further directions, and without any separate, interim, or interlocutory reports, or orders, except where the special circumstances of the case absolutely call therefor; and in so doing he shall be guided by the practice in the administration of estates upon an application made in Chambers for an administration order.

This *Rule* was formerly a part of Chy. Ord. 639. See note to following *Rule*.

Moneys realized to be paid into Court, and not paid out except on Judge's order.

974. All moneys realized from the estate shall at once be paid into Court, and no moneys shall be distributed or paid out for costs or otherwise, without an order of a Judge in Chambers or the Court, and on the application for such order, the Judge may review, amend, or refer back to the Master his report or order, or make such other order as he deems proper, and no order for payment out shall be made until the purchaser has

consented thereto, or has been notified of the motion. Chy. O. 639. **Rule 974.**

The object of this and the preceding *Rule* is to do away with the necessity of a hearing on further directions in administration suits; the judgment granted by the Master covers all those directions, which, by the former practice, were usually made on the hearing on further directions, except the order for payment of the fund out of Court; *e.g.*, it directs any balances found in the hands of accounting parties to be paid into Court, it also authorizes a sale of the land, the payment of the purchase money into Court, the execution of conveyances by all proper parties, and empowers the Master also to execute such conveyances for infants, who are incapable of executing the same themselves: see App. Form No. 185; *Rules* 89, 97, 107. The Master has also power to make any order, or report, which may be necessary for completely winding up the estate, or protecting the rights of the parties to the suit; for example, if it should become necessary to appoint a receiver, or grant an injunction, it would seem that it is intended that the Master shall have power to make the necessary order therefor: see *Re Patterson, Catton* v. *Patterson*, before Proudfoot, J., 23rd Nov., 1881: *sed quære*, and see *Sullivan* v. *Harty*, 9 P. R. 500. Where the executor is insolvent a receiver may be appointed: *Harrold* v. *Wallis*, 9 Gr. 443; and it would seem that a receiver may be appointed, when necessary, in proceedings commenced under *Rules* 965, 972: *Re Francke, Drake* v. *Franke*, 58 L. T. N. S. 305.

Rule intended to do away with further directions in administration suits.

Judgment form of.

Powers of Master under.

The words "without any separate interim, or interlocutory reports, or orders, except where the special circumstances of the case absolutely call therefor," indicate that it is only unnecessary orders, or reports, that are dispensed with, but that so far as such interlocutory reports, or orders, may be essential to the winding up of the estate, the Master is to have power to make them. Under *Rule* 67, a party directed by the Master to bring in any account, or do any other act, is to be held bound to do the same in pursuance of the direction of the Master without any warrant, or written direction, served for that purpose. The provisions of that *Rule*, of course, only apply when the party attends the Master in person or by solicitor, and has notice of the direction.

Separate orders and reports only to be made when essential.

The Master should not proceed with the reference *ex parte*, even though the defendant did not appear on the motion for judgment: *Jackson* v. *Matthews*, 12 Gr. 47; *Robinson* v. *Whitcombe*, 20 Gr. 415.

Master not to proceed *ex parte*.

Under the ordinary administration order, it has been held that the Master may take an account of timber cut with which a defendant is chargeable: *Stewart* v. *Fletcher*, 18 Gr. 21; and may also, without any special directions, take evidence, and report the facts, as to payments made by executors for the maintenance and education of infant beneficiaries: *Stewart* v. *Fletcher*, 16 Gr. 235; and may also take the accounts on the footing of wilful neglect and default; and when the widow of the deceased is found a debtor to the estate, her indebtedness may be set off against her claim for past and future dower: *Williams* v. *Reynolds*, 25 Gr. 49. The Master would have similar powers under a judgment awarded by himself, he would also be entitled to make all proper allowances to executors, administrators, and trustees, by way of compensation for their services.

Accounts which may be taken under ordinary administration judgment.

Where a legacy is given to executors as compensation for their services, they are not precluded from claiming a further sum under the statute if the legacy be an insufficient remuneration: *Denison* v. *Denison*, 17 Gr. 306: see, however, *Kennedy* v. *Pingle*, 27 Gr. 305; *Williams* v. *Roy*, 9 Ont. 534; and see *supra* p. 175. In the event of a deficiency of assets such a legacy does not abate with other legacies: *Anderson* v. *Dougall*, 15 Gr. 405. Such a legacy precludes any presumption that the executor is entitled to the undisposed of residue: *Loveless* v. *Clarke*, 24 Gr. 14; but see *Boys' Home* v. *Lewis*, 4 Ont. 18; 3 C. L. T. 211. Where a suit was brought by an executor unnecessarily, the Court refused to allow him any commission: *Graham* v. *Robson*, 17 Gr. 318. But where executors had acted improperly, the Court, although allowing them compensation, refused them their costs of suit: *Kennedy* v. *Pingle*, 27 Gr. 305. The omission to keep a regular set of books is not alone a sufficient ground for refusing trustees compensation: *Life Association of Scotland* v. *Walker*, 24 Gr. 293.

Compensation to executors, etc., may be allowed.

Effect of legacy by way of compensation.

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Rule 975.

Misconduct of executor, effect of, on right to compensation.

Nor is the fact that a balance is found against an executor, part of which is occasioned by the allowance of a surcharge, alone sufficient to disentitle him to compensation: *Sievewright* v. *Leys*, 1 Ont. 375; *McCardle* v. *Moore*, 2 Ont. 229. An executor, not being a trustee of the realty, is not entitled to receive the rents thereof, and if he do, he is a mere intermeddler, and not entitled to any compensation in respect of such rents: *Dagg* v. *Dagg*, 25 Gr. 542; and see *Re Brazill, Barry* v. *Brazill*, 11 Gr. 253. Since *The Devolution of Estates Act*, however, the rights of personal representatives in regard to the real estate are materially changed. See further as to principle on which compensation is allowed, *Rule* 57 note.

Compensation prior to claims of creditors.

The executor's claim for compensation is prior to the claims of creditors: *Harrison* v. *Patterson*, 11 Gr. 105; and a trustee's claim for compensation must be satisfied before a conveyance of the trust estate to the *cestui que trust* will be ordered: *Life Association of Scotland* v. *Walker*, 24 Gr. 293.

Order for payment out of Court cannot be made by Master.

The only order which the Master is precluded from making in suits for administration, or partition, in which he has awarded judgment, is that for the payment out of the money in Court; but the Master should state the amount of the commission, and what he finds would be a proper apportionment thereof among the different solicitors under *Rule* 1187, and also the amounts he finds payable to creditors, and other beneficiaries, respectively.

Application to Judge for, how made.

The order for payment is to be made by a Judge, or the Court. Application for this order, in cases in the Chancery Division, is to be made in Chambers on a Monday: Chy. Ord. 590; *Rule* H. C. J. iv.; (see, however, *Rule* 211, which for the present is suspended) in the other Divisions the motion may be made on a Tuesday or Friday. The application is to be made upon notice; and it would seem that all persons who, under the former practice, would be entitled to notice of a hearing on further directions, would be entitled to notice of such an application.

When an appeal from Master necessary.

Where a party is not satisfied with the findings of the Master, the Judge, on any motion for distribution, may, on notice being given by the complaining party to the other parties, review the Master's decision without an appeal, if the matters complained of can be investigated and disposed of on reading the pleadings (if any), and judgment, and the Master's report without reference to the evidence; otherwise an appeal in the usual way under *Rule* 848, *et seq.* is necessary *Kendrick* v. *Kendrick*, 9 C. L. T. 310.

Master to enquire as to outstanding estate.

And to compute interest on debts and legacies.

975. In taking an account of a deceased's personal estate under an order of reference, the Master is to inquire and state to the Court what, if any, of the deceased's personal estate is outstanding or undisposed of; and is also to compute interest on the deceased's debts from the date of the judgment or order, and on legacies from the end of one year after the deceased's death, unless any other time of payment is directed by the will. Chy. O. 474.

Master not to proceed *ex parte*.

The Master ought not to proceed *ex parte*, even though the defendant did not appear on the motion for administration: *Jackson* v. *Matthews*, 12 Gr. 47.

Proof of persons necessary to be served with judgment.

Before proceeding to take the accounts, the Master should require the necessary evidence to be brought before him, to show who are the parties, if any, who ought to be served with an office copy of the judgment as prescribed by *Rule* 322. The Master should direct on whom the judgment is to be served, and he may also dispense with service, on any parties, as he may think fit: *Ib.*

Service may be dispensed with.

Service may be dispensed with on parties whose apparent interest is small, and where there is difficulty in effecting service, and other parties in the same interest are already represented, or directed to be served with the judgment;

mere difficulty in effecting service would not alone be sufficient ground for dispensing with service. **Rule 976.**

Parties who are served with an office copy of a judgment under *Rule* 322 do not thereby become parties to the action, they merely acquire a right to attend the proceedings on giving notice of their desire to do so to the plaintiff's solicitor, but they are bound by the proceedings as though they were actually parties to the action. *English* v. *English*, 12 Gr. 441; and see *supra* p. 352. Persons served do not become parties to the action.

Parties so served may give notice to the plaintiff of their desire to attend the proceedings, and are then entitled to be served with the appointments in the Master's office, and with notice of the motion for distribution; but when a person served with the judgment, does not notify the plaintiff of his desire to attend the proceedings, he is not entitled to notice of the proceedings in the Master's office, nor of the motion for distribution: see *Rule* 322 note. But on notice to plaintiffs' solicitor may attend proceedings.

Persons so attending, however, are not, as of course, entitled to the costs of so doing out of the estate, and unless the Court is satisfied that there was some good reason for their so attending they will be left to bear their own costs in any event; and may be ordered to pay the extra costs occasioned by his unnecessary attendance: see *supra* p. 352.

Parties served under *Rule* 322 cannot be required to account: see *ante* p. 352.

Where the Master finds any persons (not coming within *Rule* 322), ought to be made parties, and enabled to attend the proceedings, he may add them as parties under *Rule* 46. Persons added under that *Rule* become parties to the action, as if they had been originally made parties to the writ. Master may add parties.

The direction contained in *Rule* 975, as to the allowance of interest on debts, applies to debts not bearing interest, prior to the date of the judgment. The judgment for administration, as has been said, operates as a judgment for all the creditors of the estate for the amount of their respective debts, and consequently from that date they bear interest; but where a creditor is entitled to interest from any prior date, by virtue of any statute, or any contract, expressed or implied, the Master may allow such interest. But where a sum is payable at a certain day, with interest, there is no implied contract to pay interest at the same rate after default; and even where the same rate has been paid for many years after default, there is no implied contract to continue doing so: *Re Roberts, Goodchap* v. *Roberts*, 14 Ch. D. 49; 42 L. T. N. S. 666; *Cooke* v. *Fowler*, L. R. 7 H. L. C. 27; *Dalby* v. *Humphrey*, 37 U. C. Q. B. 514; *Simonton* v. *Graham*, 8 P. R. 495; as to what is a sufficient demand of interest within the Jud. Act s. 86, s-s. 2 *supra* p. 89; see *Geake* v. *Ross*, 32 L. T. N. S. 666. Interest to be allowed on debts. Judgment for administration operates as a judgment in favour of all creditors. Rate of interest payable.

General legacies payable out of personalty bear interest from the expiration of a year from the testator's death, unless the testator was the legatee's debtor, or being a parent or standing in *loco parentis* to the legatee has made no provision for the maintenance of the legatee who is an infant: interest on legacies charged on land, bear interest from the testator's death: *Ashburner* v. *Macguire*, 2 Tudor's L.C. (6th ed.) 308; but where the legacy is payable out of the proceeds of the sale of land, the interest does not run until a year from the death: *Turner* v. *Buck*, 18 L. R. Eq. 301; but where the sale was postponed by the testator till after the death of a tenant for life, and the rents were directed to be applied as if the sale had taken place, a legacy payable out of the proceeds, was held to bear interest from the death of the tenant for life: *Re Waters, Waters* v. *Boxer*, 42 Chy. D. 61 L. T. N. S. 431. Where for the convenience of the estate the payment of a legacy is postponed by the testator, the legacy bears interest nevertheless from a year from the testator's death: *Re Olive, Olive* v. *Westerman*, 50 L. T. N. S. 355; and see further as to interest on legacies: *Re Judkin*, 25 Ch. D. 743; 50 L. T. N. S. 200. Interest on legacies.

For form of report in administration proceedings, see App. Form 42.

976. Every advertisement for creditors affecting the estate of a deceased person, which is issued pursuant to an order, is to direct every creditor, by a time to be thereby limited, to send to such other party as the Master directs, Advertisement for creditors, form of.

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Rules 977, 978.

or to his solicitor, to be named and described in the advertisement, the name and address of the creditor, and the full particulars of his claim, and a statement of his account, and the nature of the security (if any) held by him; and such advertisement is to be in the form set out in Form No. 36 in the Appendix, with such variations as the circumstances of the case require, and at the time of directing such advertisement, a time is to be fixed for adjudicating on the claims. Chy. O. 475.

Where the Master finds that there has been a proper advertisement for creditors, under R. S. O. c. 110, s. 36, he may dispense with any further advertisement without any special direction so to do: *Cuthbert* v. *Wharmby*, W. N. (69) 12; Seton, 805; and see *Bracken*, *Doughty* v. *Townson*, 60 L. T. N. S. 628; *S. C.* affirmed 88 L. T. Jour. 6.

Affidavit of creditor dispensed with unless required.

977. No creditor need make an affidavit, or attend in support of his claim (except to produce his security, if any,) unless he is served with a notice requiring him to do so as hereinafter provided. Chy. O. 476.

Parties entitled to appear on adjudication on creditor's claim.

No person, except the personal representative, is entitled (except by leave of the Master) to appear on the claim of any person not a party to the cause, against the estate of the deceased, in respect of any debt or liability. But the Master may direct any other party to the cause to appear, either in addition to, or in place of, the personal representative, upon such terms as to costs or otherwise as he shall think fit: see *Rule* 334.

Creditors when allowed costs.

Creditors merely sending in their claims pursuant to advertisement, ought not to be allowed any costs of so doing; but where they are required to go into formal proof thereof, the Master may fix a sum for costs, or allow taxed costs of proving the claim: see *Rule* 1178.

A notice to a creditor requiring him to make an affidavit in support of his claim, may be transmitted by post, pre-paid, addressed to him or his solicitor: see *Rule* 988.

Corroborative evidence.

When a creditor's claim is disputed, he may be required to produce corroborative evidence thereof: see R. S. O. c. 61, s. 10; and see cases *Rule* 965, note.

A judgment obtained without fraud or collusion is conclusive evidence in suits between creditors in relation to the property of the debtor, of the indebtedness of the latter and of the amount of such indebtedness: *Candee* v. *Lord*, 2 Com. N. Y. Rep. 269; *Martin* v. *Boulanger*, 8 App. Cas. 296; 49 L. T. N. S. 62; and see *Bowerman* v. *Phillips*, 15 Ont. App. 679: *Re Hague*, *Traders Bank* v. *Murray* 13 Ont. 727.

Where the solicitor of a plaintiff in an administration action, had purchased, after judgment and pending an inquiry thereunder as to debts, two claims against the estate for less than the sum due, it was held that the officer to whom the action was referred had no jurisdiction to certify that the solicitor was a trustee for the creditors for any surplus he might receive over and above what he had paid for the claims: *Re Tillett*, *Field* v. *Lydall*, 32 Ch. D. 639; 54 L. T. N. S. 604; and it was also held that such a contention could not be raised at the hearing in further directions, except by consent of the solicitor.

Creditors to produce securities.

978. Every creditor is to produce before the Master, the security (if any) held by him, at such time as is specified in the advertisement for that purpose, being the time appointed

for adjudicating on the claims; and every creditor, if required by notice in writing, to be given by the executor or administrator of the deceased, or by such other party as the Master directs, in the form set forth in Form No. 37 in the Appendix, is to produce all other deeds and documents necessary to substantiate his claim before the Master, at such time as is specified in the notice. Chy. O. 477. Rules 979-983. And other documents, if notified.

The notice to produce documents in support of his claim, may be transmitted to the creditor, by post, addressed to him or his solicitor, if any: see *Rule* 988. Notice may be posted.

979. In case a creditor neglects or refuses to comply with the next preceding Rule, he is not to be allowed any costs of proving his claim, unless the Master otherwise directs. Chy. O. 478. Otherwise not to be allowed costs.

980. The executor or administrator of the deceased, or such other party as the Master directs, is to examine the claims sent in pursuant to the advertisement, and is to ascertain, as far as he is able, to which of such claims the estate of the deceased is justly liable. Chy. O. 479. Creditors claims to be examined.

981. The executor or administrator, or one of the executors or administrators, or such other party either alone or jointly with his solicitor, or other competent person, or otherwise, as the Master directs, is, at least 7 clear days before the day appointed for adjudication, to file an affidavit, which may be in the Form No. 50 in the Appendix, verifying a list of the claims, the particulars of which have been sent in pursuant to the advertisement, and stating to which of such claims, or parts thereof, respectively, the estate of the deceased is, in the opinion of the deponent, justly liable, and his belief that such claims, or parts thereof respectively, are justly due, and proper to be allowed, and the reasons for such belief. Chy. O. 480. Affidavit to be made by person examining creditors' claims. When to be filed. Form of.

982. In case the Master thinks fit so to direct, the making of the affidavit referred to in the next preceding Rule, is to be postponed till after the day appointed for adjudication, and is then to be subject to such directions as the Master may give. Chy. O. 481. Time for making affidavit may be postponed

983. At the time appointed for adjudicating upon the claims, or at any adjournment thereof, the Master may allow any of the claims, or any part thereof respectively, Adjudication on claims by Master.

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Rules 984-986.

Further evidence may be required.

without proof by the creditors, and may direct such investigation of all or any of the claims not allowed, and require such further particulars, information, or evidence relating thereto, as he thinks fit, and may, if he so thinks fit, require any creditor to attend and prove his claim, or any part thereof; and the adjudication on such claims as are not then allowed is to be adjourned to a time to be then fixed. Chy. O. 482.

Master cannot employ experts.

The Master has no power under this *Rule* to employ experts to assist him in coming to a conclusion on the claims of persons claiming to be creditors: *Re Robertson, Robertson* v. *Robertson*, 24 Gr. 555.

Mortgagee's claim.

A mortgagee is entitled to prove against the general estate, and hold his security for any amount the general estate is insufficient to pay: *Re Stewart, Stewart* v. *Stewart*, 10 Gr. 169. Where on a deficiency of assets, some creditors are paid more than their proportion, they may, on the petition of a creditor who has not been paid his proportion, be ordered to refund the excess: *Chamberlen* v. *Clarke*, 1 Ont. 135; 9 Ont. App. 273.

Where the Master requires a creditor to attend and prove his claim, the notice so to do may be transmitted to him or his solicitor by post, unless the Master otherwise directs: see *Rule* 988.

Notice to be sent creditors.

984. Notice is to be given by the executor or administrator, or such other party as the Master directs:

Where claim allowed without proof

(1) To every creditor whose claim, or any part thereof, has been allowed without proof by the creditor, of the allowance, and the notice may be in the form No. 38 in the Appendix.

Where proof of claim is required.

(2) And to every such creditor as the Master directs to attend and prove his claim, or such part thereof as is not allowed, by a time to be named in the notice, which may be in the form No. 39 in the Appendix, not being less than 7 clear days after the notice, and to attend at a time to be therein named, being the time to which the adjudication thereon has been adjourned; and in case any creditor does not comply with the notice, his claim, or such part thereof as aforesaid, is to be disallowed, unless the Master thinks fit to give further time. Chy. O. 483.

The notice may be transmitted by post, prepaid, to the creditor or his solicitor, unless the Master otherwise directs: see *Rule* 988.

Creditor may send in particulars of claim.

985. A creditor who has not before sent in particulars of his claim pursuant to the advertisement, may do so 7 clear days previous to any day to which the adjudication is adjourned. Chy. O. 484.

After expiry of time limited by

986. After the time fixed for the advertisement, no claim is to be received (except as before provided in case of

an adjournment,) unless the Master thinks fit to give special leave upon application, and then upon such terms and conditions as to costs and otherwise as the Master directs. Chy. O. 485. Rules 987-989. advertisement for filing claims.

An application of a creditor to prove after the time has elapsed is usually granted; but on the terms of not disturbing any division of assets which has actually been made: *Re Metcalfe, Hicks* v. *May*, 13 Ch. D. 236; 42 L. T. N. S. 383; 49 L. J. Ch. 192.

987. Where an order is made for payment of money out of Court to creditors, the party whose duty it is to prosecute the order is to send each creditor, or his solicitor (if any,) a notice that the cheques may be obtained from the Accountant; and the notice may be in form No. 40 in the Appendix, and the party is, when required, to produce any papers necessary to enable the creditors to receive their cheques. Chy. O. 486. Creditors to be notified when their claims are payable out of Court.

Creditors who have proved claims, but who are not parties to the action, are not entitled to notice of a hearing on further directions, nor of an application for distribution: *Lavin* v. *O'Neill*, 13 Gr. 179.

Creditors who have received more than their share, may be ordered to refund, on the application of a creditor who has not received his proper proportion: *Chamberlen* v. *Clarke*, 1 Ont. 135; 9 App. Ont. 273; but the right may be barred by the Statute of Limitations, if not prosecuted within six years from the date of the overpayment: *Blake* v. *Gale*, 31 Ch. D. 196; or may be lost by acquiescence: *S. C.* 55 L. T. N. S. 234.

988. Every notice by these Rules, required to be given is, unless the Master otherwise directs, to be deemed sufficiently given and served if transmitted by post, prepaid, to the creditor to be served, according to the address given by the creditor in the claim sent in by him pursuant to the advertisement, or, in case the creditor has employed a solicitor, to such solicitor, according to the address given by him. Chy. O. 487. Form of notice. Notice, how to be sent to creditors.

The expression "these Rules" in this *Rule* is not intended to refer to the whole body of *Rules*, but merely to *Rules* 965-987.

3. Partition.

989. Any adult person entitled to a judgment or order for the partition of an estate, may, on serving one or more of the persons entitled to a share of the estate of which partition is sought, with a 14 clear days' notice of motion, apply to the presiding Judge in Chambers, or to the Master in the County (other than the County of York) wherein the land sought to be affected by the proceeding lies, for an order for the partition or sale of the premises in question; Adult party may apply to Local Master for partition, on motion.

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Rule 989.

Proceedings on judgment for partition.

whereupon the Judge or Master may make such order for partition or sale, or such other order as may be proper, and the Master shall thereupon proceed in the least expensive and most expeditious manner, according to the practice now in force, for the partition or sale of the premises, the ascertainment of the rights of the various persons interested, the adding parties, the taxation and payment of costs, and otherwise. Provided always, that where an infant is interested in the estate, no order shall be made for partition or sale until such infant is represented by its guardian *ad litem*; and provided also that all moneys realized from the estate shall at once be paid into Court, and that no moneys shall be distributed or paid out for costs or otherwise, without an order of a Judge in Chambers or the Court; and on the application for such order, the Judge may review, amend, or refer back to the Master his report or order, or make such other order as he deems proper. Chy. O. 640.

Infants interested must be represented by guardian *ad litem*

Money not to be paid out without Judge's order.

Where infant plaintiff seeks partition, writ must be issued.

This *Rule* is confined to the case of proceedings instituted by adult persons; where an infant institutes proceedings for partition, a writ must be issued: *Brown* v. *Brown*, 2 C. L. T. 311. This *Rule* extends the principle of *Rule* 329 to partition suits; formerly it was necessary to make all tenants in common of the land in question, parties to the bill; under this *Rule*, it suffices to notify one or more of such persons. The application cannot be made for the partition of an estate of a deceased person, until the lapse of one year from his death: R. S. O. 1887, c. 104, s. 8; *Grant* v. *Grant*, 9 P. R. 211. Prior to the last revision of the Statutes the period was six months: R. S. O. (1877) c. 101, s. 8. Where the interests are unequal, the person having the largest interest should, as a general rule, be notified of the application.

Summary application cannot be made, when any party claims adversely.

This *Rule* does not apply where it is necessary to add a defendant whose claim to share in the estate is contested, *e.g.*, where a stranger is in possession claiming adversely to the plaintiff and his co-tenants, an action must be brought by writ: see *Young* v. *Wright*, 8 P. R. 198: *Re McMillan, Patterson* v. *McMillan*, 8 P. R. 546; 17 C. L. J. 86; *Hopkins* v. *Hopkins*, 9 P. R. 71; and where after judgment for partition has been issued a question is raised as to the validity of an outstanding lease, it would seem that the Master has no jurisdiction to try it, but an issue may be directed by a Judge under *Rule* 655: *Re Rogers, Rogers* v. *Rogers*, 11 P. R. 90.

A Local Master has no power to make an order for partition of lands out of his jurisdiction, *i.e.*, his county, and if he do so his order is null and void even as to lands within his County: *Nichol* v. *Allenby*, 17 Ont. 275; but see *Rule* 990.

Where the lands are situate in the County of York, or in more Counties than one, the application for partition should be made to a Judge in Chambers. The jurisdiction, here conferred on a Judge in Chambers, is apparently, from the wording of the *Rule*, not intended to be exercised by the Master in Chambers: and see *Rule* 30, s. 11.

Where two or more judgments are granted for partition of different parts of the same person's estate, the proceedings may be consolidated under *Rule* 990.

Accounting parties to be made original defendants.

Wherever an account is required from any person, such person should be made a defendant in the first instance, as it would seem parties served with the judgment in the Master's office cannot be made to account thereunder: *Walker* v. *Seligmann*, L. R. 12 Eq. 152: *Hopper* v. *Harrison*, 28 Gr. 22.

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Rule 989. Evidence on motion.

The plaintiff was formerly bound to allege, and if disputed, to prove, his title, and under this *Rule* it will still be necessary that the affidavits in support of the application should establish the applicant's title, and it would also appear to be necessary to show thereby, the estates and interests of all other persons interested as joint owners. The existence of a discretionary power of sale in trustees, does not exclude the jurisdiction of the Court to order partition: *Boyd* v. *Allen*, 48 L. T. N. S. 628; but a partition was refused in a case where the trustees were taking active proceedings to execute the power: *Re Dennis*, 14 Ont. 267.

Partition not granted of unpatented land.

The Court will not decree partition of lands, for which no patent has issued, neither will it decree a sale of such lands at the instance of the representatives of a deceased locatee: *Abell* v. *Weir*, 24 Gr. 464; *Cuthbert* v. *Cuthbert*, 11 Gr. 88, at p. 91; *Jenkins* v. *Martin*, 20 Gr. 613.

Tenant for life, or dowress, how far entitled to partition.

A tenant for life of an undivided share, is entitled to partition: *Gaskell* v. *Gaskell*, 6 Sim. 643; and see *Lalor* v. *Lalor*, 9 P. R. 455. A decree for partition was made at the suit of a dowress: *Harrison* v. *Bottrill*, before Blake, V.-C., 21st January, 1880; *Devereux* v. *Kearns*, 11 P. R. 452, over-ruling *Rody* v. *Rody*, 1 C. L. T. 546; but her right to partition is subject to judicial discretion and it will only be granted when her dower cannot conveniently be otherwise set apart: *Fram* v. *Fram*, 12 P. R. 185. The right of a dowress in the whole estate to have partition or sale, appears to be doubtful, but where the dower is claimed out of an undivided share, the dowress would seem entitled to partition, or sale, as the only way by which her claim can be properly ascertained and satisfied. A mortgagee of an undivided share, has been held not to be entitled to partition: *Train* v. *Smith*, before Spragge, C., 14th April, 1875; and see *Laplante* v. *Scamen*, 8 Ont. App. 560; but in *Fall* v. *Elkins*, 9 W. R. 861, it seems to have been assumed that a mortgagee was entitled to this relief; and see *Agar* v. *Fairfax*, 2 W. & T. L. C. 881: as to whether a tenant in common who has mortgaged his land can have a partition without first paying off his mortgage: see *Gibbs* v. *Haydon*, 47 L. T. N. S. 184. In this Province it would seem that he can, and that his mortgagee should be made a party either in the first instance, or in the Master's office, but any additional costs so occasioned must be borne by the mortgagor: *McDougall* v. *McDougall*, 14 Gr. 267; a mortgagee who comes in and consents to a sale, is not entitled to either six months' notice, or six months' interest: *Re Houston*, 2 Ont. 84; and see as to mortgages made since 1st July, 1888, 51 Vict. c. 15, s. 1, (O).

Mortgagee not entitled to partition.

Tenant in common whose share is mortgaged, may have partition.

Extra costs must be borne by his share.

A partition or sale cannot be ordered as against a tenant for life of the whole estate on the application of those entitled in remainder: *Murcar* v. *Bolton*, 5 Ont. 164, and a partition was refused in a case in which trustees of a will were empowered to sell and divide the proceeds and they were about to exercise the power: *Re Dennis*, 14 Ont. 267.

Where the plaintiff claimed as vendee of the equity of redemption of one of four tenants in common under a sale by the sheriff, a decree for partition was set aside on appeal, on the ground that the interest was not salable: *Wood* v. *Hurl*, 28 Gr. 146.

In determining whether a sale, or partition, should be directed, the Master will be guided by what is best for all parties interested: *Blasdell* v. *Baldwin*, 3 Ont. App. 6. When the property is not susceptible of partition, a sale should be directed: *Steven* v. *Hunter*, 14 Gr. 541.

The discretion exercised by a Judge in granting a partition or sale will not be interfered with by the Court of Appeal: *Re Dyer, Dyer* v. *Paynter*, 53 L. T. N. S. 744; but where the discretion is exercised by an officer of the Court having judicial functions his discretion may be reviewed: see *Bryant* v. *Reading*, 17 Q. B. D. 128; 54 L. T. N. S. 300; *Clench* v. *Dooley*, 56 L. T. N. S. 122.

Form of judgment.

By this *Rule* the Master is empowered to award such a judgment as the Court of Chancery was accustomed to grant in partition suits,—except the order for payment of the money out of Court: see note to *Rule* 974. He would, therefore, appear to be entitled to award a judgment under which an account of rents and profits could be taken, and under which a sum in gross could be allotted in lieu of dower, curtesy, or any other life estate, and under which all

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Rule 990. other usual and necessary accounts, and inquiries, could be taken, and made, as the circumstances of the case may require. For form of judgment: see App. Form 186.

Service of judgment. All parties interested in the land who are not served with the notice of motion for the judgment, will have to be served with an office copy of the judgment: *Rule* 46: and they will be entitled to move to vary, or set it aside, as provided by *Rule* 48.

Account of rents and profits, etc. A tenant in common who has been himself in actual occupation of the whole estate cannot be charged with an occupation rent: *Henderson* v. *Eason*, 17 Q. B. 701; *Rice* v. *George*, 20 Gr. 221; *Re Kirkpatrick*, *Kirkpatrick* v. *Stevenson*, 10 P. R. 4, except in favour of an infant co-tenant: *Courcier* v. *Courcier*, 26 Gr. 307. He is, however, liable to account to his co-tenants for rents and profits received from third parties: *Goodenow* v. *Farquhar*, 19 Gr. 614; *Curtis* v. *Coleman*, 22 Gr. 561; and if he make any claim for improvements made, or for prior incumbrances paid off, by him, he must submit to account for an occupation rent, otherwise he cannot be allowed them: *Rice* v. *George*, *supra*; *Rivet* v. *Desourdi*, 12 C. L. J. 203. But as against an execution creditor of the tenant who has been in possession, the other tenants in common cannot charge his share with the excess of rents received by him, in priority to the execution: *McPherson* v. *McPherson*, 10 P. R. 140. Where a tenant in common is lessee of his co-tenant's shares and continues in sole possession after the expiration of the lease, he becomes liable to his lessor for use and occupation: *Leigh* v. *Dickson*, 12 Q. B. D. 194; 15 Q. B. D. 60; 50 L. T. N. S. 124; 52 L. T. N. S. 790.

Only such improvements as are made by a tenant in common to prevent the estate going to ruin are recoverable: *Ib.*

Improvements how to allot. In making partition, those portions on which improvements have been made by any of the tenants in common should, as far as possible, be allotted to the parties by whom they were made: see *Wood* v. *Wood*, 16 Gr. 471.

When a sale is directed in a partition action the Master should inquire as to incumbrances existing on the shares of the parties interested up to the time of sale and not merely up to the commencement of the proceedings: *Robson* v. *Robson*, 10 P. R. 324; 20 C. L. J. 192. Such persons as have incumbrances should be made parties under *Rule* 46, and if not made parties they will not be bound by the proceedings: R. S. O. c. 104, s. 21.

When after judgment, lands discovered in another county.

990. When after an order has been made under the preceding Rule lands are discovered in another county, an application may be made to a Judge of the High Court in Chambers for the partition or sale of such lands under the order formerly made, and where two or more orders have been made by Masters in different counties, an application may be made in Chambers for an order as to the conduct of the future proceedings. Chy. O. 641.

This *Rule* applies to the case of lands *subsequently* discovered in another county; it does not apply when it appears on the original application that the lands sought to be partitioned are in different counties: in such a case a Local Master has no jurisdiction at all, even as to the lands in his own county; *Nicholl* v. *Allenby*, 17 Ont. 275.

Where lands are discovered in another county after a judgment has been pronounced by a Local Master, the Judge in Chambers may award judgment as to the lands so discovered: *Clark* v. *Clark*, 8 P. R. 156.

Several suits, consolidation of. The object of this *Rule* is to prevent more than one suit being prosecuted in respect of the same estate. Where more than one suit is brought, under this *Rule*, application may be made to consolidate them. The application must be made before a Judge in Toronto. But where two or more applications are made by different persons to the same Local Master, the latter has jurisdiction

to pronounce judgment in one of them, and stay the others: *Lambier* v. *Lambier*, 9 P. R. 422; 19 C. L. J. 158. Where a suit is stayed, the costs are *prima facie* payable out of the estate *pari passu* with the costs of the suit which is carried on: *Re Clark, Cumberland* v. *Clark*, L. R. 4 Chy. 412.

Rules 991-994. Costs.

991. The Local Masters shall enter in books kept for that purpose, all judgments, or orders, made by them, in administration and partition matters, and they shall on the conclusion of the proceedings, annex together all the papers filed with them in such proceedings, and transmit the same to the Clerk of Records and Writs, who shall duly enter the same. Chy. O. 650.

Entry of orders. At conclusion of suit papers to be forwarded to Clerk of R. & W.

This *Rule* seems somewhat inconsistent with the provisions of *Rule* 546, which provides that all orders for administration or partition made in Chambers shall be drawn up as judgments and entered in like manner as other judgments are required to be entered. By *Rule* 764 judgments are required to be signed by a Registrar, Local Registrar, Deputy Registrar, or Deputy Clerk, with whom it is presumed they are also to be entered as required by *Rule* 772; but *Rule* 991 requires the Local Masters to enter the judgments pronounced by them for administration, or partition, and most of the Local Masters fill neither of the offices mentioned in *Rule* 772.

The requirements to transmit documents to the Clerk of Records and Writs would seem to be applicable to proceedings in all the Divisions. Though why the documents in actions pending in the Queen's Bench and Common Pleas Divisions should be transmitted to the Clerk of Records and Writs is not quite apparent.

4. Property of Infants.

992. All applications for the sale, mortgage, lease or other disposition of an infant's estate shall be made to the Master in Chambers, and no reference in any such matter is to be directed to any Local Master, except by leave of a Judge. J. A. Rule 585.

Applications to sell, etc., infants estate where made.

993. The Official Guardian shall be duly notified of all applications under the last preceding Rule. J. A. Rule 586.

Official guardian to be notified.

See *supra* p. 115.

994. A petition for the sale or other disposition of the real estate of an infant, is to be intituled in the matter of the infant. Chy. O. 527.

Petition, how entitled.

Applications for the sale, leasing, or other disposition of the real estate of infants, are authorized by R. S. O. c. 137, s. 3, where it is made to appear to the Court that it is necessary, or proper, for the maintenance or education of the infant; or that, by reason of any part of the property being exposed to waste and dilapidation, or to depreciation from any other cause, the interest of the infant requires, or will be substantially promoted by such disposition. Where a sale is necessary for the payment of the debts of the ancestor it may be ordered: *Re McDonald*, 1 Chy. Ch. 97; *Re Barker*, 6 P. R. 225. But it should be shewn that unless the sale, or other disposition, is made, the estate will sustain loss, or that the creditors are about to enforce payment of their demands by suit: *Re Boddy*, 4 Gr. 144. Where none of the circumstances

Sale of infant's estate, on what realized. Interest of infant to be considered.

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Rule 994.

mentioned in the Act are proved to exist, the Court has no authority to make any order: *Calvert* v. *Godfrey*, 6 Beav. 197; *Re Phelan*, 6 P. R. 269; *Re Robinson, Pickard* v. *Wheater*, 31 Ch. D. 247; 53 L. T. N. S. 865; and see *Re Jackes*, 3 C. L. J. 69, where the Court refused to sanction a renewal of a lease made by the infant's ancestor; but see *Blean* v. *Blean*, 10 Ont. 693; and see sec. 53 s-s. 10, *ante* p. 62.

When it appeared that the application was made more for the benefit of the infants' father than of the infants themselves, the application was refused: *Re McDonald*, 1 Gr. 90; and a sale will not be ordered to repay a relative, such as a father, mother, or brother, for the past maintenance of the infant: *Keller* v. *Tache*, 1 Chy. Ch. 388; and see *Edwards* v. *Durrjen*, 19 Gr. 101.

No disposition can be authorized contrary to any will or deed.

No sale, lease, or other disposition can be ordered under R. S. O. c. 137, against the provisions of any will or conveyance by which the estate has been devised or granted to the infant, or for his use: R. S. O. c. 137, s. 3, s-s. 2; *Re Smith*, 6 P. R. 282; *Re Wilson*, 7 P. R. 244; *Re Callicott*, 1 Chy. Ch. 26 182; but see *Re Bishoprick*, 21 Gr. 589; and sec. 32, *ante* p. 26.

A guardian of an infant cannot, without the sanction of the Court, make a valid lease of his ward's land: *Collins* v. *Martin*, 41 U. C. Q. B. 602; *Switzer* v. *McMillan*, 23 Gr. 538; *Townsley* v. *Neil*, 10 Gr. 72; the report of the last case appears to be erroneous in describing the guardian who made the lease as a guardian *ad litem*, instead of a guardian of the estate of the infant.

Application for sale, etc., how to be made.

The Statute says the application is to be made in the name of the infant by his next friend or his guardian, but cannot be made without the infant's consent, if he is of the age of fourteen, or upwards: R. S. O. c. 137, s. 4; and see *Rule* 999; but see *Rule* 995; 51 Vict. c. 2, s. 4.

Applications for the sale, or other disposition, of infants' estates, cannot now be made to the County Court Judges, or Local Masters: *Rule* 992.

Execution of conveyance.

The Court may order the execution of the conveyance by the infant, or some one in his behalf, and a conveyance so executed is binding on the infant, as if made after he had attained his majority: R. S. O. c. 137, ss. 5, 6; *Rae* v. *Gedda*, 3 Chy. Ch. 404.

Proceeds of sale, retain quality of estate sold.

The proceeds of lands sold, or disposed of under the direction of the Court, retain the quality of the estate sold, or disposed of, so far as the rights of the infant's heirs, and next of kin, are concerned: R. S. O. c. 137, s. 8: *Fitzpatrick* v. *Fitzpatrick*, 6 P. R. 134; *Thompson* v. *McCaffrey*, 6 P. R. 193; *Campbell* v. *Campbell*, 19 Gr. 254. But where such moneys descend as realty if the heir do not effect an actual reconversion, they will pass to his representatives as personality: *Mordaunt* v. *Benwell*, 19 Ch. D. 302; 45 L. T. [illegible] And as to adult parties jointly interested with the infants, the order for sale operates as a conversion, and the share of such a person dying before sale, but after the order, will descend as personalty: *Hyett* v. *McKin*[illegible] Ch. D. 735.

Order for bar of dower.

Where the mother of the infant is a lunatic, an application may be made for an order barring her dower: R. S. O. c. 133, s. 13. The application must be made to a Judge in Chambers: *Re Colthart*, 9 P. R. 356.

Settled estates, jurisdiction of Court in regard to.

Settled Estates.—The Court has also the same jurisdiction which the Court of Chancery in England had on the 18th March, 1865, in regard to leases and sales of settled estates, and in regard to enabling infants, with the approbation of the Court, to make binding settlements of their real and personal estate on marriage: see s. 32, and notes *ante* pp. 26-28. The jurisdiction of the English Court of Chancery, at the above date, was regulated by Imp. Acts 19 & 20 Vict., c. 120; 21 & 22 Vict., c. 77; 25 & 26 Vict., c. 108; 28 Vict., c. 45.

Sale of settled estate when ordered.

The Court has no power under section 32, to order the sale of a part of a settled estate, in order to make improvements on the remainder: *Re Moore*, 6 P. R. 281; *Re Chambers*, 27 Beav. 653; nor can it sanction an exchange: *Re Bishoprick*, 21 Gr. 589; but in that case, on its being shown that, unless the exchange were made the property was liable to depreciation in value, the sale was directed under R. S. O. (1877), c. 40, s. 76; but the provisions of sect. 77 of that Act prohibiting any sale, or disposition against the provisions of any will, or conveyance, do not seem to have been considered in that case.

The provisions of the English Settled Estates Acts which are introduced by section 32, *ante*, only remove the bar of infancy, but do not enable an infant to do more than an adult could do, *e.g.*, when an infant was also a married woman and made a post nuptial settlement with the sanction of the Court, under those Acts, but the settlement was one which would not have bound her if she had been an adult, it was held to be invalid notwithstanding it had received the sanction of the Court: *Bucknaster* v. *Bucknaster*, 35 Ch. D. 21; 56 L. T. N. S. 795. But the Act enables an infant to make a valid post nuptial settlement so far as an adult could make one: *Re Wall*, 50 L. T. N. S. 435. **Rules 995, 996.**

An infant ward marrying without the consent of the Court cannot, against his will be required to execute a settlement of his estate, and a settlement made by an infant under such circumstances, unwillingly, but with the sanction of the Court, was set aside on the application of the settlor on attaining his majority: *Re Leigh*, *Leigh* v. *Leigh*, 60 L. T. N. S. 404.

Applications as to leases, and sales, of settled estates, and to enable minors to make binding settlements of their real and personal estate on marriage; and in regard to questions submitted in the form of special cases by persons under disability of infancy or lunacy, under section s. 32, *ante*, are excluded from the jurisdiction of the Master in Chambers and the County Court Judges, and Local Masters: *Rules* 30, 41, 138. Applications respecting settled estates how made.

995. The petition is to be presented in the name of the infant, by his guardian, or by a person applying by the same petition to be appointed guardian as hereinafter provided. Chy. O. 528. In whose name to be presented.

There is a variance between this *Rule*, and the Statute R. S. O. c 137, s. 4, which provides that the application shall be in the name of the infant by his next friend, or by his guardian. The procedure prescribed by the *Rule* is to prevail: 51 Vict. c. 2, s. 4. (O). Variance between *Rule* and R. S. O. c. 137, s. 4.

996. The petition is to state the nature and amount of the personal property to which the infant in entitled — the necessity of resorting to the real estate — its nature, value, and the annual profits thereof. It must also state circumstances sufficient to justify the sale or other disposition of the estate, and the application of the proceeds in the manner proposed. The prayer must state specifically the relief that is desired; it must designate the lands to be disposed of, and must propose a scheme for that purpose, and for the appropriation of the proceeds. If an allowance for maintenance is desired, it must be so prayed, and a case must be stated to justify such an order and to regulate the amount. Chy. O. 529. What it is to state.

A similar procedure prevails in the State of New York: see Tyler on Infancy, p. 396 — 196. Apart from the power given by the Statute, the Court has no authority to direct the sale of an infant's estate on the mere ground that it would be beneficial: *Calvert* v. *Godfrey*, 6 Beav. 197. Circumstances which justify a sale of infants' estate.

The circumstances justifying a sale of an infant's estate, under the Statute, are: (*a*) The fact that the sale is necessary, in order to maintain, or educate, the infant; or, (*b*) that by reason of the property, or any part of it, being exposed to waste and dilapidation, or to depreciation from any other cause, the interest of the infant requires, or will be substantially promoted by, a sale, or other disposition: see R. S. O. c. 137, s. 3.

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Rule 996.

Payment of debts.

A sale may be authorized for the payment of the ancestor's debts for which the estate is liable, where the creditors are pressing, and loss is likely to be incurred, if the sale be not made: *Re Boddy*, 4 Gr. 144; *Re Barker*, 6 P. R. 225.

Master in Chambers has jurisdiction to order sale.

The petition must be presented to the Master in Chambers, or to an Official Referee sitting for him, who has power to direct a sale, and take all necessary accounts, and make all necessary inquiries, and to order payment out of Court of any money realised from any sale, or other disposition of the estate; no reference is to be directed to a Local Master except by leave of a Judge: *Rule* 992. These applications are usually taken by the Registrar of the Queen's Bench Division, or an Official Referee sitting for the Master in Chambers.

Duty of father to maintain his children.

Where the father of an infant is living, it is his duty *primâ facie* to support and maintain, and educate, the infant, no matter what the infant's fortune may be: Simpson, on Infancy, p. 161; and maintenance is not ordinarily allowed out of the infant's estate, except upon proof that the father is unable to maintain, and educate, his children, according to their station and prospects in life; and although where there is an express trust in the marriage settlement, to which the father is a party, requiring the trustees to expend the trust fund for the support of the children of the marriage, such a trust may be enforced by the father: *Mundy* v. *Earl Howe*, 4 Bro. C. C. 223; yet where the trustees have an option, or a mere power, to do so, the Court will not compel them so to apply the trust fund except on evidence of the father's inability to maintain the infant: *Wilson* v. *Turner*, 22 Ch. D. 521; 48 L. T. N. S. 370.

Mother not so bound.

A mother is not under any legal obligation to support her offspring, and consequently maintenance will be allowed out of the children's own property, without reference to her ability to support them: Simp. 161.

On sale being directed, inquiry as to debts of ancestor made.

Upon an application under the R. S. O. c. 137, s. 3, for the sale of an infant's estate, it is usual before directing any application of the proceeds, to require proof of payment of the debts of the ancestor, in cases where the infant has become entitled to the property directed to be sold, as heir-at-law, or devisee; or to require an advertisement to be issued for creditors where no sufficient advertisement has previously been issued by the personal representative, and the Court then makes provision for the payment of the debts, if any.

Sale not ordered in administration action, when brought merely for maintenance of infants.

Where the sole object of the sale is the maintenance of the infant, the proceedings ought to be taken under R. S. O. c. 137, s. 3, and not by way of action for the general administration of the estate; and the Court has refused, where the latter proceeding has been adopted unnecessarily, to sanction a sale in the administration proceedings, for the purpose of maintenance: *Fenwick* v. *Fenwick*, 20 Gr. 381; *Goodfellow* v. *Rannie*, *Ib.*, 425; *Foster* v. *Patterson*, *Ib.*, 345.

The proceeds of the sale of an infant's lands will not be ordered to be paid to the infant's guardian; but will be retained by the Court in its own custody until the infant attains majority: *Flanders* v. *D'Evelyn*, 4 Ont. 704; *Mitchell* v. *Richey*, 13 Gr. 445; *Blake* v. *Blake*, 2 Sch. & Lef. 26; but see *Huggins* v. *Law*, 14 Ont. App. 383.

Principal not usually broken into.

As a general rule the Court will not break in upon the principal money, for the maintenance, and education, of infant legatees, still it may be done where necessary: *Ashbough* v. *Ashbough*, 10 Gr. 430; *Crane* v. *Craig*, 11 P. R. 236.

The marriage of a female ward of Court without the consent of the Court, is a contempt for which the husband may be punished by imprisonment. The Court in such cases usually requires a settlement to be made of the wife's property as a condition of the husband's release, and will provide that the husband shall take no benefit under the settlement, and will also ordinarily exclude the wife from power of appointing by will in his favour in default of issue: *Re Wall*, 50 L. T. N. S. 435; and see *Buckmaster* v. *Buckmaster*, 35 Ch. D. 21; 56 L. T. N. S. 795; and see *Field* v. *Moore*, 19 Beav. 176. But the Court has no power to compel a male infant marrying without leave to execute a settlement of his property against his will: *Re Leigh*, *Leigh* v. *Leigh*, 40 Ch. D. 290; 60 L. T. N. S. 404.

Accounts of guardians.

Where there are two or more guardians of an infant, the fact that one of the guardians who has maintained the infant, has been in sole receipt of the income of the infant's estate, is no discharge to the other guardians therefor, but if it is shewn that the infant has been properly maintained and educated

by the guardian who received the income, a proper sum will be allowed for that purpose without the details of the expenditure being vouched: *Re Evans, Welch v. Channell*, 51 L. T. N. S. 175. **Rule 997.**

997. The petition may pray for the appointment of a guardian, as well as for the disposal of the infant's estate. In that case a proper case must be made by the petition, and established by the evidence, for the appointment of the person proposed. Chy. O. 530. Petition may pray for appointment of guardian.

The Surrogate Court has also power to appoint guardians to minors: see R. S. O. c. 137, s. 10. This Statute, however, does not exclude the jurisdiction of the High Court: *Re Stannard*, 1 Chy. Ch. 15; *Re McQueen, McQueen v. McMillan*, 23 Gr. 191; and see R. S. O. 137, s. 13.

Where a guardian has been appointed by the Surrogate Court, the High Court will not appoint any other except for cause, and it should therefore be shewn, on applications to appoint guardians under these *Rules*, that the minor has no guardian.

A guardian may be appointed for an infant who is a British subject, though he be resident out of the jurisdiction, and have no property within the jurisdiction: *Re Willoughby*, 30 Ch. D. 324; 53 L. T. N. S. 926; but see *In re Bourgoise*, 41 Ch. D. 310.

Where the High Court appoints a guardian of the person and estate of a minor, it usually requires the guardian to give security. And if a guardian has been appointed by a Surrogate Court, an inquiry is sometimes ordered as to whether the guardian so appointed has given sufficient security; and if he has not, then he is required to give additional security before he is empowered to receive moneys on account of the infant. Where, however, the fortune of the infant is trifling, and the fund is lodged in Court, the Court frequently dispenses with security being given by the guardian; and requires instead an affidavit to be filed by the guardian from time to time, showing the due application of moneys paid to him under the order of the Court. Security. Security when dispensed with.

Although the Court is in the habit of paying respect to the wishes and directions of a testator in reference to the guardianship, and care of his children, it will not do so, where it is clearly shewn, that a compliance therewith, would be prejudicial to the happiness, and moral training, of the infants: *Anon*, 6 Gr. 632; *Re McQueen, McQueen v. McMillan*, 23 Gr. 191. In appointment of guardian Court considers interest of infant.

So, where there was a contest between a step-father and an uncle, and the child preferred the former, the Court being satisfied that it was better for the infant that the uncle should be appointed, appointed him: *Re Irwin*, 16 Gr. 461. The Court may remove testamentary guardians, and trustees, for the same causes as other guardians: R. S. O. c. 137, s. 16.

Where the father is living, if it is proposed to appoint any other person guardian, the father must be notified of the application: *Re Henricks*, 2 Chy. Ch. 418.

It is improper to give a reversionary guardianship of wards in Court to the successors in office of any person named: *Murphy v. Lamphier*, 12 Gr. 241.

It is a contempt of Court to remove a ward of Court from the jurisdiction, without the sanction of the Court; and the Court will interfere on the application of his guardian to prevent his removal: *Re Giltrie*, 3 Gr. 279; but the Court, if it is for the interest of the ward, will authorize his removal out of the jurisdiction, upon the undertaking of a guardian resident within the jurisdiction to produce the ward to the Court if and when required: *Re Callaghan*, 28 Ch. D. 186; 52 L. T. N. S. 7. Removal of ward from jurisdiction a contempt.

A guardian appointed either by the Surrogate Court, or by the High Court, is entitled to receive, and can give, a valid discharge for a legacy due to his infant ward: *Huggins v. Law*, 14 Ont. App. 383; but he has no power to make Guardian cannot make valid lease with-

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Rules 998-1000. leases of the infant's lands in his name: *Townsley* v. *Neil*, 10 Gr. 72; *Switzer* v. *McMillan*, 23 Gr. 538. The report of *Townsley* v. *Neil* appears to be erroneous in describing the guardian as a guardian *ad litem*.

out sanction of Court. The sanction of the Court should be obtained to all dispositions, whether by sale, or lease, of an infant's estate.

The infant to be produced to Judge or Master.

998. Upon all petitions for the sale of an infant's estate, the infant is to be produced before a Judge in Chambers, or before a Master. Chy. O. 531.

Production of infant when dispensed with. Where the infant is out of the jurisdiction, and not of an age making his consent to the proceedings essential, his production before the Master may, on application to a Judge, be ordered to be dispensed with: *Re Lane*, 9 P. R. 251; *S. C. sub nom. Re Love*, 18 C. L. J. 371.

But unless this order be obtained, the infant should in all cases be produced before the Master, even though he be under fourteen years.

Infant if over 14 years to be examined. Examination to be attached to petition.

999. When the infant is above the age of 14 years he is to be examined apart by the Judge or Master, upon the matter of the petition, as to his consent thereto; and his examination is to be stated to have been taken under this Rule, and is to be annexed to and filed with the petition. Chy. O. 532; J. A. Rule 587.

The sale is not to be ordered without the consent of the infant if he is of the age of fourteen years or upwards: R. S. O. c. 137, s. 4; but where there are several infants interested who are over fourteen years, it has been held that the consent of a majority of them is sufficient to authorize the Court to direct a sale, not merely of the shares of the infants who do consent, but also of those who have not consented *Re Harding*, 13 P. R. 112. In this case one of the infants interested, had disappeared and could not be found and her examination was dispensed with. Where an infant over fourteen was an imbecile, her examination and consent were dispensed with: *Re Delanty*, 13 P. R. 143.

The Judge or officer before whom the infant is examined, should take down his examination in writing, and also his consent, where the consent is necessary; and this should be signed by the infant, and the Judge or officer, and attached to the petition; *Re Axford*, 6 P. R. 192.

Where the infant is under fourteen, the Judge or officer should not only certify the fact, but should also state that the infant was produced before him.

Evidence should be given before the Judge or officer identifying the infant and proving his age: see *Rule* 1000.

Infants under 14 need not be examined.

1000. It shall not be necessary to examine any infant under 14 years of age, in support of a petition affecting such infant's estate, unless required by a Judge; but, unless otherwise ordered, it shall be sufficient for the officer before whom such infant shall be produced, to certify that he has been produced, and that he is under the age of 14 years. J. A. Rule 587.

Where the infants under fourteen were living with their mother out of the jurisdiction, and the mother swore that she was unable to produce them, owing to the expense, and the property was shown to be worth only $400, the production of the infants was dispensed with: *Re Lane*, 9 P. R. 251.

Rules 1001-1005.

1001. The witnesses to verify the petition are also to be produced before the Judge, or Master, and are to be examined *viva voce* as to the matter of the petition, and the depositions so taken are to be stated to have been taken under this Rule. Chy. O. 533.

Witnesses in support of petition to be examined before Judge or Master.

A subpœna may be issued under *Rule* 578 for the examination of witnesses in support of the application: *Raymond* v. *Tapson*, 23 Ch. D. 430; 48 L. T. N. S. 403; *McMillan* v. *Wansborough*, 10 P. R. 377.

1002. The Masters of the Supreme Court may examine infants and witnesses under the preceding Rule, without special order or reference. Chy. O. 534.

Masters authorized to take examination without special order.

There being this special provision as to the officers who may examine infants and witnesses, it is possible that Special Examiners are inferentially precluded from taking such examinations.

1003. Upon a petition so verified, the Court or Judge may either grant the relief prayed at once, or make such order as to further evidence, or otherwise, as the circumstances of the case require. Chy. O. 535.

Court may grant relief or require further evidence.

1004. No conveyance of the lands of infants is to be settled, until evidence is produced to the officer settling the same of the purchase money having been paid into Court, or of the payment thereof into Court having been dispensed with; and in cases where there is to be a mortgage for part of the purchase money, until evidence is given to the said officer of such mortgage having been registered and deposited with the Accountant. J. A. Rule 506.

Conveyances of infants' lands—evidence to be produced to officer settling.

This *Rule* applies not only to sales of infants' lands under *Rule* 992, *et. seq.*, but to sales in actions or other proceedings in Court, in which infants are interested.

The proper evidence of the payment of the purchase money is the Accountant's certificate of its having been paid into Court; and where a mortgage is required to be given, the Accountant's certificate of its having been deposited with him is also necessary.

Where a purchaser makes default, the deposit and all other payments on account of purchase money are forfeited, when the sale is under the standing conditions of sale (Form No. 43), and the property may be ordered to be resold, and the defaulting purchaser ordered to pay any deficiency: *Re Hornibrook*, 12 P. R. 591.

5. Devolution of Estates.

1005. Before an executor or administrator takes proceedings under *The Devolution of Estates Act*, for the sale of real estate in which infants are concerned, he shall give to the Official Guardian or other officer charged with the duties referred to in the 8th section of the said Act notice

Notice to official guardian.

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Rule 1006. of the intention to sell, and shall not be entitled to any expenses incurred before giving such notice.

The Devolution of Estates Act is R. S. O. 1887, c. 108.

Application to Judge.

1006. The Official Guardian or other officer aforesaid, or any person interested in the real estate or in the proceeds of the sale thereof, may apply in a summary manner to a Judge in Chambers, upon notice to all parties concerned or to such persons as the Judge may direct for such direction or order touching the real estate and the proceeds thereof or the costs of the proceedings as to the Judge may seem meet.

6. Summary Inquiries into Fraudulent Conveyances.

Voluntary and Fraudulent Conveyances.

The principal enactments, under which creditors are enabled to reach property conveyed away by their debtors, are,

(1) The Statute 13 Eliz. c. 5, which made void as against creditors all transfers of lands or goods made to delay, hinder or defraud creditors and others; and even though for valuable consideration, unless taken *bonâ fide* and without notice or knowledge on the part of the purchaser: R. S. O. 1887, c. 96, s. 3.

(2) R. S. O. 1887, c. 124, which makes transfers made by persons in insolvent circumstances, and which defeat or prejudice creditors, void as against such creditors.

Under 13 Eliz. c. 5.

The Statute 13 Eliz. c. 5.—Under this Act the law infers that creditors are delayed, etc., by a voluntary conveyance made at a time when by reason of indebtedness the transferor by so dealing with his property renders himself unable to pay his creditors if required to do so: *Freeman* v. *Pope*, L. R. 9 Eq. 206; 5 Chy. 540; whether the conveyance is fraudulent or not: *Irwin* v. *Freeman*, 13 Gr. 465; *Ferguson* v. *Kenny*, 16 Ont. App. 276. But a valid voluntary settlement may be made by a settlor, indebted at the time, provided ample available assets are left out of the settlement to meet those debts, whether the debts are then actually payable or not: *Freeman* v. *Pope*, *supra*; *Re Ridler*, 22 Ch. D. 74; *O'Doherty* v. *Ontario Bank*, 32 C. P. 285.

A transaction by which a creditor is delayed is as much within the Statute as one which defeats him altogether: *Martha* v. *McKenna*, 14 Gr. 59.

A fraudulent intention is sufficient to avoid the transaction whether there were creditors existing at the time or not: see *Merchants' Bank* v. *Clarke*, 18 Gr. 594. In the case of voluntary conveyances, it matters not whether the volunteer had or had not notice of the fraud, but in the case of a purchaser for value, fraudulent intent on the part of the transferor alone will not avoid the transaction: *Wood* v. *Irwin*, 16 Gr. 398; *Merchants' Bank* v. *Clarke*, 18 Gr. 594; *Re Johnson*, 20 Ch. D. 394; *Dalglish* v. *McCarthy*, 19 Gr. 578; *Allen* v. *McTavish*, 8 Ont. App. 440.

A voluntary disposition of property, which, by reason of indebtedness at the time, is capable of being avoided by creditors, may be avoided by any subsequent creditor, who was such at the date of its execution, or who becomes such after that date, so long as any one of the original creditors is unpaid: *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Freeman* v. *Pope*, *supra*; *Middleton* v. *Pollock*, 2 Ch. D. 108; *Vinden* v. *Fraser*, 28 Gr. 502; *Collard* v. *Bennett*, *Ib.*, 556. Under circumstances also from which intent to delay, etc., may be presumed, a voluntary settlement may be void against subsequent creditors, where it would not be presumed fraudulent merely because of the settlor's embarrassed circumstances when he made it: see May on Fraudulent Conveyances, 2nd ed. 64. A con-

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veyance which has the result of defeating creditors will not be presumed to have been executed with that intent, if from other circumstances the Court is satisfied that such was not the intent: *Ex p. Mercer, Re Wise*, 17 Q. B. D. 299. **Rule 1007.**

Where a deed is made for value the question is whether it was made *bonâ fide* and the burden of proof of this is upon those who seek to set the deed aside: *Johnson*, 51 L. J. Chy. 504.

Where none of the creditors were judgment and execution creditors and so might be entitled to attack a conveyance, as a fraudulent preference; it was held that in the absence of fraud they had no *locus standi* to set it aside under the Statute of Elizabeth: *Building & Loan Ass.* v. *Palmer*, 12 Ont. 1; and see *Macdonald* v. *McCall*, 9 Ont. 185; 12 Ont. App. 593; *Real Estate L. Co.* v. *Yorkville & Vaughan Road Co.*, 9 Ont. 464.

A transaction by which property purchased by the debtor is conveyed to his wife or other person as his appointee so as to defeat creditors, is a device within the Statute and the husband is not a proper party to proceedings to set the transaction aside: *Murdoch* v. *O'Sullivan*, 25 Gr. 392.

So where land is sold by the debtor and with the proceeds other lands are purchased and conveyed to an appointee of the debtor, the consideration money may be followed into the lands conveyed to the appointee: *Fleury* v. *Pringle*, 26 Gr. 67.

As to the circumstances under which a man may validly expend money to make improvements upon lands of his wife, see *Jackson* v. *Bowman*, 14 Gr. 156; *Davidson* v. *Macguire*, 7 Ont. App. 98.

Delay in taking proceedings to avoid a conveyance under the Statute is no defence unless continued long enough to bar the legal right: *Re Maddever*, 27 Ch. D. 523.

R. S. O. 1887, c. 124.—Section 2 of this Act provides as follows:— Fraudulent Conveyances and Preferences by Insolvents.

2. Every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes, securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay, or prejudice his creditors, or to give to any one or more of them a preference over his creditors, or over any one or more of them, or which has such effect, shall, as against them, be utterly void. 48 V. c. 26, s. 2.

[Sec. 3 make exceptions of certain assignments for the general benefit of creditors and certain *bonâ fide* sales.] See *Godfrey* v. *Poole*, 13 App. Cas. 497, where it was said that a deed which contemplates the full payment of all creditors cannot be held to be void as intended to defeat or delay creditors.

Previously to this Act, it was held under R. S. O. 1877, c. 118, that in order to work a fraudulent preference there must be a concurrence of intent to do so on the part of both debtor and creditor: *Burns* v. *Mackay*, 10 Ont. 167; and the intent to prefer might be rebutted by shewing pressure exerted by the creditor by his demanding payment or security: *Slater* v. *Oliver*, 7 Ont. 158; *Long* v. *Hancock*, 12 S. C. R. 532; *Re Boyd*, 15 L. R. Ir. 321.

Under the present Act it was at first held that without regard at all to any question of *bonâ fides*, pressure, or knowledge of the debtor's affairs, a transaction of the kind mentioned in sec. 2, which *has the effect* of defeating, delaying, or prejudicing creditors, or of giving a preference, is void under the Act: *River Stave Co.* v. *Sill*, 12 Ont. 557; *Rae* v. *McDonald*, 13 Ont. 352; but the Court of Appeal has held that the words "or which has such effect" apply only to the second branch of sec. 2, dealing with the preference of one creditor over another, and do not apply to the first branch of the section; so that a gift, conveyance, etc., which has the effect of defeating, delaying, or prejudicing creditors cannot be avoided without proof of intent to do so unless it has also the effect of giving a preference to one creditor over others: *Molsons Bank* v. *Halter*, 16 Ont. App. 323.

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Rule 1007. There seems to be no material difference between the expressions "in insolvent circumstances" and "unable to pay his debts in full": *Dominion Bank* v. *Cowan*, 14 Ont. 465.

A debtor is in insolvent circumstances if he is unable to meet the current demands of his creditors, and has not sufficient property subject to execution to pay all his debts if sold under legal process at a sale fairly and reasonably conducted: *Warnock* v. *Kloepfer*, 14 Ont. 288; *Dominion Bank* v. *Cowan*, *Ib.*, 465; *Clarkson* v. *Stirling*, *Ib.*, 460; *Rae* v. *McDonald*, 13 Ont. 352.

Where a favoured creditor to whom was transferred a promissory note for purchase money of debtor's business, parted with it to a *bonâ fide* holder for value, it was held that no relief could be given against the preferred creditor: *Robertson* v. *Holland*, 16 Ont. 532.

Where a creditor's solicitor, with consent of a debtor and knowledge of his insolvent circumstances, procured a third person to advance money to the debtor on security of a chattel mortgage on his stock in trade, without divulging anything as to the insolvent's circumstances or why the money was wanted, and out of the money the solicitor paid the creditor in full, it was held that the chattel mortgagee was protected by sec. 3 of the Act as being a person who had made a *bonâ fide* advance of money within that section: *Gibbons* v. *Wilson*, 17 Ont. 290; affirmed in the Court of Appeal, 14th Jan., 1890.

For instances in which transactions have been set aside: see *Stoddard* v. *Wilson*, 16 Ont. 17; *Johnson* v. *Cline*, *Ib.*, 129.

A mortgage by any insolvent person on future acquired chattels, to secure repayment of the price of such chattels to the vendor thereof, is binding and not within the above Act: *Goulding* v. *Deeming*, 15 Ont. 201.

The Court or a Judge may at the instance of any judgment creditor call on the debtor and his grantee, etc., to show cause why lands conveyed by fraudulent grant should not be sold.

1007. Where a judgment creditor or a person entitled to money under a judgment or order, alleges that the debtor or person who is to pay has made a conveyance of his lands which is void, as being made to delay, hinder or defraud creditors or a creditor, it shall not be necessary to institute an action for the purpose of setting aside such conveyance, but [a motion may be made to] the Court or a Judge in Chambers by the judgment creditor, calling upon the judgment debtor or person who is to pay, and the persons to whom the conveyance has been made, or who have acquired any interest thereunder, to shew cause why the lands embraced therein, or a competent part thereof, should not be sold to realize the amount to be levied under the execution. R. S. O. 1877, c. 49, s. 10.

This *Rule* was first introduced into the law of Ontario by *The Administration of Justice Act, 1873* (36 V. c. 8). It enables summary proceedings to taken be in an action in which a judgment has been obtained, to reach, by way of equitable execution, lands of the debtor fraudulently conveyed. Previously a suit in Chancery was necessary.

The *Rule* has reference only to transfers of land. The conveyances within its purview are such as are "void as being made to delay, hinder or defraud creditors, or a creditor"; in other words, such as come within the Statute 13 Eliz. c. 5, (which was directed against conveyances "to the end, purpose and intent to delay, hinder and defraud creditors and others, etc.," and which declared such conveyances to be, as against such creditors, "clearly and utterly frustrate, void and of none effect;") and probably also such as are void under R. S. O. 1887, c. 124, as to which see *supra*.

Rule 1008.

The Statute from which this *Rule* is taken enacted that, in the cases referred to, "the Court or a Judge in Chambers may upon the application of the judgment creditor call upon, etc." Under this language it was held that the proper practice was to obtain an order *nisi* calling upon the judgment debtor, etc., to shew cause: *Wark* v. *Moulton*, 7 P. R. 14. The present *Rule* would seem to have been differently expressed in order to shew that a motion is to be made, as in other cases, on notice, and not by way of an order *nisi*: see *Rule* 526.

Originally the motion was in Chancery required to be made to a Judge in Chambers: see *Queen* v. *Smith*, 7 P. R. 429; *Wark* v. *Moulton*, *supra*; but in the Common Law Courts the Clerk of the Crown and Pleas has exercised jurisdiction: see *Watts* v. *Hobson*, 7 P. R. 334. Now it would seem that the Master in Chambers and other officers having like powers may entertain such applications: see note to *Rule* 30, p. 144.

The inchoate right of dower at law obtained by a wife in land conveyed to her husband formerly made her a proper party defendant to a suit to set the conveyance aside: *McFarland* v. *McFarland*, 9 P. R. 73; and therefore she would seem to be a proper party to be served with notice under this *Rule*.

Quære whether an order will be made for a sale at an earlier period than the plaintiff could have a sale if the Sheriff had been able to sell under a *fi. fa.* lands: see *Porte* v. *Irwin*, 8 P. R. 40. The practice in Chancery in setting aside a fraudulent conveyance by an execution debtor was never to accelerate the sale.

The Court or a Judge may call on a judgment debtor, etc., to show cause why his equitable interests should not be sold to pay execution.

1008. Where any judgment creditor in an action, or a person entitled under a judgment or order as aforesaid, alleges that the debtor or person to pay is entitled to or has an interest in any land which under the former practice could not be sold under legal process, but could be rendered available in an action for equitable execution by sale for satisfaction of the debt, the Court or a Judge in Chambers may, upon the application of the creditor, call upon the debtor or person who is to pay, and the trustee or other person having the legal estate in the land in question, to shew cause why the said land or the interest therein of the debtor or the person who is to pay, or a competent part of the said land, should not be sold to realize the amount to be levied under the execution. R. S. O. 1877, c. 49, s. 11.

In *Wood* v. *Hurl*, 28 Gr. 146, in consequence of the section from which this *Rule* is taken having been, with others, grouped under the heading in the statute "Summary Inquiries into Fraudulent Conveyances," and it was held that, equitable interest was not within the section unless it was in some way covered up by a fraudulent conveyance. The above heading has been carried into the *Rules* without alteration, but by reason of *Rule* 5 the heading is to be regarded as for convenience only and does not affect the construction of this *Rule*: *Peters* v. *Stoness*, 13 P. R. 235.

Any interest in land therefore which cannot be sold by the Sheriff may be ordered to be sold under this *Rule*: *Ib. e.g.*, the interest which the debtor has under an agreement to purchase land: *Ib.*; *Re Prittie & Crawford*, 9 C. L. T. 45.

For what is saleable by the Sheriff see R. S. O. 1877, c. 64, ss. 21, 22, 25, and note to *Rule* 935, *supra* p.

The language of this *Rule* has, probably by an oversight, not been altered as was done in *Rule* 1007, so as to make it clear that the motion is to be made upon notice: see note to *Rule* 1007; it would seem, nevertheless, that an order *nisi* would not now be the proper mode of procedure in view of *Rule* 526.

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Rules 1009-1010.

Proceedings after such application.

1009. Upon any application under either of the two preceding Rules, such proceedings shall be had, either in a summary way, or by the trial of an issue, or by inquiry before an officer of the Court, or by an action, or otherwise, as the Court or Judge may deem necessary or convenient for the purpose of ascertaining the truth of the matters in question, and whether the lands of the debtor's or other person's interest therein are liable for the satisfaction of the execution; but if in a case in a County Court there is a dispute as to material facts, and the value of the land, or the debtor's or other person's interest therein, appears to be over $400, the Court or Judge shall direct the trial of an issue in the High Court, and may name the county in which the trial is to take place, subject to any order that the High Court or a Judge thereof may see fit to make in that behalf. R. S. O. 1877, c. 49. s. 12.

Cases in County Courts.

This *Rule* regulates the mode of inquiring into cases under either *Rule* 1007 or 1008.

The mode in which any question arising will be directed to be tried will be regulated by convenience in the particular case. An issue was directed to be tried in *Merchants Bank* v. *Brooker*, 8 P. R. 133; *Ray* v. *Briggs*, 13 C. L. J. 40; an inquiry by a Master in *Peters* v. *Stoness*, 13 P. R. 235. An order was made forthwith in *Watts* v. *Hobson*, 7 P. R. 334, no cause being shewn.

The order if made summarily, or the judgment on the trial of an issue, should probably be in the same form as a decree in the like case would formerly have been in Chancery: see note to *Rule* 1011.

Where an issue has been directed in a County Court case to be tried in the High Court under the last clause of the *Rule*, the High Court merely tries the issue and has no further jurisdiction in the matter; the final disposition of the matter, consequent upon the decision on the issue, takes place in the County Court in which the issue was directed: *Merchants Bank* v. *Brooker*, 8 P. R. 133.

Application to be made to the Judge of the County in which the lands are situate in County Court cases.

1010. In County Court cases the application under Rules 1007 and 1008 shall be made to the County Court, or to a Judge of a County Court, of the County or Union of Counties in which the lands to which the application relates are situate, unless the said Court or Judge upon the hearing of the application deems it more convenient and more conducive to the ends of justice to order, and orders, that the proceedings be had and taken in the Court or before a Judge of the Court, from which the execution issued; in which case the Clerk of the County Court of the County in which the land lies shall transmit the papers filed with him, together with the order of transference, to the Clerk of the County Court from which the execution issued. R. S. O. 1877, c. 49, s. 13.

Rules. 1011-1013.

1011. Where in a summary way or, upon the trial of an issue, or as the result of any inquiries under the four preceding Rules, any land, or the interest of any debtor or other person therein, is found liable to be sold, an order shall be made by the Court or Judge, declaring what land or what interest therein is liable to be sold [and directing sale thereof by the Master according to the usual practice.] R. S. O. 1877, c. 49, s. 14.

If lands or interest of debtor found liable to sale, an order to be made specifying the same.

Instead of the words in brackets the original section had the words "and such order shall be a sufficient warrant to the proper sheriff or other officer to proceed with the sale of the said land and interest."

The original language of the *Rule* does not seem to have been adequate to enable the equitable interest to be properly dealt with, as it would have been in Chancery, so that the interests of all persons concerned might be protected, incumbrancers, etc., removed, and purchasers enabled, to ascertain and purchase the interest at its real value.

The substituted words in the present *Rule* would seem to make it proper that the order pronounced should be in the same form as the decree in the like case would formerly have been in Chancery.

1012. Any notice of motion for an order under Rules 1007, 1008, or 1010, may contain a description of the land in question, and upon filing the same with the proper officer, signed by the solicitor of the applicant a certificate of *lis pendens* may be issued for registration, and in case the said motion is refused in whole or in part, a certificate for registration of the order may be issued. R. S. O. 1877, c. 49, s. 16.

Lis pendens may be registered.

7. Quieting Titles.

1013. Under "*The Quieting Titles Act*" the petition for an investigation of title is not to include two or more properties dependent on separate and distinct titles; but may include any number of lots or parcels belonging to the same person, and dependent on one and the same chain of title. Chy. O. 492.

Two or more properties held by separate titles not to be included in the same petition.

The Act referred to in this *Rule* is *The Quieting Titles Act*, (R. S. O. c. 113.)

Where the provisions of this *Rule* are violated, the Referee may refuse to proceed with the investigation of the title. This may lead to delay and expense, as the objection can only appear before the Referee, after the proceedings necessary to show the title have been taken. The object of the *Rule* is to prevent the proceedings becoming unnecessarily intricate.

Who May File Petition.—Any owner of an estate in fee simple in land, or any trustee for the sale of the fee simple, may file a petition without leave: R. S. O. c. 113, s. 2. Any other person who has any estate, or interest, legal, or equitable, in or out of land in Ontario, may also file a petition: *Ib.* s. 3; but under *Rule* 1014, *post*, the petition in the latter case, must first receive the sanction of a Judge before it can be referred to a Referee for investigation. A vendor before conveyance, is within sect. 3, and his petition will not be enter-

Who may file petition under *Quieting Titles Act*.

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Rule 1013. tained without the consent of his vendor: *Re Brown*, 3 Chy. Ch. 158; and a petitioner who is only tenant in fee in remainder must first obtain the consent of the tenant for life to the filing of the petition: *Re Pelten*, 8 P. R. 470.

Not necessary that petitioner should be in possession.

Formerly it was necessary that the petitioner should be in possession by himself, or tenant: *Re Bell*, 3 Chy. Ch. 239; *Re Mulholland*, 18 Gr. 528; *Re Mono*, 6 P. R. 150; but that is no longer necessary; and a petitioner, who is out of possession, may, on obtaining a certificate of title, obtain on petition an order for the delivery of possession to him of the land in question, which may be enforced by the same process, as a judgment for the recovery of land: see R. S. O. 113, s. 43; *Re McDonald*, before Boyd, C., 16th May, 1881.

A petition may be filed by a devisee claiming under a will where the property intended to be devised has been erroneously described: *Re Lyons*, 2 Chy. Ch. 357; *Re Callaghan*, 8 P. R. 474; but a grantee cannot by this means rectify an erroneous description in a deed under which he claims: *Ib.* As to cases in which property intended to be devised, may pass under a will, notwithstanding a misdescription of it in the will: see *Re Shaver*, 6 Ont. 312; *Hickey* v. *Stover*, 11 Ont. 106; *Young* v. *Purvis*, 11 Ont. 597; *Summers* v. *Summers*, 5 Ont. 110; *Wright* v. *Collins*, 16 Ont. 182.

Filing a petition will not save the rights of a contestant otherwise barred by Statute of Limitations.

Effect of Filing Petition.—The filing of a petition is not such a proceeding as will save the rights of a party *contestant*, otherwise barred by the Statute of Limitations: *Laing* v. *Avery*, 14 Gr. 33; nor, it would seem, will it have the effect of stopping the running of the Statute in favour of a contestant in adverse possession, until such contestant is notified, or has filed a claim, or otherwise become a party to the proceedings, nor even then, unless the petitioner ultimately obtain a certificate of title. Where a contestant claiming title under a tax sale, was barred, but the petition was also ultimately dismissed, it was held that the filing of the petition and the proceedings had on the claim of the contestant, were not an effectual questioning of the latter's title, so as preclude him from the benefit of the Act, 37 Vict., c. 15 (O), curing the defect in the tax sale, under which he claimed, if not questioned within two years: *McNab* v. *Peer*, 32 C. P. 545.

Description of land in petition.

Description of Land.—The description of the land in the heading of the petition should be sufficient to enable the land in question to be identified, but usually it is unnecessary to set out in it the metes and bounds. The description of the lands in the body of the petition, should be given in the form in which the petitioner desires the land to be described in the certificate of title. Where there is any plan of the property registered, the description of the land in the petition must be in accordance with the plan: *Re Morse*, 8 P. R. 475; R. S. O. c. 114, s. 84, s-s. 2; and where pending the petition, the land was laid out into building lots according to a registered plan, the description was required to be amended according to the registered plan: *Ib.*

Referee may insert more specific description of land in the notices to be served or published.

Where the description of the land in the heading of the petition, appears to the Referee of Titles, not to be sufficiently explicit, he should require a sufficient and proper description to be inserted in all notices by him directed to be published, or served; and where it appears that there is no sufficiently definite description of the lands contained in either the heading, or the body of the petition, or that the description given is misleading, the Referee may require the petition to be amended in that respect, before proceeding with the investigation. The petition, if amended in this respect, would also require to be re-registered, if it had been previously registered: see R. S. O. c. 113, s. 6.

Estate claimed must be correctly stated in petition.

Estate, or Interest, Claimed.—The estate, or interest, claimed by the petitioner, should also be accurately stated in the petition, and also the estates and interests of all other persons in the land, which are intended to be admitted by the petitioner, otherwise the petitioner may be ordered to pay the costs of such other persons who may come in to prove claims, not admitted in the petition.

Form of petition.

Form of Petition.—The form of petition given in the Schedule to the Act, R. S. O. p. 1037, should be followed as nearly as may be. It is neither necessary, nor desirable, to set out in detail, in the petition, the facts and circumstances affecting the title; but whenever it is necessary, a concise state-

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ment of such facts as are necessary to make out the title, and which do not appear in the produced documents, is to be delivered to the Referee, with the other documents required to be furnished under R. S. O. c. 113, s. 7, s-s. 4. **Rule 1013.** Statement of facts.

Filing the Petition.—Under R. S. O. c. 113, s. 5, the application is required to be made to the High Court or a Judge thereof. Where the petition is filed in the Chancery Division, it must be filed with the Clerk of Records and Writs. If filed in any other Division, it should be filed with the Registrar of the Division. All proceedings under *The Quieting Titles Act* have thus far been taken exclusively in the Chancery Division. Filing petition.

Where the investigation of title is to be proceeded with before a Local Referee, the petition before being filed, must be entered with the Inspector of Titles at Toronto: see *Rule* 1019.

Registering Petition.—Upon filing a petition under the Act, the officer with whom it is filed is to issue a certificate of its filing: see form R. S. O., p. 1078; which is to be registered in the Registry Office of the Registration Division, in which the lands in question are situate: R. S. O. c. 113, s. 6. This certificate need not be registered immediately on the petition being filed, but its registration may be deferred until it is sure whether the certificate of title will be granted. Registration of petitions in Registry Office.

Proofs Required on Investigation of Titles.—The following are the papers which it is necessary to deliver to the Referee of Titles, to whom the petition is referred, in all ordinary cases, and the proofs 1 to 15 should be delivered at one time, not piece-meal.

1. The affidavit of the petitioner, under the 8th section of *The Quieting Titles Act*. If the affidavit is not made by the petitioner, some valid reason should be given why it is not: *Re Rundell*, 4 Chy. Ch. 71. (For form, see Leggo's Forms, 2nd ed., No. 1029.) The schedule of documents must be marked, as an exhibit, by the commissioner before whom the affidavit is sworn: *Re Dickson*, 3 Chy. Ch. 352. Affidavit of petitioner.

N.B.—None of the affidavits in support of the petition should be sworn until the petition has been filed.

2. The certificate of counsel, or solicitor, under the 9th section of *The Quieting Titles Act*. This certificate should not be dated prior to the swearing of the petitioner's affidavit to which it relates. The certificate should follow the language of section 9. A certificate of counsel that he had corresponded with the petitioner was held insufficient: *Re Dickson*, 3 Chy. Ch. 352. Certificate of counsel.

3. The County Registrar's certificate of all registrations upon the land in question, up to, and including, the date of filing of the petition: *Re Hill*, 2 Chy. Ch. 348. It is advisable that no further registrations should be made upon the lot by the petitioner pending the investigation. If any transfer by way of mortgage, or otherwise, be made by the petitioner pending the investigation, the Referee of Titles should be immediately notified thereof: see *Re Cummings*, 8 P. R. 473; *Re Morse*, 8 P. R. 475. County Registrar's certificate.

When there are a great many registrations recorded against the lot, but not affecting the particular parcel in question, and the Registrar cannot certify those that do affect the land in question without including in his certificate those that do not, his certificate may be dispensed with, on production of a proper affidavit of search by a Provincial Land Surveyor; *Re Morse*, 8 P. R. 475.

The abstract will have to be subsequently continued to the date of the certificate of title: *Re Cummings*, 8 P. R. 473; and showing the registration of the certificate of filing the petition: R. S. O. c. 113, s. 6, s-s. 2.

4. All deeds and evidences of title in the petitioner's possession or power: see R. S. O. c. 113, s. 7, s-s. 1. Deeds.

5. If the petitioner cannot produce all the deeds relating to the land, under which he derives title, he must procure and produce:—

(*a*) Certified copies of all registered instruments affecting the title, of which the originals are not produced, including discharged mortgages, and certified copies of all certificates of discharge of mortgages, and of the affidavits of execution thereof.

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Rule 1013. A certificate of discharge of mortgage has not the effect of reconveying the estate until it is registered: *Re Morse*, 8 P. R. 475.

Affidavits of search for lost deeds.

(*b*) Affidavits of diligent search for the originals of all deeds to which the certified copies of memorials relate (where the memorials are not made sufficient evidence by R. S. O. c. 112, s. 1, s-s. 2, 3), and all other deeds relating to the title which are not produced.

Proof of contents where memorials not sufficient evidence.

(*c*) Proof of contents of the non-produced deeds, where the memorials are not sufficient evidence thereof. Those of which there are memorials in the short form in use before the Registry Act of 1865, should be shewn to have contained no trust, limitation, condition, exception, or qualification, not mentioned in the memorial, unless such memorials are under R. S. O. c. 112, sufficient evidence of the contents of the deeds to which they relate.

Proof of bar of dower.

6. If there is no release of dower by the wife of a former owner, shew that he was unmarried when he conveyed, or that his wife is dead, or that her dower is barred, or that the land is not subject to her dower: see R. S. O. c. 133, s. 3, otherwise the certificate of title must be subject to her dower.

Affidavits as to possession.

7. Affidavits are required, shewing that possession has always accompanied the title under which the petitioner claims: see *Rule* 1023. Also affidavits shewing who is, at the time of making such affidavits, in occupation, and under what title, or claim of title. These affidavits should shew how the possession has been held, and should be made by disinterested persons: see Leggo's Forms, 2nd ed., No. 1035. See further as to evidence of possession requisite: *Rule* 1023, note.

8. Consent of the person in actual possession, (wherever any person other than petitioner is in occupation), duly verified by affidavit. For form of consent see Leggo's Forms, 2nd ed., No. 1037.

Consents required.

9. Consent of any mortgagee, or person entitled, to any outstanding charge, or estate, duly verified by affidavit. For form of consent see Leggo's Forms, 2nd ed., No. 1037; and see *Re Caverhill*, 8 C. L. J. 50.

N.B.—The consents mentioned in clauses 8 and 9 must be produced even though the petitioner admit that his title is subject to the right of such tenant, mortgagee, etc. In some cases the consent must be produced before the petition will be referred for examination: *e.g.*, where the petitioner is a purchaser who has not obtained his conveyance, the consent must be produced: *Re Brown*, 3 Chy. Ch. 158; or where he is tenant in remainder expectant on a life estate, the consent of the tenant for life must be filed: *Re Pellen*, 8 P. R. 470.

Sheriff's certificate as to executions.

10. Sheriff's certificate that the property is not affected by any execution, sale under execution, or tax sale. (For form, see Leggo's Forms, 2nd ed., No. 1033, omitting word "in" in second line.) This certificate should include the names of all persons who have owned the land at any time since 1863: see *Re Harding*, 3 Chy. Ch. 232; *Re Rundel*, 4 Chy. Ch. 71; *Ex parte Lyons*, 2 Chy. Ch. 357.

County Treasurer's certificate as to taxes.

11. County Treasurer's certificate that there are no taxes in arrear, and that there has been no sale for taxes, and that the roll of taxes in arrear has been returned to him. For form, see Leggo's Forms, 2nd ed., No. 1032. Proof must be given of payment of all taxes, except those for the year in which the certificate issues. If the certificate first produced does not cover all such taxes, an additional certificate will be required: see *Re Harding*, 3 Chy. Ch. 232; *Re Chamberlain*, 2 Chy. Ch. 352.

N.B.—Certificates of title are always granted subject to the taxes for the current year in which the certificate bears date: see R. S. O. 113, ss. 12, 26, 27. Whenever the roll of taxes in arrear for the preceding year has not been returned to the County Treasurer, his certificate must be supplemented by the collector's, or township treasurer's, receipt for that year: see R. S. O. 193, s. 148.

Statement of facts.

12. A concise statement of any other facts necessary to make out the title; and affidavits or other evidence to prove the same: R. S. O., c. 113, s. 7, s-s. 4, 5.

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N.B.—All affidavits to prove facts material to the petitioner's title, should, as far as possible, be made by disinterested persons: *Ex parte Chamberlain*, 2 Chy. Ch. 352. **Rules 1014, 1015.**

13. Schedule of the particulars so produced to be marked as an exhibit to the petitioner's affidavit: *Re Dickson*, 3 Chy. Ch. 352; R. S. O. c. 113, s. 4, s-s. 1. Schedule of particulars.

Crown bonds registered in the Queen's Bench office no longer bind lands unless also registered in the Registry office: see R. S. O. c. 94, s. 3: *Re Franklin*, 8 P. R. 470, 51 Vict. c. 36 (D).

The Referee's certificate, allowing or disallowing the claim of any contestant, requires confirmation in the same manner as a Master's report made in an action.

Affidavits proving the publication, and posting of the advertisement required under *The Quieting Title Act*, s. 14, should shew that the deponent has examined issues of the papers in which the advertisement has been published; and also that the notices have remained posted at the Court House, and Post Office, continuously for one month: *Re Chamberlain*, 2 Chy. Ch. 352; *Re Hill*, *Ib.* 348. For forms of affidavits, see Taylor on Titles, 2nd ed., pp. 200, 201. Affidavits of publication of advertisement.

1014. Where an application is made under section 2 of the said Act, the Clerk of Records and Writs is to attend one of the Judges with the petition for directions, before the same is referred for investigation. Chy. O. 493. Petitions to be referred to Judge in certain cases before being referred for investigation.

The section of the Act referred to in this *Rule* includes all applications except those by owners in fee-simple, or trustees for the sale of the fee-simple.

Where the petitioner has merely a partial interest, the Court usually requires the consent of the other persons interested in the estate, to be filed, before authorizing the petition to be referred for investigation. Thus, where a purchaser before conveyance filed a petition, the consent of his vendor was required: *Re Brown*, 3 Chy. Ch. 158; and where the petitioner was a tenant in remainder, the consent of the tenant of the particular estate was required: *Re Pelten*, 8 P. R. 470. Where petitioner has only a partial interest, consent of other parties interested required.

The consent duly verified by affidavit should be attached to the petition, when brought to be filed.

1015. A petition under the Act may, at the option of the petitioner, be referred to any of the officers of the Court at Toronto, or to any conveyancing Counsel, who may from time to time be designated by the Court for the purpose; or to any of the following Local Masters, viz., the Masters at Barrie, Belleville, Berlin, Brampton, Brantford, Brockville, Chatham, Cobourg, Cornwall, Goderich, Guelph, Hamilton, Kingston, Lindsay, London, Ottawa, Owen Sound, Perth, Peterborough, Sandwich, Sarnia, Simcoe, Stratford, St. Catherines, Walkerton, Whitby, and Woodstock; or to any other of the Local Masters who shall hereafter be designated. Chy. O. 494. Petition to whom to be referred.

Only the Local Masters of the Supreme Court for Ontario, at the places above named, are *ex officio* Referees of Titles. Those Local Masters holding office at other places are not entitled to exercise the duties of the Referee Titles unless specially empowered so to do. Local Master not *ex officio* Referee of Titles.

Where the petitioner desires to have the petition referred to any Local Master as Referee of Titles, he must designate the officer to whom he desires

Rules 1016-1019.

the reference, by indorsement on the petition: see *Rule* 1017. If there be no such indorsement the petition will be referred to the Referee of Titles at Toronto: *Rule* 1018.

Registrar to be Inspector.

1016. The Registrar of the Chancery Division is, until further order, to be the sole Inspector of Titles, in respect of petitions filed under *The Quieting Titles Act*, and sole Referee of any petitions, the proceedings under which are to be conducted in Toronto. Chy. O. 633.

The Inspector of Titles supervises the work of all Local Referees of Titles, and as Referee of Titles at Toronto he investigates titles referred to him for investigation: see *Rule* 492, *et seq.*

The fees payable to the Inspector of Titles are regulated by *Rule* 1036.

Inspector of Titles to be appointed.

1017. To facilitate the proceedings in cases referred to the Local Masters, one or more Inspectors of Titles will be named by the Court, for the purposes, and with the powers mentioned in and provided for by the 23rd and 24th sections of the said Act; and on the petition are to be indorsed the names of the Inspector, or one of the Inspectors, as the case may be, and of the Local Master, thus: "To be referred to the Master at , and to Mr. , Inspector of Titles." Chy. O. 495.

Indorsement on petition.

At present there is only one Inspector of Titles, and this officer is also the sole Referee of Titles at Toronto: see *Rule* 1016.

If there be no indorsement of the name of a Local Master, the petition is to be referred to the Referee of Titles at Toronto: *Rule* 1018.

Only a Local Master who is also a Referee of Titles can be named in the indorsement. As to the Masters who may be named, see *Rule* 1015.

Where the petition is required to be referred to a Local Master as Referee, it must, before being filed, be entered with the Inspector of Titles, and a fee of $8 in stamps must be paid thereon: see *Rules* 1019, 1036.

Petitions, when to be referred to Toronto Referee.

1018. Petitions filed unindorsed with the name of a Referee, are to be referred to the Referee in Toronto, or to one of the Referees in Toronto (if more than one), in rotation or otherwise as the Court or a Judge from time to time directs; but a petition indorsed with the name of any Referee is to be referred to him accordingly, unless the Court or a Judge otherwise directs. Chy. O. 496.

At present there is only one Referee at Toronto: see *Rule* 1016.

Petitions to be referred to Local Referees to be first entered with Inspector.

1019. Where the petitioner desires the reference to a Local Master, the petition is to be entered with the Inspector of Titles before being filed as required by the Statute, and the Inspector is to note thereon the day of entering the same, adding to such note his own initials, and is thereupon to

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deliver the petition to the solicitor, or, if duly stamped, to the Registrar, to be filed. Chy. O. 497. Rules 1020-1023.

The word "Registrar" in this *Rule*, appears to be a mistake; the "Clerk of Records and Writs," is the officer with whom the petition is filed in the Chancery Division: see *Rules* 23, 1021.

1020. The Local Master shall be entitled to confer or correspond from time to time with the Inspector of Titles, for advice and assistance on questions of practice or evidence, or other questions arising under the Act or under these Rules. Chy. O. 498. Local Masters may confer with Inspector.

This *Rule* is defectively printed in the official copy of the *Rules*. The above is its proper reading.

1021. The Clerk of Records and Writs is to deliver to the party filing a petition under the Act, a certificate of the filing thereof, for registration in the proper County; and thereupon the petition is forthwith to be referred and delivered or posted by the Clerk of Records and Writs to the Referee named for that purpose. Chy. O. 499. Certificate of filing of petition to be registered.

The form of the certificate referred to in this *Rule* is given in R. S. O. p. 1038. The certificate is required to be registered in the proper registry office: see R. S. O. c. 113, s. 6.

The originals, or certified copies, of all instruments, registered prior to this certificate are required to be produced to the Referee: see *Ib.* s. 7, s.-ss. 1, 2.

1022. The particulars necessary, under section 7 of the Act, to support the petition are to be delivered or sent by the petitioner, or his solicitor, to the Referee, and are to be forthwith examined and considered by him. Chy. O. 500. Papers in support of application to be delivered to Referee and examined by him.

See further as to proof required, *Rule* 1013 note.

On delivering the papers to the Referee a fee of fifty cents is to be paid on each deed in the chain of title, other than satisfied mortgages; and ten cents on each paper filed: see Tariff. Fees payable.

Where the reference is to the Referee at Toronto the additional fee of $4 on the certificate of title is also payable: *Ib.*; but this fee is not payable where the reference is to a Local Master as Referee: see *Rule* 1036.

1023. In every case of an investigation of the title to property under the said Act, the petitioner is to shew, by affidavit or otherwise, whether possession has always accompanied the title under which he claims the property, or how otherwise, or is to shew some sufficient reason for dispensing with such proof either wholly or in part. Chy. O. 501. Evidence required as to possession.

The question of possession is always a very important one, and it is necessary that the affidavits should shew how the possession has been held, *e.g.*: whether by residence, or by cultivation, and by whom, if by tenants, giving their names and the periods during which they occupied. Proof as to possession is indispensable: *Re Wright*, 2 Chy. Ch. 355. Possession, evidence as to.

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Rules 1024, 1025.

Petitioner originally entering as a trespasser.

Where the petitioner is a mere trespasser claiming to have acquired title by possession, the evidence as to possession must be very clear and conclusive, and it must be shewn to have actually extended to the whole of the land claimed. The actual possession of some part of a lot, or parcel, of land by a mere trespasser, will be insufficient to confer a title by possession, as to any other part of which there has been no actual possession, even though the lot be a wild lot: *Harris* v. *Mudie*, 7 Ont. App. 414. In order to confer a title under the Statute of Limitations there must be an actual and visible possession, mere payment of taxes on a vacant lot confers no title: *Re Jarvis* v. *Cooke*, 29 Gr. 303; *Walton* v. *The Woodstock Gas Co.*, 1 Ont. 630; but see *Steers* v. *Shaw*, 1 Ont. 26.

Possession of part is not constructive possession of rest of lot.

In order to defeat a rightful owner's title, by adverse possession, the possession must have been continuous for the required number of years; whenever the possession is vacant the rightful owner is in possession in contemplation of law: see *Trustees Agency Co.* v. *Short*, 13 App. Cas. 793.

Evidence where title claimed solely by possession.

Where the petitioner claims title by possession, he should prove the possession for the requisite time, by the clear and positive evidence, of at least two independent witnesses. In such a case a notice, prepared by the Referee, should be served upon the person having the paper title, if he can be found, but if not, evidence of search for him and his representatives should be put in, and in such a case the possession should be shewn to have been long enough to bar him, even though he had no notice of the possession: *Re Caverhill*, 8 C. L. J. 50; *Ex parte Chamberlain*, 2 Chy. Ch. 352. Where the petitioner claims title as against the patentee, or his heirs, or assigns, of land of which they have not taken actual possession by residing on, or cultivating some portion thereof, he must shew either knowledge of his possession by the patentee, or his heirs or assigns, or else establish a possession for at least twenty years: R. S. O. c. 111, s. 5, s.-s. 4; *Re Linet*, 3 Chy. Ch. 230; *Bingle* v. *Dake*, 42 U. C. Q. B. 250; *Van-Velsor* v. *Hughson*, 45 U. C. Q. B. 252; proof of notice to the husband of the owner is sufficient: *Harris* v. *Prentiss*, 30 C. P. 484; *S. C.* in Appeal, 7 Ont. App. 414.

When actual possession of part may confer title to residue of lot.

It is not clear that it is necessary to establish so strict, and actual, a possession to all the land claimed, where the petitioner has been in possession under a claim of title which was originally defective. In such a case the doctrine of constructive possession might, and would probably, be held to apply even as against the owner of the paper title: see *Dundas* v. *Johnston*, 24 U. C. Q. B. 550; *Davis* v. *Henderson*, 29 U. C. Q. B. 344; per Burton, J., *Harris* v. *Mudie*, 7 Ont. App. p. 425; *Steers* v. *Shaw*, 1 Ont. 26.

A person who has been in possession under a fraudulent grantee, but who has not acquired any title as against the latter, cannot set up a title by possession as against a purchaser of the land, from the assignee in bankruptcy of the fraudulent grantor, effected after the fraudulent conveyance has been set aside in proceedings instituted against both the fraudulent grantor and grantee: *Donovan* v. *Herbert*, 4 Ont. 635.

Where there is no contest, attendance of petitioner's solicitor dispensed with.

1024. Where there is no contest, the attendance of the petitioner, or of any solicitor on his behalf, is not to be required on the examination of the title, except where, for any special reason, the Referee directs such attendance. Chy. O. 502.

Referee to deliver requisitions and objections.

1025. If, on such examination as aforesaid, the Referee finds the proof of title defective, he is to deliver or mail to the petitioner, or to his solicitor or agent, a memorandum of such finding, stating shortly therein what the defects are, and he is therein to state as far as possible all the objections to the title. Chy. O. 503.

1026. When the Referee finds that a good title is shewn, he is to prepare the necessary advertisement, and the same is to be published in the Official *Gazette* and in any other newspaper or newspapers in which the Referee thinks it proper to have the same inserted; and a copy of the advertisement is also to be put up on the door of the Court House of the County where the land lies, and, unless the nearest Post Office is in a city, in some conspicuous place in the Post Office which is situate nearest to the property, the title of which is under investigation; and the Referee is to indorse on the advertisement so prepared by him, the name of the newspaper or newspapers in which the same is to be published, and the number of insertions to be given therein respectively, and the period (not less than 4 weeks) for which the notice is to be continued at the Court House and Post Office respectively. Chy. O. 504.

Rule 1026. Advertisements to be published in *Gazette* and other newspapers. Notices to be posted at Court House and Post Office.

The notice is not to be published until the Referee finds that a good title is shewn.

The notice is, ordinarily, required to be published once in the *Ontario Gazette*, and at least once a week for two weeks in some local newspaper published in the county town, or other place near where the lands in question are situated; but in some cases it may be found advisable to publish the advertisement more frequently. At least a month should be given from the date of the publication of the first advertisement, for sending in claims.

Advertisement, how published

Form of Advertisement.

IN THE HIGH COUT OF JUSTICE,

DIVISION.

IN THE MATTER OF

(*Description of Land.*)

Notice is hereby given that A. B. of has made an application to the High Court of Justice for Ontario for a certificate of title to the above mentioned property under "The Quieting Titles Act," and has produced evidence whereby he appears to be the owner thereof in fee free from all incumbrances: [*if any say*] except [*giving a short description of incumbrances to which the title is subject.*]

Wherefore any other person having or pretending to have any title to or interest in the said land or any part thereof, is required on or before day, the day of , now next ensuing, to file a statement of claim, verified by affidavit, at my Chambers, in Osgoode Hall, in the City of Toronto, and to serve a copy on (*name and address of petitioners solicitor*) as solicitor for the said A. B., and in default every such claim will be barred, and the title of the said A. B. will become absolute and indefeasible at Law and in Equity, subject only to the reservations mentioned in the 26th section of the said Act.

Dated this day of 18

A note is made by the Referee at the foot, or indorsed, giving the necessary directions for publication, *e.g.*

To be inserted in the *Ontario Gazette* on the day of and in (*stating the newspaper*);
and a copy to be affixed in a conspicuous place in the Court House of the County in which the land is situate and in the Post Office nearest the premises, for one month.

A. B.,
REFEREE OF TITLES.

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Rule 1027. The advertisement is principally intended for persons, if any, whose rights are not disclosed on the proceedings. Persons who are known to have any claim adverse to the petitioner, or persons who possibly may have some adverse claim, should generally be required to be served with notice of the proceedings: see R. S. O. c.113, ss. 16-21.

Notice how published.

Affidavits proving publication.

The notices required to be posted at the Court House, and Post Office, should be kept up continuously for the period directed, and the person intending to prove the posting up, should take care to see that such notices are kept up continuously for the requisite period · *Re Hill*, 2 Chy. Ch. 348; *Re Chamberlain*, 2 Chy. Ch. 352. For form of affidavits of posting, and of publication of advertisements: see Taylor on Titles, 2nd ed., pp. 200, 201.

Where the lands are situate in a city, posting of a notice at the Post Office is not required.

Where an advertisement was posted at the Court House nearest the lands, which was not the Court House of the County in which the lands were situate, the irregularity was waived by the Judge: *Re Harris*, 12 P. R. 430; and see R. S. O. c. 113, ss. 45, 46.

Notices required to be served.

1027. Any notice of the application to be served or mailed under section 16 of the Act, is to be prepared by the Referee; and directions are in like manner, to be given by him as to the persons to be served with the notice, and as to the mode of serving the same. Chy. O. 505.

The 16th section of the Act is as follows:—

Adverse claimant to be notified.

"16.—In case there appears to exist any claim adverse to, or inconsistent with, that of the petitioner to, or in respect of, any part of the land, the Judge shall direct such notice as he deems necessary to be mailed to, or served on, the adverse claimant, his agent or solicitor."

By section 23, the Referee of Titles, to whom any petition is referred, is to proceed as the Judge should do under the Act, had the reference not been made, and he is to have the same powers.

Notice should be required to be served on every person known to have a claim adverse to the petitioner, whether the claim be admitted by the petitioner or not, unless the consent of such person be filed, duly verified, consenting to a certificate of title being granted to the petitioner, free from, or subject to, the claim, if any, of such consenting party, and, if subject to his claim, setting forth with clearness what his claim is. The notice to be served should contain explicit information why it is served: *Ex parte Hill*, 2 Chy. Ch. 348.

Notice is also often required to be served for the sake of precaution, thus, where an application was made before *The Devolution of Estates Act* by devisees within a year of the death of their testator, notice was required to be served on the heirs-at-law, as the petition was, in effect, a proceeding to establish the will: *Ex parte Hill*, 2 Chy. Ch. 348; and see *Re Dougherty*, 4 Chy. Ch. 80.

When title claimed by possession, owner of paper title to be served.

When title is claimed by possession, notice should ordinarily be served upon the persons who, but for such possession, would be the owners: *Re Chamberlain*, 2 Chy. Ch. 352. So also where the petitioner claimed the north-*east* part of a lot under a will devising the north-*west* part alleging that the word "west" was a clerical error, all persons interested in maintaining the opposite view were required to be notified: *Ex parte Lyons*, 2 Chy. Ch. 357.

Where a petitioner claims title under a will in which the land has been misdescribed, his title may be quieted in any case in which the Court would in an action for the construction of the will determine that the land in question passed by the will as claimed by the petitioner, notwithstanding the erroneous description: see *Re Callaghan*, 8 P. R. 474; *Re Shaver*, 6 Ont. 312; but where

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the defect is in a deed *inter partes* the petitioner must bring an action to reform the deed, he cannot get the defect cured under *The Quieting Titles Act:* see *Re Callaghan*, 8 P. R. 474. **Rule 1027.**

Parol evidence was held to be admissible to show that "Lot 16, Con. 7, N. H." in a will meant "North half of Lot 16, 7th Concession, Township of Morris": *Young* v. *Purvis*, 11 Ont. 597; but where a description in a will is free from any patent ambiguity it would seem that parol evidence is inadmissible to show that it means anything else than what is expressed: *Summers* v. *Summers*, 5 Ont. 110; *Hickey* v. *Stover*, 11 Ont. 106. But where there is a general devise of all the testator's land, followed by a particular erroneous description, the latter may be rejected: *Wright* v. *Collins*, 16 Ont. 182.

Petitioner may be required to give negative evidence.

Proceedings under *The Quieting Titles Act* being for the most part *ex parte*, it is often necessary to require the petitioner to negative the existence of facts, of which, in the case of a contest between the petitioner and any third person, the onus of proving would be on such third party: *Re Caverhill*, 8 C. L. J. 50.

Or explain circumstances creating suspicion.

Where any transfer of the property has taken place, under circumstances of an unusual nature, it is necessary to require the petitioner to adduce evidence to negative the existence of any fraud, or want of *bonâ fides*: *Re Dougherty*, 4 Chy. Ch. 80. Where, for instance, the property is claimed by, or on behalf of, a wife, under a conveyance made to her during coverture, an explanation of the transaction should be given on oath to show that it was *bonâ fide*, and was such, that the husband's creditors could have no claim to the property, and the affidavit of the petitioner should be corroborated by disinterested persons of credibility: *Ex parte Lyons*, 2 Chy. Ch. 357. So where the former owner, a person of the same name as the petitioner, had conveyed the land to the petitioner a few days before the filing of the petition, and the title appeared simple, explanations were required to be given: *Re Wright*, 2 Chy. Ch. 355.

And, in addition, notice must also be required to be served on persons who may appear to have a possible interest in disputing the *bona fides* of any conveyance under which the petitioner claims, wherever there are any circumstances calculated to arouse suspicion: *Re Dougherty*, 4 Chy. Ch. 80.

Service of notices, how effected.

Notices required by the Referee, to be served, are to be prepared and issued by him. Where service is directed to be effected by mailing, the Referee may direct the letter enclosing the notice, to be prepaid and registered, and a notice to be indorsed on the envelope to the effect that if the letter be not called for within eight days that it is to be returned to the Referee of Titles, by whom the notice is issued. Directions to return letters, if not called for, are required by the Post Office authorities, to be printed, in order to secure due attention.

Where a notice, served in this way, is returned to the Referee of Titles, he should require further service. Where service is authorised on the attorney, solicitor, or agent of the party to be notified, there should be evidence produced that the person served was in fact the solicitor, attorney, or agent of the party required to be notified.

Form of notice to persons appearing to have adverse interests.

IN THE HIGH COURT OF JUSTICE,

———— DIVISION.

IN THE MATTER OF

Take notice that A. B., of

has made application to the High Court of Justice for Ontario for a certificate of his title to the above mentioned property under "The Quieting Titles Act," and take notice that if you claim any interest therein, (*if the petitioner admits the party notified has some interest say*) other than (*specifying interest which is admitted*) you must lodge your claim in writing, stating the particulars thereof, and verified by affidavit, at my Chambers in [Osgoode Hall, in the City of Toronto,] on or before the day of and serve a

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Rules 1028, 1029.

copy on (*name and address of petitioner's solicitor*) as solicitor for the said A. B., and in default thereof, any claim, right, or interest, you may have therein at Law or in Equity, will be for ever barred and extinguished.

This notice is served upon you because (*set out briefly the reason for giving the notice*).

Dated this day of 18

A. B.,
Referee of Titles.

Proof of service.

Strict proof is required to be given of the due service of all notices required to be served. The entries of service in a deceased solicitor's docket were held insufficient proof: *Ex parte Palmer*, 2 Chy. Ch. 351. When a certificate was granted on a false affidavit of the due service of a notice, the certificate was set aside on the application of the party directed to be notified, with costs; the Court refusing to enter into the question whether he was properly entitled to notice or not: *Re Ashford*, 3 Chy. Ch. 77.

Adjudication on claim of contestant.

Where there is a contest, the Referee may, by consent, report on the contestants' claim before disposing of the petitioner's title; but he should not do so, without consent. In general, the petitioner is bound, in the first place, to make out his own title before he can claim to have an adjudication upon the claim of a contestant: *Re Cameron*, 14 Gr. 612. And a contestant is at liberty to point out defects in the petitioner's title, before proceeding to prove his own: *Armour* v. *Smith*, 16 Gr. 380.

Referee may award costs.

The Referee of Titles may award costs to, or against, a petitioner, or contestant: R. S. O. c. 113, ss. 21, 23; *Rules* 1170, 1178; *Anon*, 2 Chy. Ch. 22. When a petitioner claims title by possession and the holder of the paper title on being notified appears and contests the matter, costs will not be awarded against him as a matter of course, even though the petitioner succeed in establishing his title: *Low* v. *Morrison*, 14 Gr. 192.

Form of report.

The order, or certificate of the Referee should be drawn up in similar terms to a report—*e.g.*, "I find and certify," and not "adjudge and determine": *Anon*, 2 Chy. Ch. 22.

Inspector and Toronto Referee to confer with Judges.

1028. The Inspector, or Toronto Referee, is from time to time to confer with one of the Judges in respect of matters before such Inspector or Toronto Referee, as there shall be occasion. Chy. O. 506.

When title made out before Local Referee, he is to certify same and forward papers to Inspector

1029. When any person has shown himself, in the opinion of a Local Master, to be entitled to a certificate or conveyance under the Act, and has published and given all the notices required, the Master is to write at the foot of the petition, and sign, a memorandum to the following effect: "I am of opinion that the petitioner is entitled to a certificate of title (*or* conveyance) as prayed" (*or* subject to the following incumbrances, etc., *as the case may be*); and is to transmit the petition (if by mail, the postage being prepaid,) with the deeds, evidence, and other papers before him in reference thereto, to the Inspector of Titles with whom the petition was entered; and the Inspector is to examine the same carefully, and should he find any defect in the evidence of title, or in the proceedings, he is, by correspondence or

Duty of Inspector.

otherwise, to point the same out to the petitioner, or his solicitor, or to the Master, as the case may be, in order that the defect may be remedied before a Judge is attended with the petition and papers for approval. Chy. O. 507. Rule 1030.

Finding of Local Referee not conclusive.

It will be seen from this *Rule* that the finding of a Local Referee of Titles is not conclusive, but that it is the duty of the Inspector of Titles to examine the proceedings, and to require any defects in the proofs to be supplied. When the Inspector finds the proceedings defective, he either transmits the papers to the Referee, with a note of the defects, or, where they are few, and of trifling character, he communicates directly with the solicitor of the petitioner.

Where there has been any contest before a Referee of Titles, he should before certifying in favour of the petitioner, and transmitting the papers to the Inspector, dispose of the claim of the contestant. The order or report of the Referee on the claim of a contestant should be filed and confirmed, in the same manner as a Master's report in an action, before a certificate of title is granted to the petitioner: *Rules* 84, 848.

Appeal from Inspector, or Referee of Titles.

An appeal will lie from the order, report, or certificate, of a Referee of Titles, or Inspector of Titles, to a Judge in Court in the same manner as an appeal from a report made in an action: *Rule* 1035; seven clear days' notice of appeal must be given to the respondent: see *Rules* 1035, 848-850.

A contestant who succeeds in establishing an adverse claim, cannot obtain a certificate of title in the proceedings in which he is contestant, but he may himself file a petition, and on such petition, he would be entitled to use the evidence taken in the matter in which he was contestant: *Re Dunham*, 8 P. R. 472.

When title is made out to satisfaction of Inspector or Toronto Referee, he is to certify same: and to prepare certificate of Title.

Certificate to be engrossed in duplicate.

1030. When the Inspector, or other Referee (not being a Local Master,) finds that the petitioner has shewn himself entitled to a certificate of title, or a conveyance under the Act, and has published and given all the notices required, the Inspector, or Referee, (not being a Local Master,) is to write at the foot of the petition, and sign a memorandum to the same effect as is required from a Local Master, and is to prepare the certificate of title, or conveyance, and is to engross the same in duplicate, one being on parchment or parchment paper; and is to sign the same respectively at the foot or in the margin thereof; and is to attend one of the Judges therewith, and with the deeds, evidence, and other papers before him in reference thereto; and on the certificate or conveyance being signed by the Judge, the Inspector or other Referee aforesaid, as the case may be, is to procure the same to be signed by the Registrar, and registered; and the Clerk of Records and Writs is to deliver or transmit the same when so signed or registered, to the petitioner, his solicitor, or agent, for registration in the proper County. Chy. O. 508.

Signed by Judge, Inspector, or Toronto Referee and Registrar.

Certificate of Title, by whom prepared.

A Local Referee to whom a petition is referred, is not to prepare the certificate of title.

The Inspector of Titles—or the Referee of Titles, at Toronto, where the petition is referred to him—are the only officers authorized to prepare certificates of title, issued under the Act.

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Rules 1031-1034.

Engrossment of certificate.

This *Rule* requires the certificate to be engrossed by the officer preparing it; the object of the *Rule* being, to insure the certificates being engrossed in a proper manner; but for sometime past, the practice has been for the petitioner, or his solicitor, to procure the engrossments to be made on printed headings, supplied for the purpose by the law stationers.

The engrossment should be well and carefully made, without using figures or abbreviations, as the Judges refuse to sign certificates engrossed in a careless and slovenly manner.

Fees on.

Where the petition is referred to a Local Referee, no fee is payable on the certificate of title, except the fees for entry; the fee of $8, payable to the Inspector, being in full of all fees: *Rule* 1036. Where the petition is referred to the Referee of Titles at Toronto, a fee of $4 is payable on the certificate of title, in addition to the fees for entry: see Tariff.

After certificate of title granted, Title Deeds may be delivered up without order on receipt being given.

1031. When a certificate of title or conveyance under the Act has been granted, the Inspector or Referee may, without further order, deliver, on demand, to the party entitled thereto, or his solicitor, all deeds and other evidences of title, not including affidavits made, and evidence given in the matter of the title; and is to take his receipt therefor. Chy. O. 509.

Original deeds, only returned to petitioner.

Under this *Rule* it has been the practice to return only original deeds and documents of title, but not certified copies, these are retained by the Inspector of Titles, with the other papers in the matter.

Inspector or Toronto Referee to keep copies of all letters.

1032. Every Inspector and other Toronto Referee is to keep a book, and to preserve therein a copy of all his letters under these Rules, and is to prepare monthly, for the information of the profession, a memorandum of points of practice decided in matters under the Act. Chy. O. 510.

Points of practice decided under the Act, are brought to the attention of the official reporter, and by him published in the authorized reports from time to time.

Applicant to pay all postage, etc.

1033. The applicant or his solicitor is to pay, or prepay, as the case may be, all postages and other expenses of transmitting letters or papers. Chy. O. 515.

Proceedings under, how conducted, and fees therefor.

1034. Petitions under section 33 of the Act are to be filed and proceeded with in the same manner (as nearly as may be) as petitions for an indefeasible title; and the fees of officers, solicitors, and counsel, are to be the same as in respect of the like proceedings in suits. Chy. O. 516.

The 33rd section of the Act, above referred to is as follows:—

Declarations of legitimacy, etc.

"33. In case any person domiciled in Ontario, or claiming any real estate in Ontario, desires to establish, not his title to some specific property, but generally that he is the legitimate child of his parents, or that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or that his own marriage was a valid marriage, or that he is the heir, or one of the co-heirs of any person deceased, or that he is a natural born subject of Her Majesty, he may, if the said Court thinks fit, have any of the said matters judicially investigated and declared."

Under the Imperial Statute, 21 & 22 Vict. c. 93, it has been held that a petitioner cannot obtain a declaration of the legitimacy of his grandfather: *Dodds* v. *Attorney-General*, 42 L. T. N. S. 402. **Rules. 1035-1038.**

1035. Appeals from the Toronto Referees, Referee or Local Masters and others when they are acting under the said Act, are to be prosecuted in the same way as appeals from a Master. Chy. O. 591. Appeals from Referee and Local Masters, under Q. T. Act.

This *Rule*, it is presumed, also governs appeals from the Inspector of Titles, although he is not expressly named. Appeals from a Master may be prosecuted in two ways: appeals from Masters' reports, and certificates, being governed by *Rules* 848, 850; and appeals from Masters when acting in Chambers being governed by *Rule* 846; it is probably intended that appeals from Masters when acting under *The Quieting Titles Act* shall be had in the same manner as appeals from reports, and such appeals are therefore to be prosecuted as directed by *Rules* 848-50. From Masters.

1036. The fee of the Inspector of Titles on entering the petition with him shall be $8, and no further fee is to be paid him for correspondence, examination of the title, drawing and engrossing certificate or conveyance, or for any other matter or thing done under the petition. Chy. O. 514. Fee payable to Inspector of Titles.

1037. The fees of solicitors and counsel, and the fees payable by stamps, for proceedings under the said Act, are respectively, to be the same as for like proceedings in suits. Chy. O. 511. Fees to solicitors and counsel.

This *Rule* seems somewhat inconsistent with the Tariff, which prescribes the fees to be paid to Referees of Title, some of which differ from those payable for the like proceedings in suits. Possibly the *Rule* may be construed so far as it relates to disbursements, as if it read, "where no other fee is expressly prescribed by the Tariff, the fees payable to Referees of Titles shall be the same as for like proceedings in suits."

8. Controverted Municipal Elections.

1038. Proceedings in the nature of *quo warranto* under *The Municipal Act* shall be by motion on leave obtained from the Court or a Judge. Upon the application for leave to serve a notice of motion, then upon the Court or a Judge finding sufficient ground for giving the notice, and upon such security being given as the Act requires and the sufficiency thereof being allowed, the Court or Judge shall give a *fiat* for leave to serve the notice of motion. Proceedings by motion. *Fiat* to be obtained.

The procedure prescribed by these *Rules* is not in accordance with that prescribed by *The Municipal Act*, (R. S. O. c. 184), s. 188, which directs that a writ of summons in the nature of a *quo warranto* shall be issued; but by sec. 208, the Judges of the High Court are empowered to make *Rules* "respecting the practice generally"; the provisions of these *Rules*, therefore, supersede the

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Rule 1038. practice prescribed by the Statute: see 50 Vict. c. 8, s. 2, (O); 51 Vict. c. 2, s. 4, (O). The application must be made in the name of the Sovereign upon the relation of some person qualified to be a relator.

Relator—who may be.

The Relator.—The relator is the person upon whose application the jurisdiction of the Court is put in motion.

Under "*The Municipal Act*," (R. S. O. c. 184), s. 187, *any municipal elector in the county* may be the relator in a case where the right of any municipality to a Reeve, or Deputy-Reeve, or Reeves, is in question: see R. S. O. c. 184, ss. 69-71. When the question is as to the validity of the election of any Mayor, Warden, Reeve, Deputy-Reeve, Alderman, or Councillor, then *any candidate* at the election, or *any elector who gave, or tendered his vote thereat*, is qualified to be a relator; and if the contest be concerning the validity of an appointment by the members of the council of a municipality of any member of their body: see R. S. O. c. 184, s. 186; then *any member of the council*, or *any elector of the ward*, or if there is no ward, then *any elector of the municipality* for which the appointment was made, may be the relator.

A voter of another ward if he desires to complain of an election cannot proceed in a summary manner under s. 187, but must file an information in the nature of a *quo warranto*: *Regina ex rel. Coleman* v. *O'Hare*, 2 P. R. 18; see also *Regina ex rel. Hart* v. *Lindsay*, 18 U. C. Q. B. 51; *Regina ex rel. Clancey* v. *St. Jean*, 46 U. C. Q. B. 77.

Candidate—definition of.

As to who is to be deemed a candidate: see *Coombe* v. *Pitt*, 3 Burr. 1590; *Morris* v. *Burdett*, 1 Camp. 218; *S. C.* 2 M. & S. 216; *Muntz* v. *Sturge*, 8 M. & W. 310; Harrison's Munl. Manl., (5th ed.) 138.

One whose nomination prevented, may protest election.

It is not necessary in order to constitute a person a "candidate" so as to qualify him to be a relator, that he should be actually nominated at the election, where his actual nomination has been prevented by the misconduct of the Returning Officer: *Regina ex rel. Corbett* v. *Jull*, 5 P. R. 41. But if after being nominated, he, with the consent of his proposer and seconder, withdraw, he ceases to be a candidate: *Regina ex rel. Coyne* v. *Chisholm*, 5 P. R. 328; and see *Regina ex rel. Harris* v. *Bradburn*, 6 P. R. 308.

A relator who was a candidate need not, in his application to oust the defendant, show that he himself is qualified for the office: *Regina ex rel. Mitchell* v. *Adams*, 1 C. L. Ch. 203.

If the interest of a relator is denied by the defendant on grounds assigned, then he must establish his interest: *Regina ex rel. Bartliffe* v. *O'Reilly*, 8 U. C. Q. B. 617.

Electors—who qualified to be.

As to who are qualified to be electors: see R. S. O. c. 184, ss. 79-87. Electors who are disfranchised between the nomination and polling day are disqualified from voting: *Regina ex rel. Taverner* v. *Willson*, 12 P. R. 546. An elector who has been instrumental in electing a candidate will not be permitted to dispute the validity of the election of that candidate: *Regina ex rel. Pomeroy* v. *Watson*, 1 U. C. L. J. 48; *Regina ex rel. Loyall* v. *Ponton*, 2 P. R. 18; *Regina ex rel. Rosebush* v. *Parker*, 2 C. P. 15; *Kelly* v. *Macarow*, 14 C. P. 457; *Regina ex rel. Grayson* v. *Bell*, 1 C. L. J. 130; *Regina ex rel. Regis* v. *Cusac*, 6 P. R. 303; *Regina ex rel. Harris* v. *Bradburn*, *Ib.*, 308; unless he can show that he was ignorant of the objection he desires to urge: *Regina ex rel. Coleman* v. *O'Hare*, 2 P. R. 18; nor can a Councillor who has been instrumental in the election of a person as Reeve, or Deputy-Reeve, afterwards dispute the election: *Regina ex rel. Rosebush* v. *Parker*, 2 C. P. 15; but when his election is successfully disputed by a third party the seat may be awarded to an opposing candidate who voted for the defendant: *Regina ex rel. Clint* v. *Upham*, 7 U. C. L. J. 69.

Elector when estopped from disputing validity of election.

No contest allowed where the election is by acclamation.

And when there is only one candidate, or set of candidates, who is, or are, in good faith elected by acclamation, no contest can be entertained under section 185: *Regina ex rel. Bugg* v. *Bell*, 4 P. R. 226. As to how far the acquiescence of a candidate in an irregular election disqualifies him from afterwards being a relator: see *Regina ex rel. Mitchell* v. *Adams*, 1 C. L. Ch. 203; *Regina* v. *Lofthouse*, L. R. 1 Q. B. 433. But the acquiescence of a candidate in an irregular election will not prevent a voter who was no party to such acquiescence from applying: *Re Charles* v. *Lewis*, 2 C. L. Ch. 171. But if a voter take part in an election

he cannot be heard to say that it was wholly void: *Regina ex rel. McLaughlin* v. *Hicks*, 5 U. C. L. J. 89. Rule 1038.

Where the applicant failed to show in his statement that he was either a candidate or an elector who had voted; it was held that the omission was fatal, and could not be amended at a later stage of the proceedings: *Regina ex rel. Chauncey* v. *Billings*, 12 P. R. 404.

A *quo warranto* obtained by one relator was set aside at the instance of another relator, on the ground of the first relator being in collusion with the defendant: *Regina ex rel. Patterson* v. *Vance*, 5 P. R. 334; but one relator cannot object to mere irregularities in the proceedings of another, unless he can show they were committed designedly to secure the failure of the proceedings: *Ib.*, and see *Rules* 441, 442.

A relator is liable to be ordered to pay the costs of the defendant. An officer of the corporation may be a relator, but it is not desirable that he should be, and he may be refused costs even though successful: *Regina ex rel. McMullen* v. *DeLisle*, 8 U. C. L. J. 291; *Regina ex rel. Brine* v. *Booth*, 9 P. R. 452. Costs, liability of a relator for.

Information, when necessary.—In cases where the summary proceedings prescribed by R. S. O. c. 184, s. 187, cannot be taken to dispute the validity of an election to any public office, the question can only be determined upon an information in the nature of *quo warranto*. *E.g.*, where the right of School Trustees to act as such is questioned, the regularity of their election can only be tested by information, and cannot be raised in any collateral proceeding. If, however, the existence of the power to form the school section for which the trustees assume to act is denied, that may be raised in a collateral proceeding: *Askew* v. *Manning*, 38 U. C. Q. B. 345. As to cases in which leave to file an information will be granted: see *Ib.* pp. 358, *et seq.* Where the election of the defendant is regular, but it is claimed that by a subsequent act he has forfeited his seat, it would seem that an information must be filed: *Regina ex rel. McGouverin* v. *Lawlor*, 5 P. R. 208. Information, when necessary to be filed.

Where the person elected has not made the requisite declaration of qualification before entering on the duties of his office: see R. S. O. c. 184, ss. 73, 270, his right to exercise the office may be called in question upon an information in the nature of a *quo warranto: Regina ex rel. Clancy* v. *St. Jean*, 46 U. C. Q. B. 77.

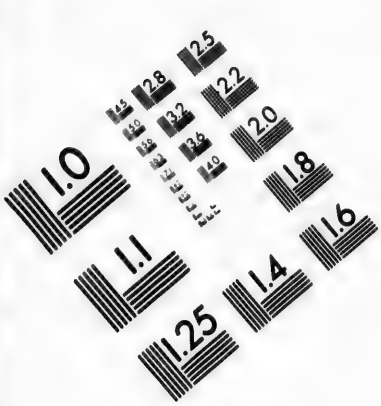
Under R. S. O. c. 184, ss. 191, 199, it would seem that a relator can now attack the whole of the members of the council in one proceeding.

Formerly it was held that a relator could not attack a municipal council by name, upon grounds which if sustained must necessarily lead to a dissolution of the body, nor could he attack the whole council in one proceeding, through the individual names of every member of it: *Regina ex rel. Lawrence* v. *Woodruff*, 8 U. C. Q. B. 336; but see *Rex* v. *Parry*, 6 A. & E. 810-820. An information for that purpose, however, would lie in the name of the Attorney-General on behalf of the Crown: *Rex* v. *Carmarthen*, 2 Burr. 869; *Rex* v. *Ogden*, 10 B. & C. 230; *Regina* v. *Taylor*, 11 A. & E. 949. When the information is filed by the Attorney-General, no leave of the Court is required, but when it is filed on behalf of some individual, then the leave of the Court must be obtained: 4 & 5 W. & M. c. 18, ss. 2, 6. Leave of Court to filing information, when necessary.

A municipal election may now be attacked by proceeding under these *Rules* for bribery, corrupt practices, or any other cause: *Regina ex rel. Johns* v. *Stewart*, 16 Ont. 5.

Where a relator can proceed under section 187, he will not be permitted to file an information: *Kelly* v. *Macarow*, 14 C. P. 313, 457; *Regina ex rel. White* v. *Roach*, 18 U. C. Q. B. 226; *Regina ex rel. Johns* v. *Stewart*, 16 Ont. 5; but see *Regina ex rel. Clancy* v. *St. Jean*, 46 U. C. Q. B. 77.

When the time for proceeding in a summary manner is suffered to elapse the relator will not be allowed to file an information in the nature of a *quo warranto: Regina ex rel. White* v. *Roach*, 18 U. C. Q. B. 226.



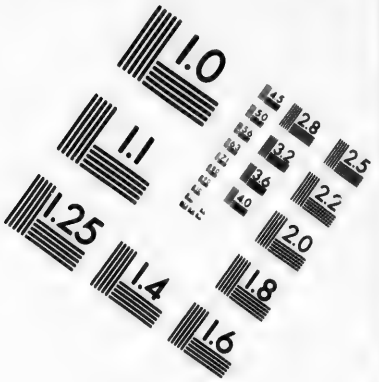
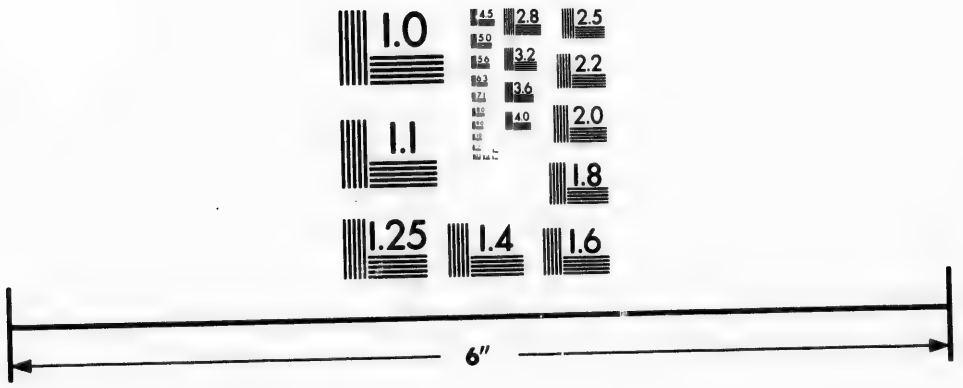
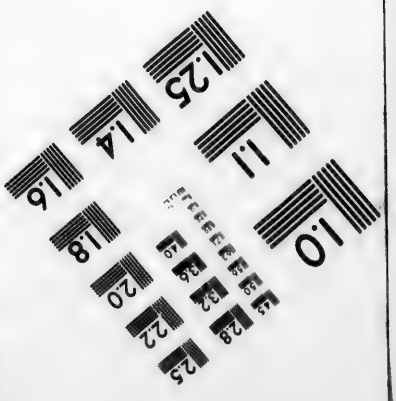


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Rule 1038. A summons under *The Municipal Act*, is not an appropriate proceeding to unseat a defendant who has forfeited his seat by an act subsequent to the election, where the election was legal: *Regina ex rel. McGouverin* v. *Lawlor*, 5 P. R. 208.

Application to whom made.

Application for leave to serve notice of motion.—The application may be now made to any Judge of the High Court, or a Judge of the County Court of the County in which the election or appointment took place: R. S. O. c. 184, s. 187, 52 V. c. 36, s. 46; or to the Master in Chambers: *Rule* 30; *Reg. ex rel. White* v. *McClay*, 13 P. R. 96; but if the proceedings are taken before a Judge of the County Court they must be styled in the County Court, as the Judge has no power to act under this *Rule* or the foregoing Statutes in proceedings taken in the High Court of Justice: *Rule* 41; *Reg. ex rel. Dougherty* v. *McClay*, 13 P. R. 56. Applications in Toronto in the High Court are now usually made to the Master in Chambers: see *Regina ex rel. Hauer* v. *Roberts*, 7 P. R. 315; *Reg. ex rel. Brine* v. *Booth*, 9 P. R. 452; *S. C.*, 3 Ont. 144; *Reg. ex rel. Halsted* v. *Ferris*, 5 P. R. 241; *Reg. ex rel. Hamilton* v. *Piper*, 8 P. R. 225; *Reg. ex rel. Frelitz* v. *Howland*, 11 P. R. 264.

Formerly where an application was made to a Judge of a County Court for a writ of summons he had power to direct that it should be made returnable before a Judge of the High Court, if he should think it proper: *Regina ex rel. Lutz* v. *Williamson*, 1 P. R. 94; but he has now no power to order a notice of motion to be made returnable before the Judge of the High Court: *Reg. ex rel. Dougherty* v. *McClay*, 13 P. R. 56.

When the Junior Judge of a County Court is officiating it would seem that he has jurisdiction to grant the leave to serve the notice of motion in cases brought in the County Court: *Regina ex rel. McDonald* v. *Anderson*, 8 P. R. 241.

The application should be supported by production of the notice of motion desired to be served, in which the various grounds intended to be relied on should be specifically set out; and also by affidavit or affidavits verifying the material facts necessary to support the application. It would seem that the affidavit of the relator alone would be sufficient: *Regina ex rel. Carroll* v. *Beckwith*, 1 P. R. 278.

When the mistake or irregularity complained of by the relator, has in no way contributed to any improper result, the Judge may properly refuse to grant leave to serve the notice of motion: *Regina* v. *Ward*, L. R. 8 Q. B. 210; *Regina* v. *Cousins*, *Ib.* 216; *Regina ex rel. Grayson* v. *Bell*, 1 C. L. J. 130; and see *Regina ex rel. Halsted* v. *Ferris*, 5 P. R. 241.

Recognizance to be entered into by Relator and two sureties.

The relator is also bound to enter into a recognizance of $200 with two sureties in $100 each, conditioned to prosecute the writ with effect, or to pay to the party against whom the same is brought any costs which may be adjudged to him against the relator: R. S. O. c. 184, s. 188. The recognizance should be produced with an affidavit of justification by the sureties.

A distinct order for the allowance of the recognizance is not necessary: *Regina ex rel. Linton* v. *Jackson*, 2 C. L. Ch. 18.

As to entitling the recognizance: see *Regina ex rel. Bland* v. *Figg*, 6 C. L. J. 44.

The relator's solicitor should not act as commissioner to take the recognizance: see *Rule* 1073; but see *Regina ex rel. Blaisdell* v. *Rochester*, 12 U. C. Q. B. 630.

Time for making the application.

Time within which application to be made.—By R. S. O. c. 184, s. 188, the application is to be made "within six weeks after the election, or one month after acceptance of office by the person elected." In computing the six weeks the day of the election is to be excluded: Har. Munl. Manl., (4th ed.,) 126-127. The month referred to is a calendar month: see R. S. O. c. 1, s. 8, s.-s. 15.

The acceptance of office is a formal acceptance by making the statutory declaration of qualification, and office: see R. S. O. c. 184, ss. 73, 270; and not a mere verbal acceptance by speech to the electors: *Regina ex rel. Clancey* v. *McIntosh*, 46 U. C. Q. B. 98.

In computing the calendar month the last day falls on the corresponding day in the ensuing month to that on which the acceptance of office took place:

Freeman v. *Read*, 4 B. & S. 184-5, but if the acceptance take place on the 29th, 30th, or 31st January, the month ends on the last day of the ensuing month of February. Six weeks are allowed to impeach the election, although the office may have been accepted more than a calendar month. If the application be not made within six weeks after the election, it may still be made, if the office has not been accepted a calendar month by the person elected. **Rule 1039.**

Where after a summons had been obtained under the former practice the relator finding his proceedings irregular notified defendant not to appear and that it was his intention to proceed *de novo*, it was held that the first proceeding was no bar to his making a second application: *Reg. ex rel. Metcalfe* v. *Smart*, 10 U. C. Q. B. 89; 2 C. L. Ch. 114. Abandonment of proceedings.

The granting of leave to give the notice of motion is in the discretion of the Judge, and if in his opinion the objection relied on has not contributed to an improper result he may properly refuse to grant leave to serve the notice: see note to *Rule* 1040.

The notice of motion is to be served personally, but if the defendant evade service an order for substitutional service may be made: R. S. O. c. 184, s. 194; but personal service will not be dispensed with except for this cause: *Reg. ex rel. Arnott* v. *Marchant*, 2 C. L. Ch. 167. Irregularities in the writ may be waived by appearance: *Regina ex rel. Linton* v. *Jackson*, 2 C. L. Ch. 18. Service of notice of motion, how to be made.

In general a copy of the notice should be left with the defendant and the original shown to him if he desire to see it: *Goggs* v. *Huntingtower*, 1 D. & L. 599, *per* Alderson, B. Service upon a wife, agent, or servant is not personal service: *Frith* v. *Donegal*, 2 Dowl. 527; *Davies* v. *Morgan*, 2 C. & J. 237; *Goggs* v. *Huntingtower*, *supra*; *Christmas* v. *Eicke*, 6 D. & L. 156; Harrison's Muni. Manl, 4th ed., 139.

An irregularity in the teste of the writ was formerly held to be waived by entering an appearance: *Regina ex rel. Linton* v. *Jackson*, 2 C. L. Ch. 18. Irregularity in proceedings.

Proceedings are not to be held irregular and void which do not interfere with the just trial of the matter on the merits: *Regina ex rel. McManus* v. *Ferguson*, 2 C. L. J. 19; and see *Rules* 441, 442.

Where a County Court Judge under the former practice, had set aside a writ which had been granted by himself, on exceptions taken thereto for irregularity; it was held that he had power to take that course, and that a Superior Court had no power to interfere with his decision: *Regina ex rel. Grant* v. *Coleman*, 8 P. R. 497; 46 U. C. Q. B. 175; and see *Regina ex rel. O'Dwyer* v. *Lewis*, 32 C. P. 104. But the Court of Appeal, although affirming the decision on the ground that the matter was not appealable, nevertheless held that, after a *quo warranto* summons had been issued, and served, it could not properly be set aside for irregularity, but must be disposed of on the merits: *Regina ex rel. Grant* v. *Coleman*, 7 Ont App. 626. Writ cannot be set aside for a mere irregularity.

Several Applications.—R. S. O. c. 184, s. 192, provides as follows:—

"192. Where more writs than one are brought to try the validity of an election, or the right to a reeve, or deputy reeve, or reeves as aforesaid, all such writs shall be made returnable before the Judge who is to try the first, and the Judge may give one judgment upon all, or a separate judgment upon each one or more of them as he thinks fit": see *Regina ex rel. Forward* v. *Detlor*, 4 P. R. 197; *Regina* v. *Mayor of Tewkesbury*, L. R. 3 Q. B. 629.

By analogy to this provision it would probably be deemed proper in the event of more than one notice of motion being served, to adjourn both or all to be heard before the Judge who is to hear the one first served, and upon such applications the Judge would be at liberty to pronounce one judgment or several as he might see fit. When an application is collusive and intended to protect the defendant in the enjoyment of his office, see *Regina ex rel. McLean* v. *Watson*, 1 C. L. J. 71.

1039. The notice of motion shall be at least a seven clear days' notice, and the relator may either mention the return day therein or may state that the motion will be Notice of motion.

Rule 1040. made on the eighth day after the day of service of the notice, excluding the day of service.

Notice of motion, what to contain.

1040. The relator shall, in his notice of motion, set out his name in full, his occupation, place of residence, and the interest which he has in the election, as candidate or voter, and shall also set forth specifically under distinct heads, separately numbered, all such grounds of objection as he intends to urge against the validity of the election complained against, and in favour of the validity of the election of the relator, or another or other person or persons, when he claims that he or they, or any of them, have been duly elected.

The omission to state that the applicant is either a candidate, or a voter who has voted at the election, is fatal, and cannot be amended at a subsequent stage of the proceedings: *Regina ex rel. Chauncey* v. *Billings*, 12 P. R. 404.

When seat claimed on ground of disqualification of defendant, evidence required that notice of disqualification of defendant was given to electors.

When the seat is claimed by the relator himself, or for some other person, on the ground of the disqualification of the party elected, it is necessary to show that the electors were duly notified at the nomination: *Regina ex rel. Tinning* v. *Edgar*, 4 P. R. 36, of the alleged disqualification. Where this is not shown, even though the disqualification be established, a new election will be ordered: *Regina ex rel. Hervey* v. *Scott*, 2 C. L. Ch. 88; *Regina ex rel. Richmond* v. *Tegart*, 7 U. C. L. J. 128; *Regina ex rel. Fanaghan* v. *McMahon*, *Ib.* 155; *Regina ex rel. Dexter* v. *Gowan*, 1 P. R. 104; *Regina ex rel. Adamson* v. *Boyd*, 4 P. R. 204; *Regina ex rel. Ford* v. *McRae*, 5 P. R. 309. In order merely to set aside the election it is not necessary to show the notice of the disqualification was given: *Regina ex rel. Coleman* v. *O'Hare*, 2 P. R. 18. When the relator claims to have been elected at the nomination owing to the defendant's disqualification, his subsequent going to the polls waives such right: *Regina ex rel. Forward* v. *Dellor*, 4 P. R. 198. The returning officer has no power to adjudicate upon the alleged disqualification of a candidate who has the majority of votes; he is bound to declare him elected, and the announcement of the fact that he has the majority of votes would seem to be a sufficient declaration: *Regina* v. *Mayor of Bangor*, 18 Q. B. D. 349, *S. C. sub nom. Pritchard* v. *Mayor of Bangor*, 13 App. Cas. 241; 58 L. T. N. S. 502.

Discretion of Judge as to awarding seat.

It would seem to be a matter of discretion with the Judge whether or not he awards the seat to the relator, which cannot be interfered with on appeal, assuming that there can now be any appeal at all: see R. S. O. c. 184, s. 207; *Regina ex rel. Clark* v. *McMullen*, 9 U. C. Q. B. 467.

Property qualification, how estimated.

In estimating the property qualification required by a candidate under R. S. O. c. 184, s. 73, the amount of mortgages upon the property must be deducted from the assessed, and not from the real value: *Regina ex rel. Kelly* v. *Ion*, 8 P. R. 432; and see *Regina ex rel. Brine* v. *Booth*, 9 P. R. 452; 3 Ont. 144; *Regina ex rel. Clancy* v. *McIntosh*, 46 U. C. Q. B. 98. The accuracy of the assessment roll cannot be controverted on such an application: *Regina ex rel. Hamilton* v. *Piper*, 8 P. R. 225.

Technical objections.

Proceedings are not to be set aside or held void on account of any irregularity or defect which shall not in the opinion of the Judge interfere with the just trial or adjudication of the case on the merits: *Rules* 441, 442; but see *Regina ex rel. Chauncey* v. *Billings*, 12 P. R. 404.

Abandonment of proceedings by relator.

Where after a defendant has been served with the summons, but before he has appeared the relator finds his proceedings are irregular or defective, he may notify the defendant not to appear, and abandon his proceedings, and commence *de novo* provided the time allowed for commencing his proceedings has not expired: *Regina ex rel Metcalfe* v. *Smart*, 10 U. C. Q. B. 89.

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Rule 1041.

Objections not taken in statement.

The relator is not permitted at the hearing to take objections not specified in the notice of motion: see *Rule* 1042; but the Judge may in his discretion entertain upon his own view of the case any substantial ground, or objection to, or in support of, the validity of the election of either, or any, of the parties which may appear on the evidence: *Ib.*

Statement of relator.

Where the allegation in the statement was that the relator "had an interest in the said election as a voter," and his affidavit stated that he had voted "on the said election, but not for the said William Rastal," it was held to be sufficient: *Regina ex rel. Ross* v. *Rastal*, 2 C. L. J. 160. A relator is not necessarily bound to prove his interest, unless it is expressly denied by the defendant: *Regina ex rel. Boutliffe* v. *O'Reilly*, 8 U. C. Q. B. 617; *Regina ex rel. Pomeroy* v. *Watson*, 1 U. C. L. J. 48; *Regina ex rel. Campbell* v. *OMalley*, 10 C. L. J. 250; *Regina ex rel. Shaw* v. *Mackenzie*, 2 C. L. Ch. 36; but it was held under the former practice that the issue of the writ did not establish the interest of the relator if denied, *Ib.* But the interest of the relator should be distinctly stated in the notice of motion: *Regina ex rel. White* v. *Roach*, 18 U. C. Q. B. 226; and see *Regina ex rel. Ross* v. *Rastal*, 2 C. L. J. 160; but where the fact appears by the affidavit, but the allegation is omitted from the notice of motion it is possible the latter may be amended: see *Regina ex rel. O'Reilly* v. *Charlton*, 6 P. R. 254; but see *Regina ex rel. Chauncey* v. *Billings*, 12 P. R. 404.

Interest of relator.

Amendment of statement when allowed.

Proof of relator's interest.

When the interest of the relator as an elector is denied, the proper proof of his right, is the production of the roll, or an authenticated copy: *Regina ex rel. Campbell* v. *O'Malley*, 10 C. L. J. 250.

Statement of relator to be signed.

Formerly the statement of the relator was required to be signed; and it was held that the affidavit of the relator indorsed that he believed the objections within stated to be well founded was not sufficient to dispense with his signature: *Regina ex rel. Telfer* v. *Allan*, 1 P. R. 214; but it would seem that the relator's signature to the notice of motion, unless he is proceeding in person, is not now necessary, but that it will be sufficient if signed by his solicitor in the ordinary way.

The affidavit of the relator alone, was held sufficient to obtain the writ of summons in the nature of a *quo warranto* under the former practice, even before the act enabling him to be a witness in his own behalf: *Regina ex rel. Carroll* v. *Beckwith*, 1 P. R. 278.

The affidavit sustaining the relator's case need not necessarily state that the defendant has accepted or acted in the office: *Regina ex rel. Helliwell* v. *Stephenson*, 1 C. L. Ch. 270. But when alienage is the objection relied on by a relator, it must be shown particularly how the parties complained of are aliens; a general affidavit of the fact was held insufficient: *Regina ex rel. Carroll* v. *Beckwith*, 1 P. R. 278.

Entitling affidavit of relator.

When the affidavit of the relator, though not entitled in any Court, followed and referred to his statement which was properly entitled, it was held sufficient, and an objection that the recognizance was not entitled in any Court was disallowed on similar grounds: *Regina ex rel. Bland* v. *Figg*, 6 U. C. L. J. 44; but see *Hirons* v. *Amherstburgh*, 11 U. C. Q. B. 458.

Affidavits to be filed.

1041. Before serving his notice of motion he shall file all the affidavits and material upon which he intends to move, except when *viva voce* evidence is to be taken, and in that case he shall name in his notice the witnesses whom he proposes to examine.

Filing papers.

When the papers on which a summons was obtained were left with the County Court Judge, but were handed by him to the defendant's solicitor, before the return day, for perusal; it was held sufficient, and that it was not essential that they should have been filed with the Deputy Clerk of the Crown before the summons issued: *Regina ex rel. Blaisdell* v. *Rochester*, 12 U. C. Q. B. 630.

YORK UNIVERSITY L...

Rule 1041.

R. S. O. c. 184, s. 197, provision of, as to trial.

"The Judge shall in a summary manner, upon statement and answer, without formal pleadings hear and determine the validity of the election, or the right to a Reeve or Deputy Reeve, or Reeves, and may by order cause the assessment rolls, collector's rolls, list of electors, and any other records of the election to be brought before him, and may inquire into the facts on affidavit or affirmation, or by oral testimony, or by issues framed by him, and sent to be tried by jury by writ of trial directed to any Court named by the Judge, or by one or more of these means, as he deems expedient, subject, however, to the provisions of section 212:" R. S. O. c. 184, s. 197.

Ib. s. 212.

Section 212 provides that when in an application in the nature of a *quo warranto*, any question is raised as to whether the candidate or any voter has been guilty of any bribery, corruption, or using violence, or intimidation, within section 209, or 210 of the Act, the evidence to prove the offence must be given *viva voce* before a Judge of any County Court, upon a reference to him by the Judge of the High Court for that purpose, or upon an appointment granted by him in cases pending in such County Court. It has been held that the Master in Chambers has power to direct a reference to a Judge of a County Court to take the evidence: *Reg. ex rel. White* v. *McClay*, 13 P. R. 96; 25 C. L. J. 284.

In other cases the right to adduce oral evidence was formerly in the discretion of the Judge, and an oral examination of the parties or witnesses might be refused; *Regina ex rel. Piddington* v. *Riddell*, 4 P. R. 80; but see now, *Rule* 578.

Where an issue is directed to be tried by jury, see *Rule* 1043.

Material facts alleged in the relator's notice of motion and supported by the affidavit should be answered, or they may be taken to be admitted by the defendant: *Regina ex rel. Hervey* v. *Scott*, 2 C. L. Ch. 88.

And the interest of the relator, if intended to be contested must be distinctly denied, even in a case where though it is stated in the notice of motion, it is not verified by the relator's affidavit: see note to *Rule* 1040.

Disclaimer, where to be filed.

Disclaimer.—By R. S. O. c. 184, s. 200, "Any person whose election is complained of may, unless such election is complained of on the ground of corrupt practices on the part of such person, within one week after service on him of the writ, transmit post paid, through the post office, directed to 'The Clerk in Chambers, at Osgoode Hall, Toronto,' or to 'The Judge of the County Court of the County of ' (*as the case may be*) or may cause to be delivered to such Clerk or Judge a disclaimer signed by him to the effect following:

Form of disclaimer, after proceedings.

I, A. B., upon whom a [writ of summons, in the nature of a *quo warranto**] has been served for the purpose of contesting my right to the office of Township Councillor (*or as the case may be*) for the Township of , in the County of , (*or as the case may be*), do hereby disclaim the said office, and all defence I may have of any right to the same.

Dated day of (*Signed.*) A. B."

Transmission of.

Such disclaimer, or the envelope containing the same, is to be indorsed on the outside thereof with the word "Disclaimer," and to be registered at the Post Office where mailed: *Ib.* s. 201.

A duplicate should also be delivered to the Clerk of the Council: see s. 204, *infra*.

Where there has been a contested election, the person elected may at any time after the election, and before his election is complained of, deliver to the Clerk of the Municipality a disclaimer signed by him as follows:

Form of disclaimer before proceedings.

"I, A. B., do hereby disclaim all right to the office of Township Councillor, (*or as the case may be*), for the Township of , (*or as the case may be*), and all defence of any right I may have to the same." *Ib.* s. 202.

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* Having regard to the change effected in the practice by these *Rules*, for the words here in brackets should now be substituted "notice of motion."

"Such disclaimer shall relieve the party making it from all liability to costs, and when a disclaimer has been made in accordance with the preceding sections, it shall operate as a resignation, and the candidate having the highest number of votes shall then become the Councillor, or other officer as the case may be." *Ib.* s. 203. **Rules 1042, 1043.** Party disclaiming not liable for costs.

A duplicate of every disclaimer is to be delivered by the party disclaiming to the Clerk of the Council who is forthwith to communicate it to the Council: see *Ib.* s. 204.

Where a disclaimer is filed, no costs are to be awarded against any person duly disclaiming, unless the Judge is satisfied that such party consented to his nomination as a candidate, or accepted the office, in which case the costs are in the discretion of the Judge: *Ib.* s. 205; *Regina ex rel. Coupland* v. *Webster*, 6 U. C. L. J. 89. Costs when disclaimer filed.

The procedure laid down in the Statute should be strictly followed, otherwise the disclaimer would be insufficient to relieve the party disclaiming from costs.

Where the disclaimer was filed a day too late the defendant was ordered to pay the relator's costs: *Regina ex rel. Hawke* v. *Hall*, 2 C. L. Ch. 182; and where a defendant, after he had accepted office, but before he knew of the issue of the writ, but knowing that his election was to be contested, sent an instrument to the council in the following form:—"Palmerston, February 7th, 1881. To the Mayor and Council of the Town of Palmerston: Gentlemen, I beg to disclaim my seat at the Council Board. (*Signed*). G. S. Davidson." it was held that the disclaimer, not being in the form prescribed by the Statute, was not sufficient to relieve the defendant from costs: *Regina ex rel. Mitchell* v. *Davidson*, 8 P. R. 434.

The effect of a disclaimer after the service of the notice of motion is to put an end to the suit: *Regina ex rel. Hannah* v. *Paul*, 9 C. L. J. 238; but where the object of the proceedings is not only to cause the defendant to vacate the office, but to substitute another candidate in the office, the disclaimer cannot prevent the substitution: see *Regina* v. *Blizard*, L. R. 2 Q. B. 55. Effect of disclaimer after writ issued.

1042. On the hearing of the motion the relator shall not be allowed to object to the election of the party or parties complained against, or to support the election or elections of the person or persons alleged to have been duly elected on any ground not specified in the notice of motion; but it shall, nevertheless, be in the discretion of the Judge to entertain upon his own view of the case any substantial ground of objection to or in support of the validity of the election of either or any of the parties which may appear in the evidence before him. Hearing of motion.

This *Rule* is taken from *Rule* 9 of the former Municipal Election Rules: see Holmested's Rules and Orders, p. 633.

When the interest of the relator appeared by the affidavits, but was omitted from the statement, the latter was allowed to be amended: *Regina ex rel. O'Reilly* v. *Charlton*, 6 P. R. 254; but see *Regina ex rel. Chauncey* v. *Billings*, 12 P. R. 404.

1043. In case a necessity shall appear for sending an issue to be tried by a jury, an order for that purpose may be made, and the issue to be tried shall be stated in the order. Issue, when to be tried.

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Rule 1044. Judgment.

1044. When the Judge before whom any such case shall be pending shall have determined the same an order shall be drawn up in the usual manner which shall state concisely the ground and effect of the judgment, which order may be at any time amended by the same Judge in regard to any matter of form, and the said order shall have the same force and effect as a writ of mandamus formerly had in the like case.

"The decision of the Judge shall be final, and he shall immediately after his judgment return the writ and judgment, with all things laid before him touching the same, into the Division from which the writ issued, there to remain of record as a judgment of the High Court; and he shall as occasion requires, enforce the judgment by a writ in the nature of a writ of peremptory *mandamus*, and by writs of execution for the costs awarded:" R. S. O. c. 184, s. 207; *Regina ex rel. Hamilton* v. *Piper*, 8 P. R. 225; *Regina ex rel. Grant* v. *Coleman*, 7 Ont. App. 619.

It is presumed as there is no longer to be any writ of summons issued the return contemplated by this section should be made to the proper officer of the Division in which the proceedings are entitled; or in cases in the County Court to the Clerk of the Court. Under the former practice it was held not to be necessary to enter the judgment in the judgment book: see *Rule* 772; but it was sufficient to file the proceedings of record: *per* Boyd, C., and Ferguson, J., *Standish* v. *Shields*, Ch. D., 4th Mar. 1886.

Notwithstanding the wording of s. 207, as to the finality of the judgment, it is possible that when it is pronounced by the Masters in Chamber it is still appealable in the same way as any other order made by him: see *Bryant* v. *Reading*, 17 Q. B. D. 128; 54 L. T. N. S. 524; *Clench* v. *Dooley*, 56 L. T. N. S. 122.

Costs, discretion of Judge as to.

Costs.—Costs are in the discretion of the Judge or judicial officer to whom the application is made: *Rule* 1170, 1178.

No costs are to be awarded against a person duly disclaiming, unless the Judge is satisfied that such party consented to his nomination, or accepted the office, in which case costs shall be in the discretion of the Judge. In all cases not otherwise provided for, costs are in the discretion of the Judge: R. S. O. c. 184, ss. 205, 206.

There appears to be no means of enforcing payment of interlocutory costs, unless they be ordered to be paid by the judgment in the matter: see *per* Patterson, J. A., *Regina ex rel. Grant* v. *Coleman*, 7 Ont. App. at p. 626.

Where a new election is ordered, the relator is *primâ facie* entitled to costs against the defendant: *Regina ex rel. Ross* v. *Rastal*, 2 C. L. J. 160; *Regina ex rel. Kirk* v. *Asselstine*, 1 U. C. L. J. 49. So also when the relator is declared entitled to the seat in consequence of defendant's disqualifications: *Regina ex rel. Richmond* v. *Tegart*, 7 U. C. L. J. 128.

But the Judge may refuse to order a party to pay costs, when it is not shown that he participated in the improper conduct for which an election is set aside: *Regina ex rel. Davis* v. *Wilson*, 3 U. C. L. J. 165; and see *Regina ex rel. Swan* v. *Rowat*, 13 U. C. Q. B. 340; *Regina ex rel. Gordanier* v. *Perry*, 3 U. C. L. J. 90.

When the relator was an officer of the Corporation, though successful, costs were refused: *Regina ex rel. McMullen* v. *DeLisle*, 8 U. C. L. J. 291; *Regina ex rel. Brine* v. *Booth*, 9 P. R. 452.

Decisions as to costs.

A defendant who had acted in good faith, but was held to be disqualified, was ordered to pay costs: *Regina ex rel. Rollo* v. *Beard*, 3 P. R. 357; *In re Charles* v. *Lewis*, 2 C. L. Ch. 171, 177.

But where a defendant through the improper decision of the Clerk of a Council was declared entitled to a seat, and accepted office, and was sworn in without having interfered with the decision of the Clerk or otherwise misconducted himself, though his election was set aside, no costs were awarded against him: *Regina ex rel. McManus* v. *Ferguson*, 2 C. L. J. 19. Rule 1044.

Where a returning officer was added as a party, and was acquitted, and discharged, and the relator's statement not being strictly correct, the relator was ordered to pay the officer his costs: *Regina ex rel. Hawke* v. *Hall*, 2 C. L. Ch. 182.

A returning officer will not usually be ordered to pay costs, even though his conduct be in some particulars irregular, if his motives were pure, and his conduct free from corruption or partiality: *Regina ex rel. McVean* v. *Graham*, 7 U. C. L. J. 125; *Regina ex rel. Coupland* v. *Webster*, 6 U. C. L. J. 89; *Regina ex rel. Arnott* v. *Marchant*, 2 C. L. Ch. 167.

Where the returning officer acted *bonâ fide*, and the defendant procured a written legal opinion to be sent to him, by which means he obtained the seat, the costs of making the returning officer a party, were ordered to be paid by the defendant: *Regina ex rel. Pomeroy* v. *Watson*, 1 U. C. L. J. 48.

Where the returning officer has acted improperly at the defendant's instance, both he and the defendant may be ordered to pay the relator's costs: *Regina ex rel. Acheson* v. *Donoghue*, 15 U. C. Q. B. 454.

But a returning officer who received illegal votes, not on the assessment rolls, was ordered to pay costs: *Regina ex rel. Johnson* v. *Murney*, 5 U. C. L. J. 87; and see *Regina ex rel. Mitchell* v. *Rankin*, 2 C. L. Ch. 161; *Regina ex rel. Totten* v. *Benn*, 4 U. C. L. J. 262; *Regina ex rel. Corbett* v. *Jull*, 5 P. R. 41.

Costs will not always be awarded against an unsuccessful relator: *Regina ex rel. Crozier* v. *Taylor*, 6 U. C. L. J. 60; *Regina ex rel. Armor* v. *Coste*, 8 C. L. J. 290; *Regina ex rel. Piddington* v. *Riddell*, 4 P. R. 80.

A by-law passed by a township council levying money to pay the costs of a contested election is illegal and will be quashed with costs: *In re Bell* v. *Mauvers*, 2 C. P. 507; 3 C. P. 400.

Costs will be taxed on motions in the High Court under these *Rules* according to the tariff on motions in the High Court. See *Reg.* v. *Hill*, 9 C. L. T. 170.

FORMS OF PROCEEDINGS

IN

CONTESTED MUNICIPAL ELECTIONS.

No. 1.—*Form of Notice of Motion by the Relator.*

IN THE HIGH COURT OF JUSTICE. (*a*)

——DIVISION.

THE QUEEN UPON THE RELATION OF A. B.

AGAINST

C. D.

Take notice that by leave of (the Honourable Mr. Justice *or* the Master in Chambers—*or* His Honour E. F., Esquire, Judge of the County

(*a*) This and the following forms are entitled in the High Court of Justice, but where the Judge of the County Court gives leave, under 52 V. c. 36, s. 46, to serve the notice of motion, this, and all other proceedings, must be entitled in the County Court. Where the proceedings are in a County Court, the forms here given will require some further modification.

Rule 1044. Court of (*b*), a motion will be made on behalf of the above named A. B. *(setting out his name in full, occupation, place of residence, and the interest which he has in the Election as candidate or voter:* see *Rule* 1040) unto [the presiding Judge, *or as the case may be*] in Chambers at on the day of] *or* on the eighth day after service hereof so you excluding the day of service at o'clock in the forenoon, or as soon thereafter as the motion can be heard, for an order declaring that , of (*here inserting the names and additions of all, if more than one person*), hath [*or* have] not been duly elected, and hath [*or* have] unjustly usurped and still doth [*or* do] usurp the office of , in the Town of [*or* Township of , *as the case may be*], in the County [*or* United Counties] of , under the pretence of an election held on , at , in the said County [*or* United Counties] [and (*when it is claimed that the relator, or the relator and another, and others ought to have been returned*) that (*here name the party or parties so entitled*) was [*or* were] duly elected thereto, and ought to have been returned at such election], and declaring that he the said relator hath an interest in the said election as a , upon the following grounds that is to say:

First—That (*for example*) the said election was not conducted according to law, in this, that, etc.

Second—That the said was not duly or legally elected or returned, in this, that, etc.

Third—That, etc.

(*Signed by the relator in person or by C. D. his Solicitor.*)

NOTE,—Where the intention of the relator is to impeach the election as altogether void, in that event, as the office cannot be claimed for any other or others, the portion of the above and succeeding forms relating thereto should be omitted.

No. 2.—*Form of Affidavit of Relator.*

IN THE HIGH COURT OF JUSTICE.

———DIVISION.

THE QUEEN UPON THE RELATION OF A. B.

AGAINST

C. D.

I, A. B., of the of , in the County of , (*addition*) make oath and say:

1. I am the relator above named, and my name, occupation, place of residence, and the interest which I have in the election referred to in the notice of motion now shown to me marked "A" are truly set forth in the said notice of motion.

2. I believe the several grounds which are set forth in the said notice of motion against the validity of the election therein mentioned are well founded.

Sworn, etc.

(*b*) The Judge of the County Court has no jurisdiction to give leave to serve the notice of motion when the proceedings are to be carried on in the High Court. See *Rule* 1038 and notes.

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No. 3.—*Form of Recognizance.* **Rule 1044.**

IN THE HIGH COURT OF JUSTICE.

——DIVISION.

THE QUEEN UPON THE RELATION OF A. B.

AGAINST

C. D.

ONTARIO, County [*or* United Counties] of . Be it remembered, that on the day of , in the year of our Lord one thousand eight hundred and , before me, , of , Chief Justice of, etc., [*or* a Justice, *or* a Commissioner for taking bail in Her Majesty's High Court of Justice for Ontario,] cometh , of , and , of , and acknowledge themselves severally and respectively to owe to , of (*here insert the name or names of the person whose election is complained against*), as follows, that is to say, the said , the sum of two hundred dollars, and the said and the sum of one hundred dollars each, upon condition that if the said do prosecute with effect, the notice of motion in the nature of a *quo warranto* to be served on an order or fiat to be made at the instance and upon the relation of the said , against the said , for an order declaring that he [*or* they] the said hath not been duly elected to the office of (*here state the office claimed*) and removing the said therefrom [and (*where so claimed by the relator*) declaring that he the said relator (*or the party or parties entitled*) were duly elected, and should be admitted to the said office]; and if the said , do pay to the said all such costs as the said Court or the Judge or officer presiding in Chambers, at [the City of Toronto, in the County of York], shall direct in that behalf, then this recognizance to be void, otherwise to remain in full force.

Taken and acknowledged the day and year first above mentioned.
Before me, .

(*Signature of Judge or Commissioner.*)

No. 4.—*Form of Affidavit of Justification.*

IN THE HIGH COURT OF JUSTICE.

——DIVISION.

THE QUEEN UPON THE RELATION OF A. B.

AGAINST

C. D.

I, A. B., of, etc., one of the sureties in the recognizance hereto annexed, make oath and say as follows:

1. I am a freeholder (*or* householder, *as the case may be*), residing at, etc.

2. I am worth property to the amount of one hundred dollars over and above what will pay all my just debts [*if bail in any other action add* and for every other sum for which I am now bail].

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Rule 1044.

3. I am not bail in any other action or proceeding [*if so*, except for E. F. at the suit of G. H. in the Court of, etc., in the sum of, etc., *setting out all cases in which the deponent is bail*].

4. And I, C. D., also one of the sureties in the recognizance hereunto annexed, make oath and say as follows:

5. I am a freeholder, etc. (*proceed as above*).

Sworn by the above named deponents, A. B. and C. D., severally, before me, at the of , this day of , A.D. 18 .
(*Signature of Commissioner*),
A Commissioner, etc.
} (*Signature of deponents*)

No. 5.—*Form of a Judge's Order giving leave to serve a Notice of Motion.*

IN THE HIGH COURT OF JUSTICE.

———DIVISION.

THE QUEEN UPON THE RELATION OF A. B.

AGAINST

C. D

Upon reading the notice of motion proposed to be served by A. B. of , of , in the County of , on C. D. of , for an order setting aside the the election of said C. D. as [and (*if so*) declaring that the said (*relator or other person named*) was [*or* were] duly elected, and ought to have been returned to the said office], and upon reading the affidavits filed in support of the said notice of motion, and also upon reading the recognizance of the said , and sureties therein named, and the same being allowed as sufficient, I do order that the said A. B. be at liberty to serve the said notice of motion upon the said C. D.

Dated this day of , 18 .

No. 6.—*Form of Affidavit of Service of Notice of Motion.*

IN THE HIGH COURT OF JUSTICE.

———DIVISION.

THE QUEEN IN THE RELATION OF A. B.

AGAINST

C. D.

I, of in the (*addition*), make oath and say:

1. That I did on the day of last [*or* instant *as the case may be*,] personally serve the above named defendant [*or* defendants], with the annexed notice of motion by delivering to him [*or* each of them] a true copy thereof.

Sworn before me at the of , in the county of this day of , A.D. 18 .
(*Signature of Commissioner*).
A Commissioner, etc.
} (*Signature of deponent.*)

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No. 7.—*Form of Disclaimer before Notice of Motion Served.* (*a*) **Rule 1044.**

I, A. B., do hereby disclaim all right to the office of [Township Councillor, *or as the case may be*] for the [Township of, *or as the case may be*] and all defence of any right I may have to the same.

(*Signature of party disclaiming*).

Dated this, etc.

To the Clerk of the Corporation of———

No. 8.—*Form of Disclaimer after Notice of Motion Served.* (*a*)

IN THE HIGH COURT OF JUSTICE.

———DIVISION.

(*Or other Court in which proceedings are pending*).

THE QUEEN ON THE RELATION OF A. B.

AGAINST

C. D.

I, C. D., upon whom a notice of motion has been served for the purpose of contesting my right to the office of [Township Councillor *or as the case may be*] for the [Township of , in the County of , *or as the case may be*] do hereby disclaim the said office and all defence I may have to any right to the same.

(*Signature of party disclaiming*).

Dated this day of , etc.

To the Clerk of the Corporation of———

If the proceedings are pending in the High Court then add, and to the Clerk in Chambers at Osgoode Hall, Toronto.

Or if the proceedings are pending in a County Court then add, and to the Judge of the County Court of the County of

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No. 9.—*Form of Order for Trial of an Issue*

IN THE HIGH COURT OF JUSTICE.

———DIVISION.

THE QUEEN UPON THE RELATION OF A. B.

AGAINST

C. D..

Upon the application of Her Majesty the Queen upon the relation of A. B. to set aside the election of chosen upon the day of , to be for the Township of (*or as the case may be*), in the County of , and for an order declaring that he the said A. B., [*or* that he the said A. B. and C. D., etc., were, *or* that C. D., etc.,

(*a*) See notes to *Rule* 1041.

Rule 1044. was duly elected, and ought to have been returned], it hath become material to ascertain whether (*here state concisely the issues to be tried*); and that the truth of such matters as aforesaid should be found by a jury: I do, therefore, pursuant to *Rule* 1043 in such case, made and provided, order that an issue be tried between the said relator and the said C. D. before the Judge of the County Court of the County of and a jury of the said County, and that the question [*or* questions] to be tried shall be whether (*here state the issues*).

Dated, etc.

No. 10.—*Form of Indorsement of Verdict thereon.*

I hereby certify that on the day of , before me, L. M., Judge of the County Court of the County [*or* United Counties] of , came as well the within named relator as the within named (*the other party or parties*) by their attorneys (*or as the case may be*), and the jurors of the jury, before whom the said issues were tried, being sworn to try the matters within mentioned on their oath, said that, etc. (*set out findings*).

JUDGMENTS.

No. 11.—*Form of Judgment in favour of the Relator.*

IN THE HIGH COURT OF JUSTICE.

——DIVISION.

THE QUEEN ON THE RELATION OF A. B.

AGAINST

C. D.

Be it remembered, that on the day of , in the year of our Lord one thousand eight hundred and , at the Judges' Chambers in the City of Toronto, before me, , Chief Justice of the Queen's Bench [*or* Common Pleas *or* Chancellor of Ontario *or* one of the Justices of the High Court of Justice], came as well the above-named relator by , his attorney, as the above-named by his [*or* their] attorney, and service of the notice of motion hereunto annexed having been duly proved upon affidavit,* and upon the said day and upon other days thereafter, at his Chambers aforesaid, having heard and read the notice of motion and proofs of the said relator, touching and concerning the usurpation by him alleged against the said of the office of , in the said notice of motion mentioned [and (*if so*) the election of (*the party or parties named*) thereto], and the answers and proofs of the said ; and having heard the said parties by their counsel (*or as the case may be*), and upon due consideration of all and singular the premises, now, that is to say, this day of , in the year aforesaid, I do adjudge and determine:

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First—That the said relator had, at the time of his making his afore- **Rule 1044.**
said complaint, an interest in the election to the said office of
as a .

Second—That, etc.

Third—That, etc.

Fourth—That the said hath [*or* have] usurped, and doth [*or* do] still usurp the said office, and that he [*or* they] be removed therefrom [*or* that the election of to the said office was void, and that he [*or* they] be removed therefrom (*as the judgment may be*)]. [And that the relator (*or* the said (*naming the party or parties whose election is affirmed, when he or they are adjudged to be entitled to the said office*) was (*or* were) elected thereto, and ought to have been returned, and is (*or* are) entitled in law to be received into, and to use, exercise, and enjoy the said office:] And I do adjudge and determine that the said do not in any manner concern himself [*or* themselves] in or about the said office, but that he [*or* they] be absolutely forejudged and excluded from further using or exercising the same, under pretence of the said election [and further, that the said (*naming the relator or parties whose election is affirmed*) be [*or* be respectively] admitted to the said office in his [*or* their] place or places]: And I do further order, adjudge, and determine, that the said relator do recover against the said his costs and charges by him in and about the said relation and the prosecution thereof expended, to be taxed in the said Court. (*a*)

All which the said notice of motion and the said judgment, and the statements, answers, and proofs of the said relator and of the said , and all other things had before me touching the same, I do hereby certify and deliver into the said Court, according to the form of the statute in such case made and provided.

(*Signature of Judge*).

No. 12.—*Form of Judgment for Defendant.*

(*Proceed as in the foregoing form to the* *)

Thereupon now at this day, that is to say, on the day of aforesaid, at the Judges' Chambers at Toronto aforesaid, all and singular the notice of motion and proofs of the said relator, and the answers and proofs of the said being seen and fully understood, I do consider and adjudge that the said office of so claimed by him [*or* them] the said be allowed or adjudged to him [*or* them]; that the said be dismissed and discharged of and from the premises above charged upon him [*or* them]; and also that he [*or* they] the said do recover against the said relator his [*or* their] costs by him [*or* them respectively] laid out and expended in defending himself [*or* themselves] in this behalf. (*a*) All which, etc., (*as in the judgment for the relator*).

No. 13.—*Form to be added to Judgment when costs are taxed.*

(*Proceed as in Forms 11 & 12 to* (*a*).

Afterwards, that is to say, on the day of , in the year of the reign of our Lady the Queen, cometh the said , and prayeth that his [*or* their] said costs, so as aforesaid adjudged to him [*or*

(*a*) See form to be added when costs are taxed *infra* No. 13.

Rule 1044. them], be taxed and assessed according to the form of the statute in such case made and provided, and the said costs of the said , in and about his [*or* their] prosecution [*or* defence] aforesaid, [and (*when the Returning Officer is a party*) of the said , in and about his defence aforesaid], so as aforesaid adjudged to him [*or* them], are now here accordingly taxed and assessed as follows, that is to say, the costs of the said at the sum of [and the costs of the said (*when Returning Officer entitled thereto*), at the sum of], and the said (*relator*) in mercy, etc.

EXECUTIONS.

No. 14.—*Form of a Writ of Mandamus to a Corporation.*

To remove the person or persons, being less than the whole number of members of any Municipal Corporation, whose election is adjudged invalid, and to admit the person or persons lawfully elected.

VICTORIA, etc.,

To the Corporation of the Town [Township *or* City] of .

Whereas on the day of , in the year of our Lord one thousand eight hundred and , at the Judge's Chambers in the City of Toronto, before , Chief Justice of the Queen's Bench [*or* Common Pleas, *or* the Chancellor of Ontario, *or* one of the Justices of our High Court of Justice for Ontario], it was by the said Chief Justice [*or* Chancellor, *or* Justice], adjudged and determined that , of , had usurped, and did then usurp, the office of [and that was (*or* were) duly elected thereto, and ought to have been returned, and was (*or* were) entitled in law to be received into, and to use, exercise and enjoy the said office†], all of which has by the said Chief Justice [*or* Chancellor *or* Justice] been duly certified into our High Court of Justice, Division, pursuant to the statute in that behalf. Now, we, being willing that speedy justice be done in this behalf, as it is reasonable, command that the said (*the person or persons, naming him or them, whose election has been declared invalid*), do not in any manner concern himself [*or* themselves), in or about the said office, but that he [*or* they] be absolutely forejudged, removed, and excluded from further using or exercising the same, under pretence of his [*or* their] election thereto.* [And we do further command that the said (*the person or persons, naming him or them, who has or have been adjudged lawfully elected*) be forthwith admitted, received and sworn into the said office, to use, exercise and enjoy the same.] And we do hereby command you, and every of you, to obey, observe, and do all and every act, matter, and thing that may be necessary on the part of you or any of you in the premises, according to the purport, true intent and meaning of these presents, and of the statutes in that behalf, and that you make known to our High Court of Justice, Division at Toronto, on the day of , how this writ shall have been executed.

Witness, etc.

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Rule 1044.

No. 15.—*Form of a Writ of Mandamus to a Corporation.*

When neither the election of the person or persons (less than the whole number of members of the Municipal Corporation) who has or have been returned, nor the person or persons claimed to be returned is or are held valid, and for a new election.

VICTORIA, etc.

To the Corporation of , and to any Returning Officer or other person or persons to whom it shall of right belong to do any act necessary to be done, touching the election hereinafter commanded to be held.

Whereas (*as in the last precedent to the asterisk, omitting the part between the brackets, at †, and then proceed as follows :*) And we do further command that you the said Corporation, and any Returning officer or other person or persons, or such of you to whom the same shall of right belong, that you do, pursuant to and according to the statute in that behalf, cause an election to be as speedily held as shall be lawful, for the election of a person [*or* persons] in the place or stead of the said , who has [*or* have] been removed as aforesaid; and that you, or such of you to whom the same does of right belong, do administer to the person [*or* persons] who shall be so elected the oath [*or* oaths], if any, in that behalf by law directed; and that you admit, or cause to be admitted, such person [*or* persons] so elected into the said office, and that you, the said Corporation, do shew how this writ shall have been executed to our High Court of Justice Division at Toronto, on the day of .

Witness, etc.

No. 16.—*Form of a Writ of Mandamus to the Sheriff.*

Where the elections of all the members of any Municipal Corporation have been adjudged invalid, and for the admission of those adjudged to have been legally elected.

VICTORIA, etc.

To the Sheriff of the County (*or* United Counties) of .

GREETING:

Whereas (*the same as in Form No. 14 to the end of the words* "adjudged and determined," *then say*) that the election [*or* elections] of all the members of the Corporation of , returned as elected at the election [*or* elections] of members of the said Corporation held (*describing the time or times and place and places of such election or elections*) was [*or* were] invalid or void in law, and that (*naming them all*) had usurped (*proceeding as in Form No. 14, adopting the plural form to the asterisk, and then as follows :*) And we do hereby further command you the said Sheriff, that you do, pursuant to the statute in that behalf, admit or return and swear into, or cause the said (*naming the person adjudged to have been duly elected*) to be forthwith admitted or returned, and sworn into the said office, to use, exercise and enjoy the same, and that you do and perform, or cause to be done and performed, all and every act or acts, thing or things

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Rule 1044. necessary to be done and performed in the premises. And we hereby command and strictly enjoin all and every person and persons to whom the same shall lawfully belong, to be aiding and assisting you, and to do all and every lawful and necessary act to be done by him or them in the premises, according to the purport, true intent, and meaning of these presents, and of the statute in that behalf; and how you shall have executed this writ make known to our High Court of Justice Division at Toronto, on the day of next, and have you then there this writ.

Witness, etc.

No. 17.—*Form of Mandamus to the Sheriff.*

When the elections of all the members of any Municipal Corporation have been adjudged invalid, and requiring others to be elected.

VICTORIA, etc.

To the Sheriff, etc., (*as in the form No. 14 to the asterisk, omitting the part between the brackets, at* †, *and adopting the plural form, then concluding as follows:*) And that you do every act necessary to be done by you in order to the due election and admission of members of the said Corporation, in the place and stead of the persons whose elections have been so declared invalid; and we hereby command and strictly enjoin all and every person and persons (*continuing as in the last precedent in the end*).

Witness, etc.

No. 18.—*Form of Fi. Fa. Against Defendant for Relator's Costs.*

ONTARIO.

VICTORIA, etc.

To the Sheriff of the County of ;

GREETING:

We command you, that you levy, or cause to be levied, of the goods and chattels of C. D., of (*add the description of the Returning Officer, where the execution is against him*), the sum of , which hath been lately adjudged to A. B., of , in our High Court of Justice, Division, at Toronto, according to the form of the statute in such case made and provided, for his costs by him laid out and expended in the prosecuting of a certain motion in the nature of a *quo warranto*, lately pending before our said Court against , at the relation of the said A. B., for usurping the office of , in our of , in your County [*add, when the Returning Officer is a party*, to which proceeding the said was made a party], and whereof the said C. D. (etc.) is [*or* are] convicted, as in our said Court appears of record, and that you have that money before our Division of our said Court, at Toronto, aforesaid, and have you then there this writ.

Witness, etc.

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Rule 1044.

No. 19.—*Form of Fi. Fa. Against the Relator for the Defendant's Costs*

ONTARIO.

VICTORIA, etc.

To the Sheriff of the County (*or* United Counties) of .

GREETING:

We command you, that you levy, or cause to be levied, of the goods and chattels of A. B., of , the sum of , which hath lately been adjudged to C. D., of , in our High Court of Justice, Division, at Toronto, according to the form of the statute in such case made and provided, for his costs by him laid out and expended in his defence upon a certain motion in the nature of a *quo warranto*, made unto our said Court against the said C. D., upon the relation of the said A. B., for usurping the office of in our of , in your County [*or* Counties;] [*if the Returning Officer has been made a party, add here*, to which proceeding E. F., the Returning Officer at the election of the said C. D. to the said office, was made a party], whereof the said A. B. is convicted, as in our said Court appears of record; and that you have that money before the Division of our said Court at Toronto, immediately after the execution thereof, to satisfy the said C. D. for his costs aforesaid, and have you then there this writ.

Witness, etc.

N. B.—When the Returning Officer has been made a party, and is entitled to costs, the fieri facias *must be framed accordingly.*

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CHAPTER XII.

EXTRAORDINARY REMEDIES.

1. Bailable Proceedings, 1045-1097.
   (i) *Arrest*, 1045-1088.
   (ii) *Absconding Debtors*, 1089-1097.
2. Replevin, 1098-1111.
3. Mandamus, 1112-1129.
   (i) *In Actions*, 1112-1116.
   (ii) *On motion*, 1117-1123.
   (iii) *Application in Chambers*, 1124-1129.
4. Injunctions. 1130,
5. Interim Preservation of Property, 1131-1136.
6. Prohibition, 1137-1139.
7. Certiorari, 1140.
8. Interpleader, 1141-1169.
   (i) *Generally*, 1141-1161.
   (ii) *In County Courts*, 1162-1166.
   (iii) *By Bailees and Carriers*, 1167-1169.

1. Bailable Proceedings.

(i) *Arrest.*

No *ca. re.* to issue.

1045. No writ of *capias ad respondendum* shall issue in any case, but an order for arrest may be made in an action which shall have the same effect as such a writ formerly had.

An order for arrest will only be granted in those cases, in which a writ of *ca. re* or a writ of *ne exeat* might have formerly issued. In order to entitle a plaintiff to an order for arrest, therefore, he must shew to the satisfaction of a Judge of the High Court, or to the Judge or acting Judge of a County Court, by the affidavit of himself or some other person that he has a cause of action against a defendant liable to arrest, to the amount of $100 or upwards, or that he has sustained damage to that amount, and must also by affidavit shew such facts and circumstances as satisfy the Judge that there is good and probable cause for believing that the defendant, unless he be forthwith apprehended, is about to quit Ontario with intent to defraud his creditors generally, or the plaintiff in particular; whereupon the Judge may order the defendant to be held to bail for such sum as the Judge thinks fit: R. S. O. c. 67, s. 1.

A writ of *ne exeat* was a writ formerly issuable in Chancery to restrain a defendant from leaving the Province in cases where the plaintiff had an equitable money demand against the defendant and there was reason to apprehend that the defendant intended to quit the jurisdiction. A party who, according to the former practice, was entitled to a *ne exeat* is now to proceed under R. S. O. c. 67, s. 1; *Ib.* s. 3, as modified by these *Rules*.

R. S. O. c. 67, s. 1, applies only to actions against persons liable to arrest: see R. S. O. c. 67, s. 5. Some persons are privileged from arrest in civil proceedings. The privilege from arrest is either temporary or permanent. Among those permanently privileged are—members of the Royal Family, and

the servants of the Royal Household; peers and peeresses of the realm of England in certain cases; foreign ambassadors and their servants; Judges: see Arch Pr. 14th ed., p. 1455, and married women: R. S. O. c. 67, s. 7. Among those who have a temporary privilege from arrest are members of the Legislative Assembly during the Session of the House, and for twenty days before and twenty days after: R. S. O. c. 11, s. 48, s-s. 10; probably also members of the Senate, and House of Commons, of Canada during the sittings of Parliament for forty days before and forty days thereafter: see Arch. Pr. 14th ed., p. 1456. Barristers while attending the Superior Courts for the purpose of being engaged in the business of the same, or while attending circuit, and for this purpose a circuit is continuous from its commencement to its termination: see Arch. Pr. 14th ed., pp. 1484-5. A solicitor is also privileged while attending Court, or any of the officers of the Court, and in going to, and returning therefrom; also Coroners while executing their office. Parties to suits and witnesses while going to, attending at, and returning from Court. Bail are also privileged from arrest in actions on bail bonds, replevin bonds, and recognizances of bail: *Brandon* v. *Robson*, 6 T. R. 336; *Ormond* v. *Brierly*, 1 Salk. 9; *Mellish* v. *Petherick*, 8 T. R. 450. But if the plaintiff obtain judgment on such bond or recognizance he may hold the defendant to bail in an action on the judgment: *Prendergast* v. *Davis*, 8 T. R. 85. Executors and administrators are also privileged from arrest in actions brought against them for the debts of the deceased: unless they have made themselves personally liable for the debt: see Arch. Pr. 14th ed., p. 1459. A defendant only indebted for costs would seem not to be liable to arrest: R. S. O. c. 67, s. 6. As to sailors in Her Majesty's service: see Impl. Stat. 29 & 30. Vict. c. 109, s. 97; and as to soldiers see the annual *Mutiny Act*: Arch. Pr. 14th ed., p. 1460-1. **Rule 1045.**

Where a defendant has a foreign domicile and comes temporarily within the jurisdiction, he is not liable to arrest, in respect of a tort committed within the jurisdiction: *Rice* v. *Fletcher*, 13 P. R. 46; nor in respect of a debt contracted in the country of his domicile: *Smith* v. *Smith*, 9 P. R. 511; provided he is about to return to the country where he is domiciled: *Butler* v. *Rosenfeldt*, 8 P. R. 175. If he is going to another country he may be liable to arrest: *Ib.* But where a defendant contracts a debt in Canada and then absconds to, and acquires a domicile in, a foreign country, he may on his subsequently coming within the jurisdiction be held to bail in respect of a debt so contracted: *Kersteman* v. *McLellan*, 10 P. R. 122; *sed vide Clements* v. *Kirby*, 7 P. R. 103; *Stauffer* v. *Stauffer*, before Proudfoot, J., May 15, 16, 1883. Pecuniary liability arising from a fraud committed by the defendant is a claim for which he may be arrested: *Hunter* v. *Mountjoy*, 6 Gr. 433. A trustee not in default, is not liable to arrest: *Colverson* v. *Bloomfield*, 29 Ch. D. 341; and where a trustee is ordered to pay money after service of the order, he is not in default until the order has been served, and he has failed to comply with its terms: *Ib.*

A defendant in an action for alimony is liable to be held to bail, if he is about to quit Ontario with intent to defraud his creditors in general, or the plaintiff in particular. The amount for which he may be held to bail is a sum sufficient to cover future alimony for two years besides arrears and costs, but may be less, in the discretion of the Court or Judge: *Rule* 1088. The order for arrest may be obtained in a proper case before, or after judgment. When a writ of *ne exeat* had been granted before decree, it was held to continue in force after decree: *Macdonald* v. *Macdonald*, 5 U. C. L. J. 66. Where in an alimony action the defendant had been arrested and held to bail; on an application for his discharge, the Judge looked into the merits so far as to see if the plaintiff could reasonably expect to succeed in her case; and the defendant having displaced the *primâ facie* case made by the plaintiff, he was ordered to be discharged: *Macpherson* v. *Macpherson*, 2 Chy. Ch. 222. Such a practice is, however, open to objection, as to some extent involving the trial of the action on the merits on an interlocutory application.

The Master in Chambers, and Local Masters (not being County Court Judges), have no jurisdiction to grant the order for arrest: *Rules* 30, s. 1, 138. But County Court Judges may grant such orders in actions pending in the High Courts: R. S. O. c. 67, s. 1.

Rules 1046-1049.

Order for arrest.

1046. In case a person is to be arrested and held to special bail, the process shall be by order of the Court or a Judge, in the words or to the effect of Form No. 155 in the Appendix, which order shall bear date on the day on which it is made, and may be delivered to the Sheriff of any County in Ontario for execution. R. S. O. 1877, c. 50, ss. 4, 30, 31.

The form given in the Appendix appears to contemplate that the order shall be directed to a particular Sheriff to be named in the order. Where it is doubtful in which County the defendant may be found, provision is made by *Rule* 1048 for the issue of concurrent or duplicate orders. Concurrent orders, may, as in the case of concurrent writs, be addressed to different Sheriffs. Formerly when a writ of *capias ad respondendum* issued, it was not necessary to issue an ordinary writ of summons so far as the defendant arrested was concerned, but the issue of an order for arrest, is not now intended to dispense with the issue of a writ of summons. The writ of summons should be issued and duly indorsed, and served on the defendant before or along with the order for his arrest.

Orders to be in force two months and not renewable.

1047. Every order for arrest shall be in force for two months from the day of the date thereof inclusive, and no longer; but on the expiration thereof a new order may be obtained in the manner directed by *The Act respecting Arrest and Imprisonment for Debt.* R. S. O. 1877, c. 50, s. 29; J. A. Rule 9.

A new order can only be obtained on proof of the like facts and circumstances as were necessary in order to obtain the former order: see R. S. O. c. 67, s. 1. It would seem that the affidavits used on the former application could not be used on a second application; at all events, so far as they related to facts which were susceptible of change, a modification, since the date of the affidavits being sworn.

The two months within which an order for arrest is in force are calendar months: R. S. O. c. 1, s. 8, s-s. 15; 51 Vict. c. 2, s. 4, (O). An order made on the 10th day of the month would expire on the 9th day of the second month thereafter. The day of the date of the order being included.

Concurrent orders may issue.

1048. Concurrent or duplicate orders for arrest may be issued from time to time in like manner and form as the original order, and shall be in force for the same period as such original order and no longer. R.S.O. 1877, c. 50, s. 32.

So far as regards the Sheriff to whom the order is directed, the concurrent order would vary from the original order.

Copies, etc., to be served.

1049. Every order, and so many copies thereof as there are persons intended to be arrested thereon shall be delivered with the original order to the Sheriff or other officer to whom the order is delivered for execution, and the plaintiff or his solicitor may direct the Sheriff or officer to arrest one or more of the defendants therein named, which direction shall

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be duly obeyed by the Sheriff or officer. R.S.O. 1877, c. 50, s. 33. Rules 1050, 1051.

The direction to the Sheriff should be made by indorsement on the order, and signed by the solicitor.

Sheriff to execute within two months from date.

1050. The Sheriff or officer shall, within two months from the day of the date of the order for arrest, but not afterwards, execute the same according to the exigency thereof, and shall upon or immediately after the execution of such order cause one copy thereof to be delivered to every person whom he is directed to arrest, and shall exhibit the original order to each. R. S. O. 1877, c. 50, s. 34.

After the lapse of two calendar months from its date, including the day it bears date, the order ceases to be in force: see *Rule* 1047. Although the order is in force for two months, yet if the Sheriff execute it before the expiration of the two months the plaintiff may immediately after its execution obtain an order on the Sheriff to return the order for arrest: Arch. Pr. 11th ed., 800. He cannot be so ruled after the plaintiff has taken an assignment of the bail bond, provided it be a valid one under 23 H. 6, c. 9, or where he accepts a *capiovit* or other security from the defendant without the privity of the Sheriff: *Ib.*, and see *Rule* 1056, note.

Defendant may apply to a Judge to be discharged from custody.

Power of Judge.

Court may discharge or vary Judge's order.

1051. Any person arrested upon any order for arrest may apply at any time after his arrest to the Court, or a Judge, for an order that he be discharged out of custody; and such Court or Judge may make such order thereon as to such Court or Judge seems fit subject to appeal; and the Judge or acting Judge of a County Court making any order to arrest, whether in the High Court or in his own Court, shall in respect to such order, and the arrest made thereupon, possess all the powers given to a Judge of the High Court under this Rule, and may in like manner, on application to him, order the defendant to be discharged out of custody, or make such order therein as to him seems fit; and any such order made by a County Court Judge may be discharged or varied by a Divisional Court. *See* R. S. O. 1877, c. 50, s. 36.

Usually on an application to a Judge to discharge a defendant, the Judge will not, when the affidavits upon which the order for arrest was made, are *primâ facie* sufficient, discharge the defendant on affidavits being filed negativing his intention to leave Ontario: *McGuffin* v. *Cline*, 4 P. R. 134; nor on the ground that the plaintiff's cause of action was not sufficiently shown: *Robertson* v. *Coulton*, 9 P. R. 16; *Terry* v. *Comstock*, 6 U. C. L. J. 235; *Bank of Montreal* v. *Campbell*, 2 C. L. J. 18; *Jones* v. *Gress*, 25 U. C. Q. B. 594; *Delisle* v. *DeGrand*, 3 P. R. 105; but see *Brown* v. *Riddell*, 13 C. P. 457. But where it appears that the defendant, though about to leave Ontario, was nevertheless on grounds disclosed by the defendant, not liable to arrest, he may be discharged: see *Rule* 1045, note; and where the plaintiff's cause of action was denied by the defendant and not corroborated by the plaintiff, the defendant was discharged: *Donegan* v. *Short*, 12 P. R. 589; and the omission

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Rule 1052. to swear to damages where the cause of action is tort, also entitles a defendant to his discharge: *Ib.* Putting in special bail is a waiver of technical objection to the order for arrest, but it does not amount to a waiver of objections not of a technical nature: *McGuffin* v. *Cline*, *supra*; and see *Racey* v. *Carman*, 3 U. C. L. J. 204; *sed vide Ross* v. *Balfour*, 5 O. S. 683; *Bowers* v. *Flower*, 3 P. R. 62; but an undertaking to put in bail in due course of law is not a waiver of an objection to the affidavit: *Glass* v. *Baby*, 1 P. R. 274. When the affidavit on which the order for arrest was made was entitled in the High Court of Justice without naming any Division it was held that the defect was amendable: *Robertson* v. *Coulton*, *supra*; and see R. S. O. c. 67, s. 2; *Ellerby* v. *Walton*, 2 P. R. 147; *Molloy* v. *Shaw*, 5 P. R. 250; *Damer* v. *Busby*, 5 P. R. 356. The order for arrest will not be set aside for irregularity in the affidavit, after the prisoner has escaped: *Keefer* v. *Merrill*, Tay. 490. Where the affidavit to hold to bail was made while the defendant was in the United States, and was left here to be used in case he should come over, the arrest was set aside: *Cozens* v. *Ritchie*, Dra. 167.

An application to set aside the order for arrest made after special bail put in, and judgment obtained, on the ground that the affidavit was insufficient in law, will not be entertained: *Runciman* v. *Armstrong*, 2 C. L. J. 165.

When in the affidavit on which the order was granted, the words "intent to defeat" were used, instead of "intent to defraud," it was held to be no ground for setting aside the arrest: *Laing* v. *Singerland*, 12 P. R. 366.

Where the defendant seeks to set aside the Judge's order and arrest, on the ground that the affidavit discloses no sufficient cause of action; or does not show facts which should have satisfied the Judge that the defendant was about to quit Ontario, it would seem that the application is really in the nature of an appeal from the Judge who granted the order, and must be made to the Divisional Court, and cannot be entertained by a single Judge: see *Damer* v. *Busby*, 5 P. R. 356, *et seq*; *Diamond* v. *Cartwright*, 22 C. P. 494; *Robertson* v. *Coulton*, 9 P. R. 16; and see *Palmer* v. *Rodgers*, 6 U. C. L. J. 188.

When the application under this *Rule* is made to a Judge upon materials not laid before the Judge who made the order to arrest, the application should in general be to discharge the defendant out of custody, or for the bond or other security to be given up to be cancelled, as the case may require. But when the application is based on the alleged insufficiency of the affidavits on which the order to arrest was granted, then the application may be in addition to set aside the order, but in this case it would seem the application should be made to a Divisional Court as it is in the nature of an appeal from the Judge who granted the order: see *supra*, and *Cartwright* v. *Hinds*, 3 Ont. 384; *Gilbert* v. *Stiles*, 13 P. R. 121; and where the application is based upon the insufficiency of the material on which the order for arrest was granted, as distinguished from a motion to discharge the prisoner from custody on the merits, no new material can be used: *Ib.* A Judge of a County Court who has made an order for arrest in an action in the High Court, under R. S. O. c. 67, s. 1, has power under this *Rule* to entertain an application to discharge the defendant from arrest.

Statement of claim when to be delivered when defendant is imprisoned for want of bail.

1052. If any defendant is taken or charged in custody upon any such order, and imprisoned for want of bail to the action, the plaintiff may, within one month after the arrest of the defendant, deliver a statement of claim in the action; otherwise the defendant shall be entitled to be discharged from the arrest or detainer, unless further time to deliver a statement of claim is given to the plaintiff by the Court or a Judge. Rules of T. T. 1856, 100; R.S.O. 1877, c. 50, s. 37.

The month mentioned in this *Rule* is a calendar month: see R. S. O. c. 1, s. 8, s-s. 15; 51 Vic. c. 2, s. 4, (O).

The time for delivery of a statement of claim in ordinary cases is now regulated by *Rule* 369. The object of this *Rule* is to hasten proceedings against prisoners: *Glenn* v. *Box*, 3 U. C. Q. B. 183; *Tyson* v. *McLean*, 1 P. R. 339; *Bambery* v. *Salomon*, 3 U. C. L. J. 69; *Glennie* v. *Ross*, 3 P. R. 289; 10 U. C. L. J. 105. If the defendant be out on bail the *Rule* does not apply: *Glenn* v. *Box*, *supra*. **Rules 1053, 1054.**

The pendency of proceedings to set aside the *capias* and arrest was held to be no excuse for not declaring within the time limited: *Houtaling* v. *Cuttle*, 6 P. R. 251.

1053. The plaintiff shall, unless the Court or a Judge otherwise orders, cause the defendant to be charged in execution within fourteen days after the plaintiff is entitled to enter final judgment. *See* Rules T. T. 1856, 99. When defendant to be charged in execution.

This *Rule* is intended to apply to defendants referred to in the preceding *Rule*, who are imprisoned for want of bail in the action. The term "charging in execution" is the process whereby a prisoner in actual confinement is detained in custody in execution: *Hesketh* v. *Ward*, 17 C. P. 667. This is effected by delivering a writ of *ca. sa.* to the Sheriff. The writ must be delivered to the Sheriff within fourteen days after the time the plaintiff is entitled to enter judgment, and not from the time the judgment is actually entered. Where a defendant is arrested under an order pending action, and before judgment gives bail, and after judgment and *ca. sa.* to fix bail returned *non est inventus*, is rendered to the Sheriff's custody by his bail, in their own discharge, such prisoner is still held under the *mesne* process, and is not charged in execution: *Hesketh* v. *Ward*, *supra*. Where the defendant is not a prisoner at the time of the trial, but is rendered, or renders himself in discharge of his bail before judgment: see *Brash* v. *Latta*, 5 U. C. L. J. 225; *Curry* v. *Turner*, 3 P. R. 144. Where the defendant is surrendered by his bail after judgment and notice thereof given to the plaintiff: see *Torrance* v. *Holden*, 10 U. C. L. J. 322. Where the defendant is out on bail before judgment, he need not be "charged in execution," within the time mentioned in this *Rule*: *Torrance* v. *Holden*, 10 U. C. L. J. 298. The writ of *ca. sa.* to fix bail must be returnable on a day certain, and not immediately after execution: *Proctor* v. *McKenzie*, 11 Ont. App. 486.

Where a defendant is ordered to be discharged because plaintiff has not charged him in execution in due time, he cannot be thereafter arrested on the same judgment: *Burn* v. *Straight*, 5 O. S. 523; and see *Wheatley* v. *Sharpe*, 8 P. R. 307; *Golding* v. *Mackie*, *Ib.* 237.

See Rob. & Jos. Digest, 3060.

1054. Where the defendant is described in the order for arrest, or affidavit therefor, by initials, or by wrong name, or without a Christian name, the defendant shall not for that cause be discharged out of custody, or the bail bond be delivered up to be cancelled on motion for that purpose, if it appears to the Court that due diligence has been used to obtain knowledge of the proper name. Rules T. T. 1856, 66. Misnomer of defendant in bailable proceedings, effect of.

A defendant arrested, if summoned by a wrong name may still be discharged, and have the bail bond delivered up to be cancelled, unless the plaintiff can shew that he has exercised diligence to ascertain the right name: *Ladbrook* v. *Phillips*, 1 H. & W. 109; *Rossett* v. *Hartley*, 7 A. & E. 522; and in determining the question whether due diligence has been used, the Court will consider all the circumstances: see *Hicks* v. *Marreco*, 1 C. & M. 84; *Finch* v. *Cocken*, 2 C. M. & R. 196; *Lyon* v. *Walls*, 2 M. & Sc. 393; *Lindsay* v. *Wells*, 3 Bing. N. C. 777. The fact that the affidavits to hold to bail are not entitled in any Discharge of defendant for misnomer.

Rules 1055, 1056.

Court is no ground for setting aside the order made thereon: *Ellerby* v. *Walton*, 2 P. R. 147; *Molloy* v. *Shaw*, 5 P. R. 250; and see *Damer* v. *Busby*, 5 P. R. 356.

On writs from County Courts, the Sheriff to take bail from persons arrested, and assign bail bond, etc.

1055. The Sheriff to whom an order for arrest issued out of a County Court is delivered, shall take bail from any defendant arrested thereon, and if required shall assign the bail bond in like manner as in cases where like process is issued from the High Court, and such assignment shall have the same effect as if the order had issued from the High Court. R. S. O. 1877, c. 50, s. 38.

When plaintiff may sign judgment upon bail bond.

1056. In all cases where the bail bond is directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it. Rules T. T. 1856, 68.

Bail to Sheriff.

Bail to the Sheriff.—On the arrest of a defendant on *mesne* process, the sheriff's officer may not carry him to gaol within twenty-four hours from the time of such arrest, under a penalty of £50, unless the defendant refuses to be carried in the meantime, to some safe and convenient dwelling house in the county, to be named by him, not being his own house: 32 Geo. 2, c. 28, ss. 2 and 12; Arch. Pr. 13th ed., 707.

This provision has been held not to apply where a defendant is arrested for disobedience of an order to pay the debt: *Mitchell* v. *Simpson*, 23 Q. B. D. 373; 61 L. T. N. S. 248.

It is the duty of the officer to request the defendant to name such house, before he can take him to gaol within the twenty-four hours: *Dewhirst* v. *Pearson*, 1 Dowl. P. C. 664; 1 C. & M. 365; *Simpson* v. *Renton*, 5 B. & Ad. 35, and see *Gordon* v. *Laurie*, 9 Q. B. 60; 18 L. J. Q. B. 98. The defendant is entitled to be discharged on giving bail to the sheriff, and on payment of the sheriff's fees including the costs of the bond. The sheriff may take a bond with one surety; but it is strictly his duty not to accept a bond with less than two sureties. The bond must be executed and taken on or before the tenth day limited by the order for arrest, for putting in special bail. The sheriff is to take bail for the sum indorsed on the order, and no more; 12 Geo. 1, c. 29, s. 2; in practice the penalty is usually double the sum for which the defendant is ordered to be held to bail: see *Baker* v. *Jackson*, 9 Ont. 661. The security to the sheriff must be by bond, otherwise it is void, 23 H. 6, c. 9 ss. 7, 8; 10 Co. 101; *Lewis* v. *Knight*, 8 Bing. 271; 1 M. & Sc. 353; 1 Dowl. P. C. 261. The bond must be to the sheriff himself by the name of his office, and upon condition written, that the defendant shall appear at the day contained in the order for arrest, and in such place as the order shall require: 23 H. 6, c. 9, s. 7, otherwise it shall be void: *Ib.* s. 8. If the bond be executed before the condition is filled up it will be void: *Powell* v. *Duff*, 3 Camp. 181.

Defendant to be discharged on giving bail to Sheriff.

Form of bond—one surety sufficient, but Sheriff should require two.

The bond is forfeited if the defendant do not put in bail to the action, or as it is called 'bail above,' or 'special bail,' within ten days after his arrest; or if special bail be put in within that time, then by his not perfecting them in due time. When in consequence of the forfeiture of the bail bond to the sheriff, an action is brought thereon, upon an assignment thereof by the sheriff, or proceedings are taken, against the sheriff; upon an application to stay such action or proceedings, in order that the case may be tried on the merits against the original defendant, it is in the power of the Court, or Judge, to direct the bail bond to the sheriff to stand as security to the plaintiff should he succeed in establishing his claim against the defendant on the merits, and it is to cases in which such a direction has been given that *Rule* 1056 applies.

Bail to Sheriff, when forfeited.

YORK UNIVERSITY LAW

Rules 1057-1060.

1057. Proceedings on the bail bond may be stayed on payment of costs in one action, unless sufficient reason be shewn for proceeding in more. Rules T. T. 1856, 69.

Proceedings on the bail bond may be stayed on payment of costs in one action.

After verdict in more than one action on a bail bond, an application to stay proceedings under this *Rule* on payment of costs in one action only is too late: *Johnson* v. *Macdonald*, 2 Dowl. 44.

1058. In case an order for returning an order for arrest expires in vacation, and the Sheriff or other officer having the return of such order, returns *cepi corpus* thereon, an order may thereupon issue requiring the Sheriff or other officer within the like number of days after the service of the order, as by the practice of the Court is prescribed with respect to orders to bring in the body, to bring the defendant into Court, by forthwith putting in and perfecting bail to the action, and if the Sheriff or other officer does not duly obey the order, an attachment shall issue for disobedience of the order, whether bail has or has not been put in and perfected in the meantime. Rules T. T. 1856, 74.

Order may issue requiring Sheriff to bring body into Court.

Attachment may issue for disobedience.

Orders to bring in the body are to be made returnable in six days: *Rule* 908.

The concluding clause of *Rule* 1058, as to the issue of an attachment against the sheriff, or other officer, must be read in connection with *Rule* 879; under that *Rule* an attachment cannot issue in any case without an order therefor, to be applied for on notice to the party against whom it is to be issued: *Jupp* v. *Cooper*, 5 C. P. D. 26. It will be noticed that the order prescribed by this *Rule* is one "to bring the defendant into Court, by forthwith putting in and perfecting bail to the action," *i.e.*, special bail.

Order for issue of attachment is now necessary.

1059. A plaintiff shall not be at liberty to proceed on the bail bond pending an order to bring in the body of the defendant. Rules T. T. 1856, 71.

Plaintiff may not proceed against bail, pending order to bring in body.

The bail bond referred to in this *Rule* is the bond given to the sheriff, or bail below, and which bond is conditioned for the defendant putting in "special bail," within ten days after his arrest. The sheriff is, under 4 & 5 Ann, c. 16, s. 20, bound to assign this bond to the plaintiff, by "indorsing the same and attesting it under his hand and seal in the presence of two or more credible witnesses;" and if the security be forfeited, the plaintiff may bring an action thereon in his own name; but under this *Rule* the action cannot be proceeded with pending an order to bring in the body; which is a proceeding to compel the defendant to put in special bail. If the sheriff refuse to assign the bond, an action will lie against him: See *Stamper* v. *Milbourne*, 7 T. R. 122. The plaintiff should not take an assignment unless he is satisfied as to the sufficiency of the sureties, as by taking an assignment he waives his right to proceed against the sheriff to compel him to return the order: see *Brooks* v. *Stone*, 1 Wil. 223; *Etherick* v. *Cooper*, Salk. 99. The plaintiff is not bound to take the assignment though tendered by the sheriff: *Rex* v. *Daw*, 2 Salk. 608.

1060. No order shall be drawn up for setting aside an attachment regularly obtained against a Sheriff for not bringing in the body, or for staying proceedings regularly

Application to set aside attachment against

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Rules 1061, 1062. Sheriff for not bringing in body, or to stay proceedings against bail, to be founded on affidavit of merits, etc.

commenced on the assignment of any bail bond, unless the application for the order, if made on the part of the original defendant, be grounded on an affidavit of merits, or if made on the part of the Sheriff, bail, or any officer of the Sheriff, be grounded on an affidavit shewing that the application is really and truly made on the part of the Sheriff, or bail, or officer of the Sheriff, as the case may be, at his or their own expense, and for his or their indemnity only, and without collusion with the original defendant. Rules T. T. 1856, 72.

Special bail must not only be put in, but perfected, before the Court will stay proceedings on the bail bond to the Sheriff: *Gould* v. *Birmingham*, 3 O. S. 298. Where the plaintiff had delayed for three years to proceed against the bail below to compel them to put in special bail, proceedings on the bail bond were stayed after judgment and execution, on payment of costs: *Young* v. *Shore*, 2 O. S. 314.

Where bail rely on the performance of their undertaking they must plead it, they cannot apply summarily to stay proceedings in such a case: *Mitchell* v. *Noble*, 1 C. L. Ch. 284; and see *Blackman* v. *O'Gorman*, 5 U. C. L. J. 161.

Where bail surrendered their principal and gave due notice within eight days after the return of process on the recognizance, and the plaintiffs, nevertheless, proceeded to judgment, proceedings were stayed without requiring payment of costs up to the notice: *Wright* v. *Tucker*, 6 U. C. Q. B. 24; see *Rule* 1084.

Special bail may be put in at any time before return of order to bring in body.

1061. Whenever a plaintiff obtains an order to the Sheriff, on a return of *cepi corpus* to bring in the body, the defendant shall be at liberty to put in and perfect special bail at any time before the expiration of such order. Rules T. T. 1856, 73.

Where Sheriff may be ruled.

The Sheriff may be ordered to bring in the body after the time for putting in bail has expired: *Pouchee* v. *Lieven*, 4 M. & S. 427; *Hutchins* v. *Hird*, 5 T. R. 479; *Potter* v. *Marsden*, 8 East. 525. But the order cannot issue after judgment has been recovered against the sheriff for an escape, nor when the defendant has been released by order of the plaintiffs: *Borwick* v. *Walton*, 2 B. & Al. 623; nor where the plaintiff has taken an assignment of the bail bond: 2 Saund. 60 b., provided it be a valid one; nor where he accepts a *cognovit* or other security from the defendant, without the privity of the Sheriff: *Rex* v. *Sheriff of Surrey* in *Brewer* v. *Clarke*, 1 Taunt. 159; Arch. Pr. 12th ed., p. 812. The order should be issued, and served promptly: *Rex* v. *Sheriff of Middlesex*, 1 Dowl. 53. The order may issue on *præcipe* without motion: see *Rules* 908, 909, 912.

Orders to bring in the body are returnable in six days: *Rule* 908. Under this *Rule* special bail may be put in at any time before the expiration of the six days.

Condition of recognisance of bail.

1062. The condition of the recognizance of special bail shall be, that, if the defendant be condemned in the action at the suit of the plaintiff, he will satisfy the costs and condemnation money, or render himself to the custody of the Sheriff of the County in which the action against such

defendant has been brought, or that the cognizors will do so for him. R. S. O. 1877, c. 50, s. 40. Rule 1063.

Notwithstanding the condition of the recognizance to satisfy the costs "and condemnation money" bail are not liable for more than the sum for which bail is ordered and the costs. Thus, where the plaintiff swore to a cause of action in tort for $500, but bail was ordered for $300 only, it was held, notwithstanding that the plaintiff subsequently recovered judgment for $400 damages and $125.27 costs in the action, that the bail were only liable to the extent of $300 and the costs: *Baker* v. *Jackson*, 9 Ont. 661; and see *Laing* v. *Slingerland*, 17 Ont. 392. The condition of the recognizance prescribed by this *Rule* appears only to be appropriate where a defendant is arrested on *mesne* process, where he is arrested after judgment it would seem that bail should be required in the terms of R. S. O. c. 67, s. 14.

1063. Upon due notice given to the plaintiff or his solicitor, and upon production of the bail-piece, and whether the defendant is detained in custody or not, bail may justify before any Judge of the Court in which the action is pending, and such justification and the opposing thereof may be by affidavit or affirmation without the attendance of the bail in open Court or before such Judge, unless specially required by such Court or Judge, and such Court or Judge may thereupon issue an order for the allowance of such bail and for the discharge of the defendant (if in custody) by a writ of *supersedeas*. R. S. O. 1877, c. 50, s. 41. How bail may justify. And order for allowance to issue.

(*a*) Every order of a Judge directing the discharge of a defendant out of custody, upon special bail being put in and perfected, shall also direct a *supersedeas* to issue forthwith. Rules T. T. 1856, 98. Order for discharge of defendant out of custody.

The first part of the *Rule* is taken from the C. L. P. Act, the words "any Judge of the Court in which the action is pending," were originally applied to the Judges of the Queen's Bench and Common Pleas, and the section was originally enacted before any jurisdiction in Chambers had been conferred on the Clerk of the Crown of the Queen's Bench, and the County Court Judges, and Local Masters. Since the section was originally enacted the Superior Courts of Law and Equity have been amalgamated into one Court.

Bail cannot be justified where their justification is opposed, before the County Court Judge, or Local Master, having jurisdiction in Chambers in the action, nor in Toronto before the Master in Chambers, but the application must in all cases be made before a Judge of the High Court; because the liberty of the subject is involved, and the jurisdiction of the Master in Chambers, and Local Masters, and County Judges, is therefore excluded: see *Rules* 30, 41, 138.

Whether the bail-piece should be filed, or simply produced before it has been actually allowed, does not seem to be clear: see *Rule* 1075, which seems to assume that the bail-piece is to be filed, this *Rule* speaks merely of its production. According to the English practice it was customary to file the bail-piece in the Judge's Chambers, until the bail had justified and had been allowed, when it was taken out and filed in the office of the Master: Arch. Pr. 11th ed., pp. 823-847. The notice of justification is to be given two days before the time of justification; *Rule* 1080. Where notice of justification was given at the

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Rule 1064. same time as notice of the bail being put in, it would seem that the notice was required to be a four days' notice according to the former English practice: see Arch. Pr. 11th ed., 824; but this was expressly provided for by the English Rule 96, H. T. 1853, which does not seem to have been adopted in Ontario. A two days' notice therefore would seem sufficient though the notice of the bail, and notice of justification, be given at the same time.

If the plaintiff excepts to the bail, it would seem that the affidavits of justification according to Form No. 46, will be *primâ facie* sufficient, and the onus will lie on the plaintiff either by cross-examination of the bail on their affidavits, or by counter affidavits to establish their insufficiency.

Bail may surrender their principal to the Sheriff of any County, etc.

1064. Special bail, on production of a copy of the bail-piece certified by the Officer of the Court having the custody thereof, may surrender their principal to the Sheriff of the County in which the principal is resident or found, and the Sheriff shall receive the principal into his custody and give the bail a certificate under his hand and seal of office of the surrender, for which certificate the Sheriff shall be entitled to the sum of one dollar, and any Judge of the Court in which the action is pending, upon proof of due notice to the plaintiff or his solicitor of the surrender, and upon production of the Sheriff's certificate thereof, shall order an *exoneretur* to be entered on the bail-piece, and thereupon the bail shall be discharged. R. S. O. 1877, c. 50, s. 42.

The fee by this *Rule* authorized to be charged by the Sheriff is not included in the Tariff, and it is presumed is payable in addition to the fees therein specified. It is only bail to the action who can render their principal. Bail to the Sheriff cannot render their principal, they can only discharge themselves by having special bail put in and justified: or by special bail being put in and the principal thereupon rendered. Where the defendant himself fails to put in special bail, the bail to the sheriff may put it in, and without justifying may render their principal: see *Rule* 1082, Arch. Pr. 11th ed., 861; and this may also be done by the Sheriff, or Sheriff's officer, and perhaps by the defendant's solicitor in discharge of any undertaking he may have given. And the render may be made after the Sheriff has been ordered "to bring in the body," and after an assignment of the bail bond and proceedings commenced thereon: *Ib.* If, however, the plaintiff proceed against the Sheriff the render should in general be made before the expiration of the order to bring in the body: Arch. Pr. 11th ed., 802. Special bail may render their principal *ex debito justitiæ* at any time pending the action, or after judgment at any time before the return of the *ca. sa.* The Court also as a matter of favour has allowed bail a further time after the return of a *ca. sa.* to render their principal: see *Rule* 1084. If the bail do not render their principal within the time allowed by the latter *Rule* their right to render him is gone. As to enlarging time for rendering: see Arch. Pr. 11th ed., 863.

It was formerly held that the bail given under a writ of *ne exeat* had no power to surrender their principal as at common law, and an application by sureties for a discharge from a bond and for repayment of the money paid to the Sheriff as collateral security was refused: *McDonald* v. *McDonald*, 1 Chy. Ch. 22; the money deposited was ordered to be applied in payment of the plaintiff's claim: *Richardson* v. *Richardson*, 8 P. R. 274; *Needham* v. *Needham*, 29 Gr. 117; but it would seem to be the intention of these *Rules* to abolish this distinction, and to allow the surrender of the principal by the bail, whether the course of action in respect of which the defendant has been arrested be legal or equitable.

Where the bail render their principal, an order to enter an *exoneretur* on the bail bond should be obtained; until the *exoneretur* is entered, the bail remain liable to the plaintiff on the bail bond: *Laing* v. *Slingerland*, 17 Ont. 392. Rules 1065-1067.

Such surrender not to affect the place of trial.

1065. In cases where the surrender is made to any other Sheriff than the Sheriff of the County specified in the condition of the recognizance of bail, the plaintiff shall not be compelled to change the place of trial or to conduct his suit in any manner different from that in which he would have been required to conduct it had the surrender been made to such last-mentioned Sheriff. R. S. O. 1877, c. 50, s. 43.

It may be observed that according to the terms of the order for arrest (Form No. 155) the bail are required to undertake to surrender the defendant to the custody of the Sheriff of the County in which the appearance is required to be entered; but under the preceding *Rule* 1064, they are authorized to surrender their principal to the custody of the Sheriff of the County in which their principal is resident or found.

Person arrested out of his County may be transferred to it, paying the costs.

1066. In case a person is surrendered by his bail to the Sheriff of any County other than that in which he resided or carried on business at the time, such person shall be entitled to be transferred to the gaol of his own County on prepaying the expense of his removal; and the Sheriff in whose County he was arrested may, if he is satisfied of the facts, transfer him accordingly; but if the Sheriff declines to act without an order of the Court or a Judge, such an order shall be made on the application of the prisoner and notice to the opposite party. R. S. O. 1877, c. 50, s. 44.

Special bail may be entered and plaintiff may proceed as upon a writ of summons.

1067. Special bail may be put in and perfected according to the established practice. *See* R. S. O. 1877, c. 50, s. 39.

The persons who are to become bail are not to exceed two in number, except by leave of the Court or a Judge: *Rule* 1070. They must give a bond, or enter into a recognizance before a Judge, or a Commissioner for taking recognizances of bail, to the effect mentioned in *Rule* 1062. The bond or recognizance with an affidavit of the due taking thereof, and affidavits of justification by the sureties (*Rule* 1079) must then be filed in the office named in the order for arrest within the time limited by the order, and at least two days' notice given to the plaintiff in writing of the putting in, and justification of, the bail: *Rule* 1080. If the affidavits of justification are served with this notice, the plaintiff must, before the time appointed for the bail to justify, if he intends to object to the sufficiency of the bail, give one day's notice of exception, otherwise the bail will be allowed as sufficient: *Rule* 1077. If, however, the affidavits of justification are not served with the notice of bail, the plaintiff has twenty days thereafter within which to serve notice of exception to the bail: *Rule* 1078. The plaintiff who has excepted to the bail may cross-examine the bail on their affidavits of justification in the usual way, or may file counter affidavits to show their insufficiency: *Rule* 1063. If the bail is allowed, an order allowing the bail is issued, and a copy thereof is to be served on the plaintiff's solicitor. The bail is then said to be put in and perfected.

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Rules 1068-1073.

If the bail are rejected the defendant must get further time to put in bail, otherwise the plaintiff may take an assignment from the Sheriff of the bail bond, and commence an action thereon, or proceed against the Sheriff by attachment. To obtain this, a return of *cepi corpus* must be obtained to the order for arrest, whereupon an order to bring in the body may issue, and in default of special bail being put in, the attachment may issue : see, however, *Rule* 1058, note. As to persons disqualified from being bail : see *Rules* 1071, 1072, 1073, 1074. Bail, though rejected, may, nevertheless, render their principal : *Rule* 1082.

In cases in a County Court, how plaintiff to proceed.

1068. In case (in any action in a County Court) the defendant has been surrendered by his bail into the custody of the Sheriff of a County other than that in which the action has been instituted, the plaintiff may charge the defendant in execution, and take all other necessary proceedings in like manner as if the suit had been instituted in the High Court. R. S. O. 1877, c. 50, s. 45.

Bail in C. C.

1069. Recognizances of bail in County Courts may be proceeded upon in like manner as in the High Court. *See* R. S. O. 1877, c. 50, s. 46.

All actions upon recognizances of bail are now to be brought by writ of summons, formerly proceedings might be taken by *sci. fa.*, but such proceedings are now abolished : *Rule* 224.

Notice of more than two bail, irregular.

1070. Notice of more bail than two shall be deemed irregular, unless by order of the Court or a Judge. Rules T. T. 1856, 75.

More than two bail when allowed.

Where the amount is large a Judge may allow several to become bail in different amounts : *Anon*, 13 Price 448 ; *Easter* v. *Edwards*, 1 Dowl. 39.

Bail not to be changed without leave.

1071. The bail of whom notice shall be given, shall not be changed without leave of the Court or a Judge. Rules T. T. 1856, 76.

Where the bail of which the defendant gives notice fail to justify ; the defendant must get leave to add bail, and also an extension of the time for putting in and perfecting the bail.

Bail indemnified by solicitor of defendant cannot justify.

1072. No person shall be permitted to justify himself as good and sufficient bail for any defendant if such person has been indemnified for so doing by the solicitor or solicitors concerned for such defendant. Rules T. T. 1856, 77.

Solicitor for either party cannot take recognizance.

1073. No solicitor shall take any recognizance of bail in a case in which he is employed as solicitor or agent for either party. Rules T. T. 1856, 78.

The affidavit of justification cannot be sworn before the defendant's solicitor : *Rule* 613 ; *Koyle* v. *Wilcox*, 2 O. S. 113.

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Rules 1074-1077.

Solicitor, Sheriff's Officer, or Bailiff cannot be bail, except for purpose of rendering.

1074. If any person put in as bail to the action, except for the purpose of rendering only, be a practising solicitor, or clerk to a practising solicitor, or Sheriff's officer, bailiff, or person concerned in the execution of process, the plaintiff may treat the bail as a nullity, and sue upon the bail bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the meantime. Rules T. T. 1856, 79.

After the return day of the order for arrest, where special bail have not already been put in, and where bail to the Sheriff are desirous of rendering their principal, special bail must be put in before the render can be made: *Harrison* v. *Davis*, 5 Burr. 2683. It is bail put in under such circumstances, which is bail for the purpose of rendering only, referred to in this *Rule*.

The render may be made without justification, and even though the bail have attempted to justify and have been rejected.

Bail put in, in the country, how to be justified in Court.

1075. When bail which has been put in, in the country, is to be justified in Court, the bail-piece with the affidavit of the due taking thereof and the affidavit of justification, shall be transmitted by the Deputy Clerk of the Crown for the County in which they have been filed to the proper office in Toronto, to be filed and produced in Court, upon the motion for allowance, on proper notice being given to such Deputy Clerk to transmit the same. Rules T. T. 1856, 80.

It is necessary to justify bail in every case before a Judge of the High Court at Toronto; the County Court Judges, and Local Masters have no jurisdiction to entertain such applications: see *Rule* 1063 note.

The words "Deputy Clerk of the Crown," in this *Rule* includes a Local Registrar, or Deputy Registrar, having the custody of the bail piece.

A rule for allowance was refused, where, after justification, one of the bail had absconded: *Billings* v. *Loucks*, 5 O. S. 78, and where the notice to the plaintiff stated that special bail had been put in, but the recognizance produced was only for the limits, an application for allowance was refused: *Clegg* v. *McNab*, 1 P. R. 150.

If notice of bail be accompanied by affidavit of justification, costs of justification how borne.

1076. If the notice of bail is accompanied by an affidavit of each of the bail, according to the Form No. 46 in the Appendix, and the plaintiff afterwards excepts to such bail, he shall, if such bail are allowed, pay the costs of justification.

The affidavit of justification cannot be sworn before the defendant's solicitor: *Rule* 613; *Koyle* v. *Wilcox*, 2 O. S. 113.

Notice of exception to bail, when to be served.

1077. If the plaintiff does not give one day's notice of exception to the bail by whom the affidavit was made, the recognizance of the bail may be taken out of Court without other justification than the affidavit. Rules T. T. 1856, 82.

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Rules 1078-1080.

The notice referred to in this *Rule* should be given at least one day before the time for justifying the bail expires.

Notice of justification of bail is a two days' notic ee *Rule* 1080.

According to the English practice the exception must be entered in "the bail-book," and giving notice of exception, without making this entry is a nullity: *Thwaites* v. *Gallinger*, 4 D. & R. 365; *Hodgson* v. *Garrett*, 1 Chit. 174; but as in this province it has not been customary to keep a bail-book, probably the filing of the exception would be sufficient. The expression "the bail may be taken out of Court," refers no doubt to the old practice whereunder the bail piece was first filed in the Judge's Chambers until allowance, and on its being allowed was handed out, and then filed in the proper office; it is equivalent to saying that the bail is to be allowed.

When notice of bail not accompanied by affidavit of justification, plaintiff has 20 days to except.

1078. Where notice of bail is not accompanied by such affidavit, the plaintiff may except thereto within twenty days next after the putting in of such bail, and notice thereof given in writing to the plaintiff or his solicitor, or where special bail is put in before any commissioner, the plaintiff may except thereto within twenty days next after the bail-piece is filed in the proper office, and notice thereof given as aforesaid; and no exception to bail shall be admitted after the time hereinbefore limited. Rules T. T. 1856, 83.

The affidavit referred to in this *Rule* is the affidavit of justification prescribed by *Rule* 1076.

Affidavits of justification, form of.

1079. Affidavits of justification shall be deemed insufficient, unless they state that each person justifying is worth double the amount sworn to, over and above what will pay his just debts, and over and above every other sum for which he is then bail, except when the sum sworn to exceeds $4,000, when it shall be sufficient for the bail to justify in $4,000 beyond the sum sworn to. Rules T. T. 1856, 84.

See *Rule* 1070. Where the affidavit is insufficient the bail may justify in person: *Shave* v. *Spode*, 2 M. & W. 42, but the defendant will not in that case be entitled to the costs of justification: *Stevens* v. *Miller*, *Ib.* 368; and see *Rule* 1078.

It would seem, notwithstanding the wording of this *Rule*, that the bail need only swear that they are worth double the amount which the defendant is ordered to be held to bail for, which may be less than the amount sworn to by the plaintiff: see *Baker* v. *Jackson*, 9 Ont. 661; *Rule* 1062.

Two days' notice of justification is sufficient.

1080. It shall be sufficient in all cases if notice of justification of bail be given two days before the time of justification. Rules T. T. 1856, 85.

According to the former English practice when notice of bail and notice of justification were given at the same time, the notice was required to be a four days' notice; see Arch. Pr. 11th ed., 824; but this was expressly provided for by the English Rule 96, H. T. 1853, which was not adopted in Ontario.

1081. In all cases bail to the action shall be justified, when required, within four days after exception, before a Judge at Chambers. Rules T. T. 1856, 86. Rules 1081-1085. Bail to action to justify within four days after exception.

This *Rule* appears to apply to the case when notice of bail is given, and the plaintiff thereupon serves notice of exception before the defendant has given a notice of justification, but in cases where before the notice of exception has been given, a notice of justification has been served, the bail should be justified at the time named in the notice of justification though it may be less than four days after the exception.

1082. Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance. Rules T. T. 1856, 87. Bail, though rejected, may render their principal.

A render can only be made by special bail: see *Rule* 1064, note.

1083. Where bail to the sheriff become bail to the action, the plaintiff may except to them, though he has taken an assignment of the bail bond. Rules T. T. 1856, 70. Plaintiff may except to bail to Sheriff who become bail to an action.

Bail to the Sheriff are persons who give a bond to the Sheriff that the defendant will put in special bail within the time limited by the order for arrest. "Bail to the action" is another term for special bail. Special bail are persons who undertake generally that if the defendant be condemned in the action he will satisfy the costs and condemnation money, *or* render himself to the custody of the Sheriff of the County in which the action against such defendant has been brought, *or* they will do so for him: *Rule* 1062.

Formerly the taking of an assignment of the bail bond to the Sheriff precluded the plaintiff from excepting to the sufficiency of the bail to the Sheriff if they become bail to the action: 2 Saund. 62.

1084. When the plaintiff proceeds by action on the recognizance of bail, the bail shall be at liberty to render their principal at any time within the space of 8 days next after service of process upon them, but not at any later period, and upon notice thereof given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only. Rules T. T. 1856, 88. When action commenced against bail, they may render their principal.

Where after due notice of render, plaintiff proceeded to judgment, the proceedings were stayed, and the costs incurred subsequent to notice, disallowed: *Wright* v. *Tucker*, 6 U. C. Q. B. 24. The Court will not interfere to stay proceedings where the render is made after the time limited by this *Rule*: *Read* v. *Scoville*, 16 U. C. Q. B. 453. Where there is doubt as to the validity of an alleged render of the principal, a Judge in Chambers will not order an *exoneretur*, but will leave the bail to plead: *Blackman* v. *O'Gorman*, 5 U. C. L. J. 161; *Potts* v. *Baird*, 7 P. R. 113. Plaintiff proceeding after notice of render not entitled to costs subsequently incurred.

Where the action is brought after render of the principal but before an *exoneretur* has been entered, the action may be stayed on terms: *Laing* v. *Slingerland*, 17 Ont. 392.

1085. Bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit, not exceeding in Bail, extent of liability of.

Rules 1086-1088.

the whole the amount of their recognizance. Rules T. T. 1856, 89.

Notwithstanding the wording of this *Rule* the bail are not liable for more than the amount which the defendant has been ordered to be held to bail for, and the costs. This may be less than the sum sworn to: see *Baker* v. *Jackson*, 9 Ont. 661; *Rule* 1062; *Laing* v. *Slingerland*, 17 Ont. 392.

Staying proceedings pending appeal.

1086. To entitle bail to a stay of proceedings pending an appeal, the application must be made before the time to surrender is out. Rules T. T. 1856, 90.

The time for surrender is out, after the expiration of eight days from the service of process on the defendant in an action against the bail upon the recognizance: see *Rule* 1084. The appeal referred to in this *Rule* is an appeal in the action against the original defendant.

Costs of prior notices of bail.

1087. Wherever two or more notices of justification of bail have been given before the notice on which bail appear to justify, no bail shall be permitted to justify without first paying (or securing to the satisfaction of the plaintiff, his solicitor, or agent) the reasonable costs incurred by such prior notices, although the names of the parties intended to justify, or some of them, may not have been changed, and whether the bail mentioned in any such prior notice have not appeared, or have been rejected. Rules T. T. 1856, 91.

It is not necessary for bail to appear in person to justify, unless so ordered: see *Rule* 1063; but though the bail do not appear in person, it is presumed this *Rule* would apply, and their affidavit of justification would not be received until the provisions of this *Rule* as to the payment of the costs of the former abortive notices of justification had been first paid.

Limit of bail.

1088. In case an order is made for arrest in an action for alimony, the amount of the bail required shall not exceed what may be considered sufficient to cover the amount of future alimony for 2 years, besides arrears and costs, but may be for less at the discretion of the Court or Judge. R. S. O. 1877, c. 40, s. 46.

On a motion to discharge a defendant from arrest in an alimony action, the merits of the case may be inquired into, so far as to enable the Judge to determine whether there is any reasonable prospect of the plaintiff recovering judgment; and where the *primâ facie* case made by the plaintiff on obtaining the order for arrest is clearly rebutted, the defendant may be discharged: *Macpherson* v. *Macpherson*, 2 Chy. Ch. 222.

Although the order to hold to bail in an alimony action is not to exceed a sum sufficient to cover future alimony for two years, yet when the Court has acquired control over the funds of the defendant through any default of his, payment of them to him may be refused except on the terms of his securing the future payment of alimony: *Gott* v. *Gott*, 10 Gr. 543.

Formerly it was held that where bail was given in an alimony suit, the bail could not render their principal, and if the principal did not satisfy the plain-

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tiff's demand, the security given by the bail was forfeited: see *McDonald* v. *McDonald*, 1 Chy. Ch. 22; *Richardson* v. *Richardson*, 8 P. R. 274; *Needham* v. *Needham*, 29 Gr. 117. But these *Rules* appear to place arrests in actions for alimony on the same footing as arrests for purely legal demands. Rule 1089.

(ii) *Absconding Debtors.*

1089. Every attaching order in an action against an absconding debtor shall be issued in duplicate and shall be so marked on its face, and one of the duplicates shall be delivered to the sheriff, and the other shall be used for the purpose of serving the defendant. *See* R. S. O. 1877, c. 68, s. 6. Orders in duplicate.

Sections 1, 2 and 3 of R. S. O. c. 66, are as follows:

1. If a person resident in Ontario indebted to any other person, departs from Ontario with intent to defraud his creditors, and at the time of his so departing is possessed to his own use and benefit, of any real or personal property, credits or effects therein not exempt by law from seizure, he shall be deemed an absconding debtor, and his property, credits or effects aforesaid, may be seized and taken for the satisfying of his debts by a writ of attachment. R. S. O. 1877, c. 68, s. 1. Who to be regarded as an absconding debtor.

PROCEDURE TO OBTAIN WRIT OF ATTACHMENT.

In the High Court.

2. Upon affidavit made by a plaintiff, his servant or agent that a person so departing is indebted to the plaintiff in a sum exceeding $100, and stating the cause of action, and that the deponent has good reason to believe and does verily believe that the person departed from Ontario and has gone to (stating some place to which the absconding debtor is believed to have fled, or that the deponent is unable to obtain any information as to what place he has fled to), with intent to defraud the plaintiff of his just dues, or to avoid being arrested or served with process, and was, at the time of his so departing, possessed of real or personal property, credits or effects, not exempt by law from seizure to his own use and benefit in Ontario, and upon the further affidavit of two other credible persons, that they are well acquainted with the debtor mentioned in the first named affidavit, and have good reason to believe and do believe that the debtor has departed from Ontario with intent to defraud the plaintiff, or to avoid being arrested or served with process, the High Court, or a Judge thereof, or the Judge of a County Court, may order a writ of attachment to issue from said High Court, and may in the order appoint the time for the defendant's putting in special bail, which time shall be regulated by the distance from Ontario of the place to which the absconding debtor is supposed to have fled, having due regard to the means of and necessary time for postal or other communication. R. S. O. 1877, c. 68, s. 2. Proceedings upon affidavit that the defendant has absconded, etc. Further affidavit. Writ of attachment to issue.

In County Courts.

3. In case the sum claimed is within the jurisdiction of the County Courts, such Court or the Judge or acting Judge thereof, may in like manner order a writ of attachment to issue from such Court, and the proceedings thereon shall be the same as in this Act provided. R. S. O. 1877, c. 68, s. 3. Proceedings in cases within County Court jurisdiction.

It would seem to have been the intention of these *Rules* to do away with the necessity for a writ of attachment, as in the case of writs of *capias ad respondendum*: *Rule* 1045; writs of replevin: *Rule* 1098; writs of *mandamus*: *Rule* 1115; writs of injunction: *Rule* 1130; writs of prohibition: *Rule* 1138; writs of certiorari: *Rule* 1140; and to substitute, for the special form of action

Rule 1089. commenced by a writ of attachment, interlocutory proceedings in an ordinary action by which the property of an absconding debtor may be taken and applied in payment of his debts. The *Rules* above referred to expressly abolish the writs above mentioned and substitute orders therefor, but there is no such express provision abolishing the writ of attachment. *Rule* 1089, however, seems incidentally to show that a writ is no longer necessary, as one of the duplicate orders is to be used for serving the defendant, and the other as authority to the Sheriff to attach the debtor's property. Again, as the former writ was the commencement of the action, it would seem to have been abolished and the ordinary writ of summons substituted by *Rule* 224. Any provisions of *The Absconding Debtor's Act* to the contrary must therefore be considered to be repealed by the *Rules*; see 51 V. c. 2, s. 4.

Affidavit. **Affidavits for Attachment.**—The order for an attachment is obtained on motion *ex parte*, supported by an affidavit to be made by the plaintiff, his servant or agent, showing that the defendant was resident in Ontario, that he was indebted to the plaintiff in a sum exceeding $100, and stating the cause of action, and that the deponent has good reason to believe and does verily believe that the defendant has departed from Ontario and has gone to, (*stating some place to which the absconding debtor is believed to have fled, or* that the deponent is unable to obtain any information as to what place he has fled to), with intent to defraud the plaintiff of his just dues, or to avoid being arrested or served with process, and was at the time of his so departing, possessed of real or personal property, credits or effects, not exempt by law from seizure, to his own use and benefit in Ontario : *Hart* v. *Ruttan*, 23 C. P. 613.

There must be the further affidavits of two other credible persons that they are well acquainted with the debtor mentioned in the first named affidavit, and have good reason to believe, and do believe, that the debtor has departed from Ontario with intent to defraud the plaintiff, or to avoid being arrested or served with process.

The forfeiture of a recognziance to appear constitutes a debt for which an attachment may issue : *Regina* v. *Stewart*, 8 P. R. 297.

The debt which the plaintiff claims, must be actually due and payable; where the period of credit had not expired it was held that the plaintiff was not entitled to sue out a writ of attachment therefor : *Kyle* v. *Barnes*, 10 P. R. 20.

The same particularity in stating the cause of action is not required as was formerly required in an affidavit to hold to bail where no order of a Judge was required, nor the same particularity as is required when personal liberty is involved : *Bank of Hamilton* v. *Baine* (2), 12 P. R. 439.

Formerly affidavits upon which the order was granted not styled in any Court, although sworn before a Commissioner for taking affidavits in the Q. B., who appended to his signature the words "a Commissioner in B. R. etc., were held to be sufficient : *Scott* v. *Mitchell*, 8 P. R. 518, following *Ellerby* v. *Walton*, 2 P. R. 147 ; and not following *Hart* v. *Ruttan*, *supra ;* and see *Wakefield* v. *Bruce*, 5 P. R. 77 ; but now that the application for the order is made in an action commenced in the usual way it would seem to be proper that the affidavits should be styled in the action except in cases where in an ordinary action leave may be applied for to issue a writ : see notes to *Rules* 274 and 276.

A statement that the defendant was indebted to the plaintiffs in the amount of certain promissory notes described, showing them to be overdue and held by the plaintiffs, and that defendant had departed, etc., with intent to defraud plaintiffs, was held sufficient : *Wakefield* v. *Bruce*, 5 P. R. 77. It is not necessary that the plaintiff should swear that the debtor was residing in this Province, if that fact be sworn to by other persons : *Ib.* It is sufficient to show that the debtor intended to defraud the plaintiff, without showing intention to defraud creditors generally : *Ib.*

An affidavit made by a County Crown Attorney proving a debt due to the Crown by an absconding debtor was held sufficient : *Regina* v. *Stewart*, 8 P. R. 297. On a motion to set aside the writ, it was held that any defect in the affidavits on which the order for the writ was granted, might be supplied by the affidavits filed in answer to the motion : *Ib.* Where a defendant had by his

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solicitor accepted service of the writ with knowledge of certain alleged irregularities and neglected moving against the writ until after the time for pleading had expired, he was held to have waived the objection: *Ib.* Rule 1089.

A defendant whose family resided in the United States, but who for several months was in this Province purchasing horses for the United States Army and contracting debts therefor with the declared intention of moving permanently into Canada, was held to be sufficiently a resident within Ontario, to be within the Act: *Higgins* v. *Brady*, 10 U. C. L. J. 268. Where the deponents reside far from the debtor, the grounds of their belief should be set out: *Bank of Upper Canada* v. *Spafford*, 2 O. S. 373; and see *Rule* 609. Where the affidavit stated that the defendant "has left the Province or is concealed within the same" it was held sufficient: *Totten* v. *Fletcher*, T. T. 2 & 3 Vict.; Har. & Jos. Dig. 3. The affidavits must show that the defendant is, or was, a resident of Ontario: *Higgins* v. *Brady*, 10 U. C. L. J. 268. It is not sufficient to describe the debtor as "lately doing business" in Ontario, nor to describe him as having "departed from Canada": *Ib.*

A claim for unliquidated damages is not one upon which an order for attachment can be obtained: see *Clark* v. *Ashfield*, E. T., 7 W. 4; Har. & Jos. Dig. 4194.

Application for order to whom to be made.—The application for the order may be made to a Judge of the High Court, or to the Master in Chambers, or any of the Local Judges, or Masters having jurisdiction in Chambers under *Rules* 30, 41, 138. Where the order has been granted by a Judge of a County Court it has been held that he has no jurisdiction to entertain an application by the defendant to set it aside: *Disher* v. *Disher*, 12 P. R. 518, but perhaps in this case it was not sufficiently taken into account that the jurisdiction of a County Court Judge in actions in the High Court is not limited by the provisions of the Statute: R. S. O. c. 62, s. 2; and that he has now a general jurisdiction in Chambers in actions in the High Court under the *Rules*, over and above that conferred by the Statute. Where the amount claimed is within the jurisdiction of the County Court the application may be made to and the order may be issued out of that Court: R. S. O. c. 66, s. 3. Motion for order.

Successive applications may be made for an order for attachment to successive Judges upon the same material, and an order granted by any one of them will be as valid as if it had been made by the first one, but on each subsequent application on the same or different material, the Judge should be notified of every previous application, though this is more as a matter of propriety than a legal right, and the omission to do so would not be a ground for setting aside the order: *Bank of Hamilton* v. *Baine* (2), 12 P. R. 439.

Form of Order.—The Statute (see R. S. O. c. 66, s. 2), enacts that the order is to direct a writ of attachment to issue from the High Court and is to appoint the time for the defendant's putting in special bail, which time is to be regulated by the distance from Ontario of the place to which the absconding debtor is supposed to have fled, having due regard to the means of and the necessary time for postal or other communication. Form of order.

It was formerly held to be unnecessary for the order for the writ to state the amount for which special bail is to be put in: *Regina* v. *Stewart*, 8 P. R. 297. The sum should, however, now be named in the order of attachment, and the amount sworn to on the affidavits in which the order is obtained is the amount for which special bail must be put in: *Ib.* at p. 300, and see *Rule* 1095.

The *Rules* give no form of order of attachment. The following form is therefore suggested, based upon the form of the writ prescribed by R. S. O. 1887, c. 68, s. 4.

Form of Order of Attachment.

IN THE HIGH COURT OF JUSTICE.

DIVISION.

Date.

(*Style of Cause.*)

Upon the application of the above plaintiff, and upon hearing read the writ of summons and the affidavits of, etc., and upon hearing the Solicitor for the applicant.

Rule 1069. It is ordered that the Sheriff of the County of , etc., do attach, seize and safely keep all the real and personal property, credits and effects, together with all evidences of title or debts, books of account, vouchers and papers belonging thereto, of C. D., to secure and satisfy the plaintiff A. B. a certain debt (*or* demand) of $ (*the sum sworn to*), with his costs of action, and to satisfy the debt and demand of such other creditors of the said C. D. as shall duly place their Orders of Attachment in the hands of said Sheriff or otherwise lawfully notify him of their claim, and duly prosecute the same.

And it is further ordered that the said C. D., do within days after the service of this order on him, inclusive of the day of such service, cause special bail to be entered for him in ,) in this action.

And the said C. D. is hereby required to take notice that his real and personal property, credits and effects in Ontario, have been hereby ordered to be attached at the suit of the said A. B., and that in default of his putting in special bail as aforesaid, the [said A. B. may, by leave of the Court or a Judge, proceed in the action to judgment and execution, and the] (*a*) said Sheriff may sell the property so attached :

And it is further ordered that the said Sheriff, as soon as he has executed this order, do return the same with the inventory and appraisement of what he has attached thereunder.

Memorandum to be subscribed or indorsed on the Order.

N.B.—This Order is to be served within six months from the date thereof, or if renewed, then from the date of such renewal, including the day of such date, and not afterwards.

See R. S. O. 1887, c. 66, Sched.

Effect of Attachment.—The placing of the order of attachment in the Sheriff's hands does not of itself bind the goods of the debtor, there must be a levy made thereunder : *Potter* v. *Carroll*, 9 C. P. 442 ; neither does the order bind the debtor's lands until actual seizure ; *Kingsmill* v. *Warener*, 13 U. C. Q. B. 18 ; *Robinson* v. *Bergin*, 10 P. R. 127. Where there had been no seizure under the order until after a *fi. fa.* had been placed in the Sheriff's hands, the latter was formerly entitled to priority : *Ib.* Since *The Creditors Relief Act* and s. 56 of *The Absconding Debtors Act*, however, there will be no such priority. Formerly where proceedings under *The Absconding Debtors Act* were taken prior to the delivery of an execution to the Sheriff, it was held that *The Creditors Relief Act* did not apply ; but the distribution of the property attached took place under *The Absconding Debtors Act*, and creditors had to recover execution for their debts in order to participate in the proceeds : *Macfie* v. *Pearson*, 8 Ont. 745.

Whether under that Statute as revised it is any longer necessary for other creditors to recover execution is not very clear. In R. S. O. 1877, c. 68, s. 28, there was an express provision that where several persons sued out writs of attachment against an absconding debtor the proceeds of the property attached were to be rateably distributed among such of the plaintiffs in such writs as obtained judgments and sue out executions, but this provision has been omitted.

By R. S. O. 1887, c. 66, s. 26, it is provided that "in case the property and effects of the absconding debtor are insufficient to satisfy the executions and *other claims certified*, none shall be allowed to share, unless their proceedings under this Act, (*i.e.*, *The Absconding Debtors Act*), or *The Creditors Relief Act*, or the provisions of *The Division Courts Act* respecting absconding debtors were

(*a*) Query whether the words here in brackets, taken from a form of the old writ of attachment, should not be omitted, as now that the action is commenced by writ of summons like any other action, the plaintiff may proceed to judgment, if no appearance or defence is entered ; and the consequence of not putting in special bail would seem to be that the sheriff may sell the property attached.

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commenced within six months from the date of the first writ of attachment." By the following s. 27, it is also provided that "the Court or a Judge may delay the distribution in order to give reasonable time for the obtaining of judgment or allowance of claims by persons who have commenced proceedings in due time against the absconding debtor." **Rules 1090-1092.**

The probable effect of these provisions is that it is not necessary for other creditors to proceed by attachment, but, where any execution is in the Sheriffs' hands, that it will suffice for other creditors to obtain executions or certificates under *The Creditors Relief Act*, and that to that extent the decision in *Macfie* v. *Pearson*, *supra*, may now be considered to be superseded. The first attaching creditor is entitled to priority as against other creditors for his costs of issuing the attachment and the Sheriff's fees for executing it, and also the costs of obtaining an order to sell the property: *Darling* v. *Smith*, 10 P. R. 360; and see R. S. O. 1887, c. 66, s. 20, (3); *Hughes* v. *Field*, 9 P. R. 127.

1090. Every such attaching order shall be dated on the day on which it is made, and shall remain in force as long as the writ of summons is in force. Date.

The writ of summons remains in force for 12 months: *Rule* 238.

1091. The plaintiff may, at any time within six months from the date of the original order of attachment, upon application to the proper officer, obtain one or more certified copy or copies of the attaching order, which may be delivered to any Sheriff other than the Sheriff to whom the original order was delivered, for the purpose of attaching the property, credits, or effects of the defendant in aid of the original order. *See* R. S. O. 1877, c. 68, s. 7. Further orders within six months

Six months was mentioned in R. S. O. 1877, c. 68, s. 7, because that was the duration of the writ of attachment. It would have been more consistent with *Rule* 1090 to have limited twelve months instead of six months in the above *Rule*.

1092. In actions against absconding debtors, the writ of summons and order of attachment may be served in like manner as in ordinary actions. *New.* Service.

The intention of this *Rule* would seem to be to enable a plaintiff to proceed in the action upon such service as would enable him to obtain judgment in an ordinary action, and to abrogate the former practice under sec. 8, of R. S. O. 1887, c. 66, by which an application for leave to proceed after service of the writ, or reasonable efforts to effect service, where the defendant has not put in special bail, was necessary: see 51 Vict. c. 2, s. 4.

R. S. O. 1887, c. 66, s. 1, is as follows:

8. "In case it is shewn by affidavit to the Court or a Judge, that a copy of the writ was personally served on the defendant, or that reasonable efforts were made to effect service, and that the writ came to his knowledge, or that the defendant has absconded in such a manner that after diligent inquiry no information can be obtained as to the place he has fled to, the Court or Judge, if the defendant has not put in special bail, may either require some further attempt to effect service or may appoint some act to be done which shall be deemed good service, and thereupon (or on the first application, if the Court or Judge thinks fit), the Court or Judge may authorize the plaintiff to proceed in the action in such manner and subject to such conditions as the Court or Judge may direct or impose." R. S. O. 1887, c. 66, s. 8.

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Rules 1093, 1094.

Under that section service of an attachment on the wife of the debtor was allowed as good service upon the debtor, on its being shewn by affidavit that the plaintiff after diligent inquiry was unable to ascertain the debtor's whereabouts: *McDougall* v. *Gilchrist*, 3 C. L. J. 28. An affidavit for the allowance of substitutional service was required, among other things, to state what efforts have been made to effect personal service: *Stephen* v. *Dennie*, 3 C. L. J. 69.

By the practice under the Statute the plaintiff could take no step until the three months allowed for the defendant to put in bail had expired: *Banker* v. *Griffin*, 3 O. S. 163. The intention of this *Rule* would seem to be to allow the action to proceed in the same manner as in an ordinary action.

Plaintiff to prove claim.

1093. Before the plaintiff shall be entitled to sign judgment by default he shall file an affidavit, proving the amount of the debt and damages claimed by him in such action, after giving credit for all payments and claims which might be set off or lawfully claimed by the debtor at the time of making the affidavit. *See* R. S. O. 1877, c. 68, s. 9.

This *Rule*, it is presumed, supersedes the provisions of R. S. O. 1887, c. 68, s. 9, which is as follows:

Plaintiff must prove his claim, etc. Rev. Stat. c. 53.

"9. Before the plaintiff obtains judgment he shall prove the amount of the debt or damages claimed by him in the action, either before a jury on an assessment, or by reference as provided in section 1 of *The Act respecting Arbitration and References*, according to the nature of the case, and no execution shall issue until the plaintiff, his solicitor or agent, has made and filed an affidavit of the sum justly due to the plaintiff by the absconding debtor, after giving him credit for all payments and claims which might be set off or lawfully claimed by the debtor at the time of making the affidavit, and the execution shall be endorsed to levy the sum so sworn to with the taxed costs, or the amount of the judgment including the costs, whichever is the smaller sum of the two. R. S. O. 1877, c. 68, s. 9."

Proof of the debtor's signature to a note, without proof of the plaintiffs being the payees, was considered sufficient proof of the debt: *Appleton* v. *Dwyer*, 4 U. C. Q. B. 247.

Defendant may be let in.

1094. The Court or Judge may, either before or after final judgment, let in the defendant to put in special bail and defend the action, in the same manner, and subject to the same rules and discretion, as on a like application in an ordinary action. *See* R. S. O. c. 68, s. 10.

This *Rule*, it is presumed, is intended to supersede R. S. O. 1887, c. 66, s. 10, which is as follows:

10. "The Court or a Judge at any time before or after final judgment, but before execution executed, upon an application supported by affidavits satisfactorily accounting for the defendant's delay and default and disclosing a good defence on the merits, may, having regard to the time of the application and other circumstances, let in the defendant to put in special bail and to defend the action. R. S. O. 1877, c. 68, s. 10."

Application for leave to put in bail is of course only necessary when the defendant has omitted to do so within the time limited by the order.

The special bail required to be put in is the same as is required when a defendant is arrested on *mesne* process: see *Rule* 1062, and notes, and *Rule* 1095.

Formerly when a defendant entered an appearance, instead of putting in special bail as required by the writ, it was held to be a useless proceeding: *Regina* v. *Stewart*, 8 P. R. 297; the only way in which the defendant could entitle himself to defend the action being by putting in special bail: *Offay* v. *Offay*, 26 U. C. Q. B. 363. **Rules 1095, 1096.**

Under the present *Rules*, however, it would seem to be intended that the defendant may appear and defend the action in the same way as in any other action, and that special bail is only required to enable him to obtain the return of his property under sec. 12 of the Act.

Although a defendant had not put in special bail, his counsel, it would seem, under the former practice, might nevertheless appear at the trial, cross-examine the plaintiff's witnesses, and give evidence in mitigation of damages: *Offay* v. *Offay*, 26 U. C. Q. B. 363.

Formerly, also, another attaching creditor of the absconding debtor might appear at the trial of the plaintiff's claim and cross-examine the plaintiff's witnesses, and address the jury against the plaintiff: *Lavis* v. *Baker*, 13 C. P. 506; and such other creditor might also move for a new trial of the plaintiff's action upon affidavits, showing fraud and collusion between the plaintiff and the defendant: *Ib.*

The validity of a judgment might formerly have been attacked, and may still be attacked, by another creditor of the debtor in an independent proceeding: *McDonald* v. *Boice*, 12 Gr. 48; and formerly also by an interlocutory application in the action, in which the impeached judgment was recovered: *Bank of Montreal* v. *Burnham*, 1 U. C. Q. B. 131; *White* v. *Lord*, 13 C. P. 289; see also *Bevan* v. *Wheat*, 14 C. P. 51; *Dickson* v. *McMahon*: *Ib.* 521. See R. S. O. 1877, c. 68, s. 21; but this section was repealed by 46 Vict. c. 6, s. 4, (O); (see now R. S. O. 1887, c. 66, s. 20) and no similar enactment made. So that it is doubtful whether a third party can now intervene by such an interlocutory application.

The Master in Chambers has no jurisdiction to set aside a judgment entered pursuant to the finding of a County Court Judge upon a reference, at the instance of another creditor who wishes to be let in to defend: *Wills* v. *Carroll*, 10 P. R. 142.

1095. The special bail (whether put in within the time limited by the order, or within such time as the Court or a Judge directs,) shall be put in and perfected in like manner as if the defendant had been arrested for the amount sworn to on obtaining the attachment. *See* R. S. O. 1877, c. 68, s. 11. Special bail, how put in.

This *Rule*, it is presumed, is intended to supersede R. S. O. 1887, c. 66, s. 11, which is as follows:

"11. The special bail (whether put in within the time limited by the writ or within such time as the Court or a Judge directs), shall be put in and perfected in like manner as if the defendant had been arrested on a writ of *capias* for the amount sworn to on obtaining the attachment; and after being so put in and perfected, the defendant shall be let in to defend, and the action shall proceed as in ordinary cases. R. S. O. 1877, c. 68. s. 11."

1096. Upon the defendant so putting in and perfecting special bail, all his property, credits and effects attached in the action (excepting any which may have been disposed of as perishable, and then the net proceeds of the goods so disposed of,) shall be restored and paid to him, unless Property to be returned.

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Rule 1097. there be some other lawful ground for the Sheriff to withhold or detain the same. *See* R. S. O. 1877, c. 68, s. 12.

This *Rule*, it is presumed, is intended to supersede R. S. O. 1887, c. 66, s. 12, which is as follows :

"12. Upon the defendant so putting in and perfecting special bail, all his property, credits and effects attached in that action (excepting any which may have been disposed of as perishable, and then the net proceeds of the goods so disposed of), shall be restored and paid to him unless there be some other lawful ground for the Sheriff to withhold or detain the same. R. S. O. 1877, c. 68, s. 12."

Motion against order.

1097. If at any time before the execution issues it appears, upon motion, that the defendant was not an absconding debtor at the time of obtaining the attaching order, such defendant shall recover his costs of defence, to be deducted from the amount of the plaintiff's claim or judgment; and the plaintiff shall be entitled only to judgment or execution for the excess, if any; and if the taxed costs of the defendant are greater that the amount of the plaintiff's claim or judgment, then the defendant shall be entitled to an order for payment of the excess forthwith. *See* R. S. O. 1877, c. 68, s. 19.

This *Rule*, it is presumed, is intended to supersede R. S. O. 1887, c. 66, s. 19, which is as follows :

"19. If, before execution issues, it appears to the Court upon motion and upon hearing the parties by affidavit, that the defendant was not an absconding debtor within the meaning of this Act, at the time of the issue of the writ of attachment against him, he shall recover his costs of defence, and the plaintiff shall not have execution for the amount of the verdict rendered or ascertained upon reference or otherwise recovered in the action, unless the same exceeds, and then for such sum only as the same exceeds the amount of the taxed costs of the defendant, and in case the sum so recovered is less than the taxed costs of the defendant, he shall be entitled, after deducting the amount of the sum recovered from the amount of the taxed costs, to take out execution for the balance. R. S. O. 1877, c. 68, s. 19."

The intent with which the debtor left the Province can be tried on affidavit on an application to set aside the attachment: *Jackson* v. *Randall*, 6 P. R. 165.

When property had been sold under the attachment, the Court on setting it aside, ordered the Sheriff to pay over the moneys realized to the defendant, and directed that no action should be brought for anything done under the attachment: *Hart* v. *Ruttan*, 23 C. P. 613.

2. Replevin.

The action of replevin was originally the form of action for the recovery of goods wrongfully taken out of the possession of a person under a distress; but early in the history of Upper Canadian Law the form of action was extended to other cases in which the goods sought to be recovered had not necessarily been taken out of the plaintiff's possession, but were merely wrongfully detained by the defendant. Actions of trover might result in the return of the goods, but were also for damages for the unlawfully taking or detaining of goods, and the value of the goods might be recovered. The object of an action of replevin was to obtain the goods in the first place, and therefore this remedy was extended, so as to be employed in cases in which the obtaining of the goods was the important matter.

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C. S. U. C. c. 29, s. 1, and R. S. O. 1877, c. 53, s. 2, provided that an action of replevin might be brought: **Rule 1097.**

(1) Where personal property has been wrongfully distrained under the circumstances in which by the law of England at the date of the Con. Stat. U. C. (viz., 5th Dec., 1859), replevin might be brought.

(2) Where trespass, or trover, would lie for the wrongful-taking or detaining of personal property.

This is in effect the present law as embodied in R. S. O. 1887, c. 55, ss. 2, and 3, which are as follows:—

2. Where goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities or other personal property or effects have been wrongfully distrained under circumstances in which by the law of England, on the 5th day of December, 1859, replevin might have been made, the person complaining of such distress as unlawful may bring an action of replevin; or where such goods, chattels, property or effects have been otherwise wrongfully taken or detained, the owner or other person capable of maintaining an action for damages therefor may bring an action of replevin for the recovery of the goods, chattels, property or effects, and for the recovery of the damages sustained by reason of the unlawful caption and detention, or of the unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses. R. S. O. 1877, c. 53, s. 2. When goods may be replevied.

3. No party to an action or proceeding, in any Court, shall replevy or take out of the custody of the Sheriff, Bailiff, or other officer, any personal property seized by him under process against such party. R. S. O. 1877, c. 53, s. 3. Goods seized not to be replevied by parties.

Under section 2, replevin will lie in Ontario though there has been no wrongful taking, but a detention only is complained of: *Deal* v. *Potter*, 26 U. C. Q. B. 578, and though both a wrongful taking and a detention are alleged, for every detention is a new taking: *Ib.*

Replevin may be brought on an improper distress for school rates: *Applegarth* v. *Graham*, 7 C. P. 171; and see *Halpin* v. *Calder*, 26 C. P. 501; *Askew* v. *Manning*, 38 U. C. Q. B. 345; or for other taxes, *Sargant* v. *City of Toronto*, 12 C. P. 185. Cases of distress.

Where a distress is properly made for some taxes, and also for other sums not properly collectable, it would seem that replevin would not lie until what is properly due has been paid: *Corbett* v. *Johnston*, 11 C. P. 317: Goods improperly pledged or sold, by a person having no right thereto, may be replevied by the owner: *Bush* v. *Fry*, 15 Ont. 122. Formerly, goods seized under an attachment from a Division Court might have been replevied by a third party claiming them as his own: *Arnold* v. *Higgins*, 11 U. C. Q. B. 191; but the proper remedy of the claimant is now to proceed under R. S. O. c. 51, ss. 269 *et seq.*: but see *Reid* v. *McDonald*, 26 C. P. 147.

As being in the custody of the law the following have been held to be not repleviable:—A vessel in the hands of a collector of customs seized for breach of revenue laws: *Scott* v. *McRae*, 3 P. R. 16; goods in the hands of an official assignee in insolvency: *Barclay* v. *Sutton*, 7 P. R. 14; and see the question as to how far goods seized under execution or attachment are protected from the remedy by replevin discussed in *Jameson* v. *Kerr*, 6 P. R. 3. Goods in *custodia legis*.

Replevin will not lie against a pound-keeper: *Ibbottson* v. *Henry*, 8 Ont. 625.

In replevin against one person goods cannot be taken out of the peaceable possession of another without notice or demand: *G. W. Ry. Co.* v. *McEwan*, 28 U. C. Q. B. 528; *Stoeser* v. *Springer*, 7 Ont. App. 497; *Hoorigan* v. *Driscoll*, 8 P. R. 184. Goods in possession of third person.

Plaintiffs in possession of certain lumber limits were held entitled to maintain replevin against a wrong-doer in respect of saw-logs cut on the limits, though by reason of an infirmity in the license they might have no title as against the Crown: *Gilmour* v. *Buck*, 24 C. P. 187.

Under the terms of the C. S. U. C. c. 29, s. 1, it was formerly held that where there was not sufficient evidence to constitute a conversion of the goods

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by defendant, so as to support an action of trover, replevin would not lie: *Smalley* v. *Gallagher*, 26 C. P. 531; but the old learning on the subject of conversion is not imported into the system introduced by the Jud. Act: *Stimson* v. *Block*, 11 Ont. 96. R. S. O. 1887, c. 55, s. 2, provides for redress where goods are wrongfully taken or detained, in favour of the person capable of maintaining an action for damages therefor, and in such cases the question is, whether there has been such an unauthorized dealing with the plaintiff's property as has caused him damage; and if so, to what extent he has sustained damage: *Stimson* v. *Block*, *supra*.

Writ of replevin abolished.

1098. The writ of replevin is hereby abolished. Whenever a party is entitled to replevy goods he may obtain an order therefor in an action commenced by writ of summons. *New.*

The order issued, of which a form is given in the Appendix Form 153, contains what was formerly contained in the writ.

The original *Rule* respecting the commencement of actions, did not apply to actions of replevin, so that a writ of replevin, declaration and avowry under the old practice were necessary: see *Campan* v. *Lucas*, 9 P. R. 142; *Wallace* v. *Cowan*, *Ib.* 144.

An action of replevin is since this *Rule* to be commenced like any other action, by writ of summons, and the return of the goods is to be obtained by order under *Rule* 1099, after the action is so commenced.

1099. An order of replevin may be obtained,

When motion for order required.

(1) On motion therefor on an affidavit by the person claiming the property, or some other person showing to the satisfaction of the Court or a Judge, the facts of the wrongful taking or detention which is complained of, as well as the value and description of the property, and that the person claiming it is the owner thereof, or is lawfully entitled to the possession thereof (as the case may be);

On *præcipe*.

(2) Or on *præcipe* if the person claiming the property, his servant or agent, makes an affidavit which shall be entitled and filed in the Court out of which the order is to issue, stating:

Affidavit to obtain order on *præcipe*.

(*a*) That the person claiming the property is the owner thereof, or that he is lawfully entitled to the possession thereof, describing the property in the affidavit;

(*b*) The value thereof to the best of his belief;

(*c*) That the property was wrongfully taken out of the possession of the claimant, or was fraudulently got out of his possession, within two months next before the making of the affidavit;

(*d*) That the deponent is advised and believes that the claimant is entitled to the order;

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(*e*) And that there is good reason to apprehend that unless the order is issued without waiting for a motion, the delay would materially prejudice the just rights of the claimant in respect to the property. Rule 1099.

(3) Or on *præcipe* (in case the property was distrained for rent or damage feasant), if the person claiming the property, his servant or agent, makes an affidavit (which shall be entitled and filed in the Court from which the order is to issue), stating, Order may issue on *præcipe* if the property was distrained for rent or damage feasant.

(*a*) That the person claiming the property is the owner thereof, or that he is lawfully entitled to the possession thereof, (describing the property in the affidavit);

(*b*) The value thereof to the best of his belief;

(*c*) That the property was taken under colour of a distress for rent or damage feasant, and in such case the order shall state that the defendant has taken and unjustly detains the property, under colour of a distress for rent or damage feasant (as the case may be). R. S. O. 1877, c. 53, s. 6.

(4) Except as hereinbefore mentioned no order of replevin shall be issued.

The order is issued on *præcipe* (by the officer in whose office appearance in the action is required to be entered: see *Rules* 20 and 25), in cases where the goods have been taken out of the plaintiff's possession, or distrained for rent or damage feasant. A special application is necessary under clause (1) in other cases.

The latter application is made in Chambers *ex parte* unless the Judge directs notice to be given: *Rule* 1100.

The affidavit for a *præcipe* order is to be by the person claiming the property, his servant or agent. An affidavit not describing the deponent as servant or agent, but using the words "now acting for the said (plaintiff)" was held to be insufficient, but for the fact that it further shewed facts from which the agency might be inferred: *Arnold* v. *Hamilton*, 1 P. R. 263.

The affidavit on special application under clause (1) may be by any one cognizant of the facts necessary to be sworn to.

In either case the affidavit must be sufficiently explicit to enable the Sheriff to identify the property: *Jones* v. *Cook*, 2 P. R. 396; *Hoorigan* v. *Driscoll*, 8 P. R. 184; and the description must be inserted in the order: *Rule* 1102.

An objection that there was in fact no taking or detention is not a ground for setting aside the order; that is one of the questions to be determined in the action: *Gilchrist* v. *Conger*, 11 U. C. Q. B. 197.

An order will not be granted to replevy a vessel seized for breach of the revenue laws: *Scott* v. *McRae*, 3 P. R. 16; neither should the order be issued on *præcipe* in such a case: *Ib.*

Where the order is issued on *præcipe* the Sheriff takes the property under it, but does not replevy it without further order directing him to do so, except where the property was distrained for rent or damage feasant: *Rule* 1106.

Rules 1100-1103.

Discretionary power of the Court or Judge when an application for an order is made.

1100. Where a motion for an order is made, the Court or Judge may proceed on the *ex parte* application of the plaintiff, or may direct notice to be served on the defendant to show cause why the order should not issue; and may on the *ex parte* application, or on the return of the motion, grant or refuse the order, or direct the sheriff to take a bond in less or more than treble the value of the property, or may direct him to take and detain the property until the further order of the Court, instead of at once replevying the same to the plaintiff; or may impose any terms or conditions in granting the order, or in refusing the same, on the return of a motion, as under the circumstances in evidence appear just. R. S. O. 1877, c. 53, s. 7.

Defendant may apply to discharge order.

1101. In case an order of replevin is issued, the defendant may at any time, or from time to time, on notice to the plaintiff, apply to the Court or a Judge, on affidavit or otherwise, to discharge, vary, or modify the order, or to stay proceedings under the order, or for any other relief, to be specified in the notice, with respect to the return, safety or sale of the property or any part thereof, or otherwise; and the Court or Judge may make such order thereon as, under all the circumstances, best consists with justice between the parties. R. S. O. 1877, c. 53, s. 9.

An objection that there was in fact no taking is not a ground for setting aside the order: *Gilchrist* v. *Cooper*, *supra*, in note to *Rule* 1099.

An objection that a writ of replevin was directed to a Sheriff who was sole liquidator of the plaintiff company, was over-ruled, in *Alpha Oil Co.* v. *Donnelly*, 12 P. R. 515.

This *Rule* applies to applications to discharge the order of replevin on the merits, and not for mere irregularities: *Ib.*

Contents of order and how to be dated.

1102. The order shall state the description and value of the property, and shall be dated on the day on which it is made, and may be in the words or the effect of Form No. 153 in the Appendix, or otherwise adapted to the circumstances of the case. R. S O. 1877, c. 53, s. 10.

Sheriff, before he replevies, to take bond.

1103. Before the Sheriff acts on the order he shall take a bond [from the plaintiff with two sufficient sureties] in treble the value of the property to be replevied, as stated in the order; which bond shall be assignable to the defendant; and the bond and assignment thereof may be in the words or to the effect of Form No. 208 in the Appendix, the

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condition being varied to correspond with the order. R. S. O. 1877, c. 53, s. 11. Rule 1104.

The taking of a bond is imperative, and no act can be done under the order until the security is given: see *Lawless* v. *Radford*, 9 P. R. 33, where the seizure was set aside as irregular.

This *Rule* makes it clear, by the insertion of the words "from the plaintiff with two sufficient sureties," that the Sheriff is bound to use due care to obtain a bond sufficient, at the time of taking it, to answer the damages recoverable in the event of the plaintiff being unsuccessful: see *Norman* v. *Hope*, 13 Ont. 556; 14 Ont. 287. The Sheriff must exercise a reasonable discretion in inquiring into the sufficiency of the sureties; if he fails to do so he will be liable to the defendant in the replevin action in case it results in his favour, for all damages to the amount of the penalty naturally flowing from the wrongful act, viz.: (where the replevin arises out of distress for rent) the rent in arrear, costs of distress and of the replevin suit, and of any action against the principal and sureties on the bond: *Ib.*

As two sufficient sureties are required it will not be sufficient if the plaintiff in replevin and one of the sureties are worth the amount of the penalty at the time the bond is taken: *Ib.*

Semble that a subscribing witness is necessary to the validity of the bond: see *Heley* v. *Cousins*, 34 U. C. Q. B. 63.

As to the terms and extent of the security to which defendant is entitled in cases respecting goods not previously taken out of the plaintiff's possession, see also *Rule* 1104.

An action lies against the Sheriff for refusing to assign the bond: *Pacaud* v. *McEwan*, 31 U. C. Q. B. 328. Only nominal damages were recovered where the plaintiff was found not entitled to recover the value of the goods, not being their owner: *Ib.*

An action on the bond will lie,

(1) For not prosecuting the suit with effect, *i.e.*, not successfully; as to which see *Welsh* v. *O'Brien*, 28 U. C. Q. B. 405: *Mulvaney* v. *Hopkins*, 18 U. C. Q. B. 174; *Patterson* v. *Fuller*, 31 U. C. Q. B. 323; 32 U. C. Q. B. 240.

(2) For delay in prosecuting: see *Beltcher* v. *Burn*, 24 U. C. Q. B. 124; *Churchill* v. *Denham*, 29 C. P. 474.

(3) For not returning the goods: see *Patterson* v. *Fuller*, *supra*.

As to the damages recoverable, see *Norman* v. *Hope*, 13 Ont. 556. Formerly the excess of solicitor and client costs of defence, over and above taxed party and party costs, were not recoverable: *Williams* v. *Crowe*, 10 Ont. App. 501; but see now *Rule* 1104.

(*a*) The bond shall be subject to the provisions of section 8 of chapter 11 of the Act passed by the Imperial Parliament in the 8th and 9th years of the reign of His Majesty King William the Third. R. S. O, 1877, c. 53, s. 12. Replevin bond to be subject to 8 & 9 Wm. III. c. 11, s. 8.

For the terms of the statute referred to, see note to *Rule* 712, *supra* p. 610.

1104. Where an order of replevin is issued for any personal property which had not been previously taken out of the plaintiff's possession, and for which the plaintiff might formerly have brought an action of trespass or trover, the defendant shall be entitled, if the plaintiff fails in the action to be fully indemnified against all damages sustained by the defendant, including any extra costs which he may Indemnity of defendant in replevin proceedings.

Rules 1105-1107.

incur in defending the action; and the bond to be taken by the Sheriff or Bailiff shall be conditioned, not only as heretofore required in that behalf but also to indemnify and save harmless the defendant from all loss and damage which he may sustain by reason of the seizure, and of any deterioration of the property in the meantime, in the event of its being returned, and all costs, charges, and expenses which the defendant may incur, including reasonable costs not taxable between party and party. This Rule shall not apply to cases of distress for rent or damage-feasant. 48 V. c. 13, s. 8.

This Statute from which this *Rule* is taken was probably passed in consequence of the decision in *Williams* v. *Crow*, 10 Ont. App. 301, to the effect that a successful defendant in replevin could not recover as damages, the extra costs he had been put to between solicitor and client.

Under this *Rule* these extra costs are now recoverable except in cases of replevin where the goods have been distrained for rent or damage *feasant*.

The sureties are not discharged by the trial being postponed on the application of the plaintiff without the defendant's consent or concurrence; *O'Connell* v. *Duchenault*, 14 Ont. 1.

Sheriff not to serve writ till he has replevied.

1105. The Sheriff shall not serve a copy of the writ of summons or the order until he has replevied the property, or some part of the property therein mentioned, if he cannot replevy the whole in consequence of the defendant having eloigned the same out of his county, or because the same is not in the possession of the defendant, or of any person for him. R. S. O. 1877 c. 53, s. 13.

What Sheriff shall do when the orders issues on *præcipe*.

1106. In case the order issues on *præcipe* the Sheriff shall take and detain the property, and shall not replevy the same to the plaintiff without the order of the Court or a Judge in that behalf; but may, within 14 days from the time of his taking the same, re-deliver it to the defendant, unless in the meantime the plaintiff obtains and serves on the Sheriff an order directing a different disposition of the property; but this Rule shall not apply in case of a distress for rent or damage-feasant, under Rule 1099. R. S. O. 1877, c. 53, s. 14.

If property to be replevied is concealed in any house, etc., how Sheriff to act.

1107. In case the property to be replevied or any part thereof is secured or concealed in any dwelling house or other building or enclosure of the defendant, or of any other person holding the same for him, and in case the Sheriff publicly demands from the owner and occupant of

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the premises deliverance of the property to be replevied, and in case the same is not delivered to him within 24 hours after such demand, he may, and shall if necessary, break open such house, building or enclosure for the purpose of replevying such property or any part thereof, and shall make replevin according to the order. R. S. O. 1877, c. 53, s. 15. Rules 1103-1110.

When the property is in the possession of any third person not holding it for the defendant named in the order of replevin, the sheriff cannot justify a seizure of it under the order of replevin: see *Stoeser* v. *Springer*, 7 Ont. App. 497, and other cases in note to *Rule* 1103.

1108. If the property to be replevied, or any part thereof, is concealed either about the person or on the premises of the defendant, or of any other person holding the same for him, and in case the Sheriff demands from the defendant or such other person deliverance thereof, and deliverance is neglected or refused, he may, and if necessary shall, search and examine the person and premises of the defendant or other person for the purpose of replevying the property or any part thereof, and shall make replevin according to the order. R. S. O. 1877, c. 53, s. 16. If concealed about the person or premises.

See note to *Rule* 1107.

1109. The Sheriff shall return the order on or before the tenth day after the service thereof, and shall transmit annexed thereto: When order to be returned with Schedule annexed.

(1) The names of the sureties in, and the date of the bond taken from the plaintiff, and the name or names of the witnesses thereto; What Schedule to contain.

(2) The place of residence and additions of the sureties;

(3) The number, quantity, and quality of the articles of property replevied; and in case he has replevied only a portion of the property mentioned in the order, and cannot replevy the residue by reason of the same having been eloigned out of his county by the defendant, or not being in the possession of the defendant, or of any other person for him, he shall state in his return the articles which he cannot replevy and the reason why not. R. S. O. 1877, c. 53, s. 17.

1110. If the Sheriff makes such a return of the property distrained, taken or detained, having been eloigned, If Sheriff returns that the

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property has been eloigned, order to issue.

as would have warranted the issuing of a *capias in withernam* by the law of England on the 5th day of December, 1859, then upon the filing of such return, an order shall be issued on *præcipe* in the words or to the effect of Form No. 154 in the Appendix, which shall have the same force and effect as a *capias in withernam* had, and before executing such order the Sheriff shall take security as provided by Rule 1103. R. S. O. 1877, c. 53, s. 18.

Damages on judgment by default.

1111. In case the plaintiff becomes entitled to sign judgment by default, he shall be at liberty to sign final judgment for the sum of five dollars, and costs according to the proper scale, but shall not be entitled to recover a larger sum except upon an assessment before a Judge or jury, or upon filing the written consent of the defendant or his solicitor, and an affidavit verifying the signature to such consent. R. S. O. 1877, c. 53, s. 28.

As to the damages recoverable by a plaintiff in replevin at a trial or on an assessment of damages see *Graham* v. *O'Callaghan*, 14 Ont. App. 477.

3. Mandamus.

(i) *In Actions.*

Mandamus in action.

1112. The plaintiff in any action in the High Court of Justice, except replevin or ejectment, may indorse upon the writ and copy to be served, a notice that the plaintiff intends to claim a *mandamus*; and the plaintiff may thereupon claim in the statement of claim, either together with any other demand which may be enforced in the action, or separately, a *mandamus* commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested. R. S. O. 1877, c. 52, s. 4.

The mandamus here referred to is not the prerogative writ which may be granted where a party has no other remedy: see notes to sec. 53 (8) *supra* pp. 53-4; but the power to grant it was originally a new power conferred on Common Law Courts (analogous to the powers of acting directly *in personam* possessed by the Court of Chancery) "to direct the performance of some act, of something to be done, which is the result of an action where an action will lie," *per* Brett, L.J., in *Glossop* v. *Heston Local Board*, 12 Ch. D. 122.

It was thus in the nature of an execution, applicable in cases where relief to a plaintiff, who was damaged by the non-fulfilment of a duty by defendant, would be best given by enforcing the specific performance of that duty.

The original Eng. Act from which the R. S. O. 1877, c. 52, relating to Prohibition, Mandamus and Injunction, was taken was intended to carry out in some measure the recommendations of the Common Law Commissioners of 1834. The view of the Commissioners had been what the Jud. Act has accomplished, viz., that resort should not be had to the auxiliary jurisdiction of Equity, but that each Court should possess within itself the power to give complete redress.

They accordingly reported that there was no reason "why a Court of Law should not exercise the same jurisdiction as a Court of Equity and restrain the violation of legal rights in cases in which an injunction might issue for that purpose from Courts of Equity": Second Report, s. 48. **Rule 1112.** Mandamus.

The object provided for by this *Rule* is that of enforcing the specific performance of certain duties, in the fulfilment of which a plaintiff is personally interested.

The Courts of Common Law formerly did not exercise the statutory jurisdiction given them, unless in cases where a bill for specific performance would lie in Equity, but the converse did not hold good, viz: that wherever Courts of Equity would entertain a bill for specific relief, the Court of Law would grant a mandamus: see *Reg.* v. *Bulby & Worksop, etc.*, 22 L. J. Q. B. 164; *Edwards* v. *Lowndes*, 1 E. & B. 81. Under the system introduced by the Judicature Act it would seem to be proper to hold, under this *Rule* and section 53 (8) that, in all cases in which the appropriate relief is to compel the performance by the defendant of that which the plaintiff is in the action held entitled to have performed, performance should be compelled by the issue of a mandamus. It has not, however, been as yet decided that a mandmus is the appropriate remedy for the performance of matters arising out of contract; see, however, *Rule* 1128. In *Re London Huron & Bruce Ry. Co.* v. *E. Wawanosh*, 36 U. C. Q. B. 93, it was held that a prerogative writ of mandamus was not the appropriate remedy in such case; see also *Re N. Simcoe Ry. Co.* v. *Toronto*, *Ib.* 101.

It has been said that the only class of cases, to which the section from which this *Rute* was taken was formerly held to apply, without doubt, was that in which there was a duty of a public nature, or a duty created by an Act of Parliament, in the fulfilment of which the plaintiff had a personal interest: Harrison, C. L. P. Act, 461.

Under the corresponding English enactment it was decided that the power given is only to be exercised to enforce performance of duties of a public nature, not those arising simply by contract: *Benson* v. *Paull*, 6 E. & B. 273; *Norris* v. *Irish Land Co.*, 8 E. & B. 512; and that the duty must be one in which the applicant is interested; and the remedy by mandamus is only available where there is no other effectual legal remedy: *Bush* v. *Beavan*, 1 H. & C. 500. See however notes to sec. 53 (8) of the Jud. Act.

Section 53 (8) of the Act goes further, however, than the previous statutes, and enacts that a mandamus may be granted "by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made."

Under that section, or this *Rule*, the remedy may be held to extend to cases of a more private nature than those to which the prerogative writ would apply: see *Norris* v. *The Irish Land Co.*, 8 E. & B. 527, *per* Coleridge, J., and *Swan* v. *North British Australasian Co.*, 7 H. & N. 603; 2 H. & C. 175; *Worthington* v. *Hulton*, L. R. 1 Q. B. 63; and in actions even though no actual damage be sustained: *Fotherby* v. *Metropolitan Ry. Co.*, L. R. 2 C. P. 188.

A mandamus was granted to improvement commissioners, directing them to levy a rate to satisfy the claim of the plaintiff, a creditor: *Ward* v. *Lowndes*, 1 E. & E. 940, 956; and to apply their funds in payment of debentures: *Webb* v. *Commissioners of Herne Bay*, L. R. 5 Q. B. 642; to a railway company, compelling them to give a notice to treat and proceed with the purchase of lands as to which they had given notice of an intention to take: *Morgan* v. *Metropolitan Railway Co.*, L. R. 3 C. P. 553, 4 C. P. 97; *Demorest* v. *Midland Ry. Co.*, 10 P. R. 73; see also *Tyson* v. *Mayor of London*, L. R. 7 C. P. 18; and to issue a precept for the assessment of compensation after a notice to treat had been given: *Fotherby* v. *Metropolitan Railway Co.*, L. R. 2 C. P. 188; *Guest* v. *Poole and Bournemouth Ry. Co.*, L. R. 5 C. P. 553; to a municipal corporation to compel the making of repairs to a drain which it was their duty to repair and the non-repair of which had caused damage to the plaintiff: *White* v. *Corporation of Gosfield*, 2 Ont. 287; and see *Re Moulton, etc.* v. *Haldimand*, 12 Ont. App. 503; and to compel the opening of a road allowance as to enable an occupant of land to have access thereto: *Hislop* v. *McGillivray*, 12 Ont. 749;

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see also *Re Wilson* v. *Wainfleet*, 10 P. R. 147; *Clarke* v. *Palmerston*, 6 Ont. 616. See as to the discretion of the Court, *Nicholl* v. *Allen*, 1 B. & S. 916, 934; and to compel them to raise the money to pay the claim of the plaintiff as a creditor of the corporation: *Quaintance* v. *Howard*, 25 C. L. J. 545.

In cases of public nuisance, the public has an interest in the removal of the nuisance, but any private individual who suffers particular injury may have his action for damages: see *Brown* v. *Mallett*, 5 C. B. 599; *Dobson* v. *Blackmore*, 9 Q. B. 991. Query, whether in such case, under the present system, such private individual can have a mandamus for the removal of the nuisance.

Indorsement of writ.

1113. The plaintiff shall indorse the claim to such *mandamus* upon the writ of summons, and the indorsement may be in the form given in No. 6 in the Appendix. *New.* See Eng. Rules 719, 720.

Judgment.

1114. If judgment be given for the plaintiff, the Court or Judge may by the judgment command the defendant, either forthwith or on the expiration of such time and upon such terms as may appear to the Court or Judge to be just, to perform the duty in question. The Court or Judge may also extend the time for the performance of the duty. *New.* See Eng. Rule 721.

Writ abolished.

1115. No writ of *mandamus* shall hereafter be issued in an action, but a *mandamus* shall be by judgment or order, which shall have the same effect as a writ of *mandamus* formerly had. *New.* See Eng. Rule 722.

This provision is similar to that contained in *Rule* 1130, providing that no writ of injunction shall issue.

It is to be observed that the *Rule* applies only to a mandamus *in an action.* There is no express provision making any alteration in the form of the prerogative writ of mandamus. The intention probably is however that that writ shall now be granted as an order and not as a writ. See note to *Rule* 1117, also *Rule* 3.

Proceedings as in ordinary action.

1116. The pleadings and other proceedings shall be the same in all respects, as nearly as may be, and costs shall be recoverable by either party, as in an ordinary action. *See* R. S. O. 1877, c. 52, s. 6, *first part.*

(ii) *On Motion.*

Jurisdiction not to be affected.

1117. Nothing in the five preceding Rules contained shall take away the jurisdiction of the High Court of Justice to grant orders of *mandamus;* nor shall any order of *mandamus* issued be invalid by reason of the right of the prosecutor to proceed by action for *mandamus* but the preceding Rules, so far as they are applicable, shall apply to

the pleadings and proceedings upon a prerogative order of *mandamus* issued by the Court. R. S. O. 1877, c. 52, s. 10. Rule 1118.

The section which was the original of this *Rule* was taken from the Imp. Act, 17 & 18 Vict. c. 125, s. 75.

The object of the Statute from which this *Rule* is taken was to declare that the right to obtain the prerogative writ of mandamus was not interfered with. It would therefore seem to be not interfered with by the *Rules* except perhaps that in form it is to be an order, not a writ. As to this writ, see *supra* p. 53.

In this and the following *Rules*, where the Statute referred to the prerogative writ, the expression has been altered to "order" of mandamus. As pointed out above, *Rule* 1115, providing for an order instead of a writ of mandamus in an action, does not seem to extend to the old prerogative writ, which was not obtained by action; but in view of *Rule* 3, in addition to the change of language in this and the following *Rules*, it may be that the prerogative mandamus, as well as the mandamus granted in an action, is now to issue as an order, and not as a writ.

1118. Whereas the provisions contained in a certain Act of Parliament passed in the ninth year of the reign of Queen Anne, entitled "*An Act for rendering the proceedings upon Writs of Mandamus and information in the nature of a* Quo Warranto *more speedy and effectual, and for the more easy trying and determining the rights of Offices and Franchises in Corporations and Boroughs*," relating to the writs of *mandamus* therein mentioned, have been found useful and convenient, and the same ought to be extended to the proceedings on other such writs; it is therefore ordered that the several enactments contained in the said statute relating to the return of writs of *mandamus*, and the proceedings on such returns, and to the recovery of damages and costs, shall extend and be applicable to all orders of *mandamus*, and the proceedings thereon, except so far only as the same are varied and altered by these Rules. R. S. O. 1877, c. 52, s. 11. Provisions of Act of 9 Anne, c. 20, extended to all other writs of *mandamus*.

The section which is the original of this *Rule* was taken from the Imp. Act, 1 William 4, c. 21.

The proceedings here provided for, relate to orders of mandamus *nisi*.

Prior to the Statute 9 Anne, c. 20,

(1) A rule to return the writ was not usually granted until an alias and pluries writ had first been issued; Former practice.

(2) If the defendant returned, in answer to the writ, a legally sufficient cause, though false in fact, the Court would not try the truth of the return upon affidavits; the prosecutor was therefore put to the bringing an action on the case for a false return, and by this extraneous proceeding might recover damages: Tapping on Mandamus, 6.

It was to remedy these defects in the effectual use of the writ that the Statute of Anne was passed. It related only to certain kinds of mandamus to admit to offices, but by the Imp. Act, 1 William 4, c. 21, (upon which the present *Rule* is founded) was made applicable in point of procedure to all writs of mandamus. The Act provides for the following matters:—

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Rule 1118.

(1) That the persons who are required to make a return to a writ of mandamus shall make their return to the first writ;

Practice under 9 Anne, c. 20, and this *Rule*.

(2) That when a return is made the persons prosecuting the writ may plead to or traverse all or any of the material facts contained within the return, to which the person making the return may reply, take issue or demur, and further proceedings may be had, as if an action on the case for a false return had been brought; so that the damages for the injury sustained might be recovered in the mandamus proceedings;

(3) That in case of judgment for the persons prosecuting the writ, they shall recover their damages and costs as they might have done in such action;

(4) That a peremptory writ shall be granted to the person for whom judgment is given, as might have been done if the return had been adjudged insufficient;

(5) That in case of judgment for the person making the return, he shall recover his costs: 9 Anne, c. 20, s. 2;

(6) The time to make a return, to plead, reply, rejoin, or demur, shall be as the Court may think just and reasonable.

The Statute of Anne under the present *Rule*, therefore, regulates (1) the return to orders of mandamus, (2) the proceedings on such returns, and (3) the recovery of damages and costs.

In the case of orders of mandamus awarded in an action, these will be generally peremptory orders of mandamus, and the question of the right of the applicant to the order will probably have been determined in the action, as also his right to damages, so that most of the proceedings regulated by the Statute of Anne will generally be applied only in cases of returns to the prerogative order of mandamus which generally issues as a mandamus *nisi*, unless the Court under *Rule* 1125 makes it absolute in the first instance: see *Re Board of Education of Napanee & Napanee*, 29 Gr. 395, 398.

Return to order of mandamus *nisi*.

The Return.—As above mentioned, this is to be made on or before the return day of the first writ; on default, and on affidavit of service of the writ, a peremptory mandamus will be granted, and after that an attachment: *Mayor of Coventry's Case*, 2 Salk. 419. On application the Court may extend the time: Tapp. 344. If the applicant is unprepared with an affidavit of service, he might obtain a *præcipe* order to make a return: *Ib.*

The writ must be returned as executed, or its execution must be legally excused or justified: Tapp. 346. If the defendant has not had sufficient time, such fact may be returned by stating that "from time to time divers matters and things have been executed for the purpose of complying with the writ, and that further matters and things are in the course of procedure": Tapp. 346.

Returns are of three kinds: (1) Traverses; (2) Special returns; (3) A statement in the nature of a demurrer.

(1) *Traverses.*—The general rules of pleading were formerly held applicable, by which it was a rule that every distinct and material allegation must, if it be intended to contradict it, be traversed: Tapp. 348. Probably this will not be so now, but the existing rules of pleading in an action will be applicable.

(2) *Special returns* by way of confession and avoidance. Where the defendant seeks either to excuse or justify the non-execution of the writ, he must, by his return, in direct terms state the grounds of his excuse or justification, and under pain of attachment make the best return his case admits of. The whole legal facts of his case must be set out *in extenso*, in order both to enable the Court to judge of the law and of the legality of the excuse, and as to whether the command has been complied with, and also to apprise the prosecutor of the grounds of defence, to enable him to answer them. The return will, therefore, not be sufficient if made in general terms.

Every good legal cause, why the prosecutor is not entitled to the writ, whether it arises from his personal incapacity to sue it out, or by reason of the absence of a legal right to what he seeks, will form a good and valid return: Tapp. 358. A return which shows a legal impossibility to perform what the writ commands is good; see *Re Bristol & Somerset Ry.*, 3 Q. B. D. 10; but the

fact that the defendant had, after notice of the plaintiff's claim, by his own act put it out of his power to comply with the order is not a legal impossibility: see *Regina* v. *Bernardo*, 23 Q. B. D. 305. Rule 1119.

A return will be bad if it shows the legal liability of the defendant, or does not sufficiently answer the command; thus, to a mandamus to ascertain whether a discretion may or may not have been honestly exercised, it is not sufficient to return that "what has been deemed necessary has been done": Tapp. 358.

(3) *A return in the nature of a demurrer to the writ.*—The defendant cannot demur to the writ, but he may submit that he is not bound by law to execute it, which submission, being in the nature of a demurrer, will be treated accordingly: Tapp. 362.

Proceedings on return.—The return must, together with the writ, be filed in the proper office, and then becomes a return: Tapp. 365.

Amendment of the return to correct clerical mistakes may be allowed.

Rule 1122 provides that the mode of objecting to the validity of a return shall be by demurrer, but a motion to quash a defective return might formerly be made when the return was vicious by reason of any clear and well acknowledged defect, such as that upon its face it was palpably framed only for the purpose of delay: *Rex* v. *Oundle*, 1 A. & E. 297; Tapp. 372.

It has also been laid down that a return which is evasive, contemptuous, frivolous, nonsensical, hypothetical, or uncertain may be quashed on motion: Tapp. 350 *sed quære*; in *Re Board of Education of Napanee & Napanee*, before Boyd, C., 14th Dec., 1881, it was held that a return could only be quashed by traverse or demurrer, and a motion to quash a return was dismissed as misconceived. See *Rule* 1222.

As to what constitutes uncertainty: see Tapp. 354, 355.

Court may make orders calling on all persons having interest in the matter of the writ to show cause against issuing, etc.

1119. Whereas writs of *mandamus*, other than such as relate to the offices and franchises mentioned in or provided for by the said Act passed in the ninth year of the reign of Queen Anne, are sometimes issued to officers and other persons, commanding them to admit to offices, or to do or perform other matters in respect whereof the persons to whom such writs are directed claim no right or interest, or whose functions are merely ministerial in relation to such offices or matters; and it may be proper that such officers and persons should in certain cases be protected against the payment of damages or costs to which they may otherwise become liable: it is therefore ordered, that it shall be lawful for the Court to which application is made for any order of *mandamus* (other than such as relate to the said offices and franchises mentioned in or provided for by the said Act passed in the reign of Queen Anne), if such Court sees fit to so do, to hear motions calling not only upon the persons to whom such order is required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such order, to show cause against the issuing of such order and payment of costs of the application; and upon the appearance of such other

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Rules 1120, 1121.

person on such motion, or in default of appearance after notice given, to exercise all such powers and authorities, and to make all such orders applicable to the case as are or may be given or mentioned by or in any Act for giving relief against adverse claims upon persons having no interest in the subject of such claims. R. S. O. 1877, c. 52, s. 12.

This and the two next following *Rules* relate to the same subject and provide that in the case of a mandamus issued to officers or persons whose functions are merely ministerial, the persons having or claiming right or interest in the matter, may be called upon to show cause, and may be made liable to costs: see *Demorest* v. *Midland Ry. Co.*, 10 P. R. 73.

See *Re Massey Mfg. Co.*, 11 Ont. 44; 12 Ont. App. 446 (see now R. S. O. c. 157, s. 19).

Peremptory Mandamus.—The Court has jurisdiction to award a peremptory mandamus in the first instance instead of a mandamus *nisi*: *Rule* 1125.

No return except obedience is admissible to the peremptory writ: Tapp. 408.

Enforcement of Mandamus.—Attachment is the proper remedy for disobeying a peremptory mandamus: *Demorest* v. *Midland Ry. Co.*, 10 P. R. 82.

See also *Rule* 1128 enabling the Court to direct the performance of the act to be done by the party obtaining the order at the expense of the party whose duty it is to do the act.

Form of return of issues joined, on demurrer, etc.

1120. The return to be made to any such order, and issues joined in fact or law upon any traverse thereof, or upon any demurrer shall be made and joined by and in the name of the person to whom such order is directed; but nevertheless the same shall, if the Court thinks fit so to direct, be expressed to be made and joined on the behalf of such other person as may be mentioned in such rules, and in that case such other person shall be permitted to frame the return, and to conduct the subsequent proceedings at his own expense; and in such case, if any judgment is given for or against the party suing such order, such judgment shall be given against or for the person on whose behalf the return is expressed to be made, and such person shall have the like remedy for the recovery of costs and enforcing the judgment as the person to whom the order was directed might and would otherwise have had. R. S. O. 1877, c. 52, s. 13.

For or against whom judgment shall be given.

Costs.

Case of death, resignation or removal, of persons making the return, provided for.

1121. In case the return to any such order is, in pursuance of the authority given as aforesaid, expressed to be made on behalf of any other person as aforesaid, the further proceedings on such order shall not abate or be discontinued by the death or resignation of, or removal from office of the person having made such return, but the same shall and may be continued and carried on in the

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name of such person; and if a peremptory order is awarded, the same shall and may be directed to any successor in office or right of such person. R. S. O. 1877, c. 52, s. 14. Rules 1122, 1123.

1122. In all cases in which the person prosecuting any order of *mandamus* wishes or intends to object to the validity of any return to the same, he shall do so by way of demurrer to the same, in such and the like manner as is now practised in the High Court of Justice in ordinary actions; and thereupon the said order and return and the said demurrer shall be entered upon record in the said Court, and the like further proceedings shall be thereupon had and taken as upon a demurrer to pleadings in ordinary actions in the said Court. Form of objections to return. Demurrer.

As to proceedings upon a demurrer in ordinary actions, see *Rules* 384-391.

(*a*) The said Court shall thereupon adjudge either that the return is valid in law, or that it is not valid in law, or that the order of *mandamus* is not valid in law; and if they adjudge that the order is valid in law, but that the return thereto is not valid in law, then the Court shall also by the judgment award that a peremptory order of *mandamus* shall issue in that behalf, and thereupon such peremptory order of *mandamus* may be issued accordingly, at any time after four days from the signing of the judgment; and it shall be lawful for the said Court, and it is hereby required, in and by its said judgment, to award costs to be paid to the party in whose favour it thereby decides, by the other party or parties. R. S. O. 1877, c. 52, s. 15. Proceedings thereon. Judgment. Peremptory *mandamus* if the order be good and the return bad. Costs.

Taken from Imp. Act, 6 & 7 Vict. c. 67, s. 1.

The Statute of Anne permitted the prosecutor merely to plead to or traverse a return, but allowed the defendant to reply, take issue, or demur. This distinction gave rise to a practice in the case of an insufficient return, of allowing the prosecution to make application to the Court in the nature of a demurrer, and called a *concilium*, to quash it, upon which, if successful, a peremptory mandamus was at once awarded. Instead of the *concilium*, a demurrer has by this *Rule* been substituted, the proceedings upon it are to be the same as in an ordinary action.

The Imp. Act and R. S. O. 1887, c. 52, s. 28, provided that costs should be in the discretion of the Court; this provision is now unnecessary in view of *Rule* 1170.

1123. Upon application by motion for any order of *mandamus* the order may in all cases be made in the first instance, if the Court thinks fit; and the order shall be dated on the day of its being made, and may be made Order may issue in the first instance.

Rules 1124, 1125.

returnable forthwith, but time may be allowed to return it by the Court or a Judge either with or without terms. R. S. O. 1877, c. 52, s. 16.

(iii) *Applications in Chambers.*

Judge may issue order of peremptory *mandamus.*

1124. In all cases in which the High Court of Justice has jurisdiction to issue an order of peremptory *mandamus*, application for the said order may be made upon affidavit to a Judge, upon notice of motion in the ordinary manner, to any person who may, in his judgment, be affected by the order, if made, to show cause why the same should not be made. R. S. O. 1877, c. 52, s. 17.

The prerogative writ was formerly obtained at a sitting of the Court in Term and was not usually peremptory in the first instance, but in an alternative form, commanding the person to whom it was directed to do the act specified or shew cause to the contrary, which was done by a return.

The enactment from which this *Rule* is taken was passed to enable applications for the prerogative writ of mandamus to be made in Chambers at any time instead of only during the sittings of the Court in Term, and to empower the Court to grant a writ to which obedience was the only return. The preamble to the original Act, 35 Vict. c. 14, was: "Whereas in many cases very great injustice is done by the delay in the issue of the prerogative writ of mandamus; and whereas, it is necessary to devise a more speedy and summary method for the issue of the same."

That Act and the present *Rule* therefore provide for a summary application to a Judge in Chambers for the issue of a peremptory order in the first instance; so that all questions as to the right to the order, and the matters which otherwise would be raised by way of return to a mandamus *nisi* may be argued and disposed of at once without any previous order and return thereto. That is the mode of procedure now generally adopted. The right, however, to move the Court for a mandamus *nisi* as formerly is preserved by *Rule* 1129; but on any such motion the Court has power under *Rule* 1123 to make a peremptory order.

The Master in Chambers and officers having like jurisdiction have no power to make orders of mandamus: see *Rules* 30 and 1129.

Where a summary application for a mandamus was made in Court the costs of a Chamber motion only were allowed, where the circumstances did not justify the imposition of a larger sum for costs than was sufficient to indicate that the respondents were in the wrong: *Re Brookfield and Public School Section 12, Township of Brooke*, 12 P. R. 485.

The prerogative mandamus is not granted where the applicant has another appropriate remedy: see notes *supra* p. 54, and *Reg.* v. *Registrar of Joint Stock Cos.*, 21 Q. B. D. 131; *Reg.* v. *Lambourn Valley Ry. Co.*, 22 Q. B. D. 463, *Re Whitaker & Mason*, 18 Ont. 63.

Duty of Judge.

1125. It shall be the duty of the Judge to whom the application is made, provided he is of opinion that the case is a proper one for the issue of the same to make an order of *mandamus* absolute in the first instance. R. S. O. 1877, c. 52, s. 18.

See note to *Rule* 1124.

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Rules 1126-1129. Service and direction of order.

1126. The notice of motion may be served upon the person or party named therein, either personally or by substitution as may be directed by the Judge, in the same manner as a writ of summons; and the motion may be prosecuted in Chambers upon affidavit or other evidence in the same manner as other applications in Chambers, and in case an order of *mandamus* is made, the same may be enforced by process of attachment. *New.* See R. S. O. 1877, c. 52, s. 19-23.

Order.

1127. Upon hearing the parties who appear, or their counsel, and after service of the notice upon all proper persons, as hereinbefore provided, the Judge, if in his opinion the case is a proper one, shall make the order and shall thereby direct what is to be done and performed by the person or party to whom the writ is directed; but if, in his opinion, the application should be refused, the said motion shall be dismissed. R. S. O. 1877, c. 52, s. 24.

Mandatory order, how enforced.

1128. If a mandamus granted in an action or otherwise, or a mandatory order, injunction, or judgment, for specific performance of any contract be not complied with, the Court or a Judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained, or by some other person appointed by the Court or Judge, at the cost of the disobedient party; and upon the act being done the expenses incurred may be ascertained in such manner as the Court or Judge may direct and execution may issue for the amount so ascertained and costs. *New.* See Eng. Rule 608 and R. S. O. 1877, c. 52, s. 9.

This *Rule* is taken from Eng. Rules of 1883, R. 608. It extended to all kinds of mandatory orders and injunctions, a power which previously existed in regard to a mandamus: see R. S. O. 1877, c. 52, s. 9.

In an action for specific performance, where an order had been made requiring defendant to make a certain road, and on his default the plaintiff applied for liberty to complete the road at the cost of defendant, it was held that the case was not within this *Rule*, but an order was made permitting plaintiff to do the work with liberty to apply that the defendant should pay the expense: *Mortimer* v. *Wilson*,, 33 W. R. 927.

Master in Chambers and Local Judges not to grant orders of *mandamus*.

1129. No part of the jurisdiction by Rules 1112 to 1128, conferred upon a Judge shall be exercised by the Master in Chambers or the Local Judges of the High Court; and nothing in the preceding Rules contained shall prevent

Rules 1130-1132.

any person from applying to the Court for a *mandamus* according to the present practice. R. S. O. 1877, c. 52, ss. 1 and 26.

The "present practice" referred to, other than that mentioned in the preceding *Rules* was by motion to the Court for the prerogative writ not necessarily a peremptory one in the first instance: see notes to *Rule* 1118.

4. Injunctions.

Writ of injunction abolished.

1130. No writ of injunction shall be issued in any case. An injunction shall be by a judgment or order, and any such judgment or order shall have the effect which a writ of injunction formerly had. J. A. Rule 401.

Same in effect as the Eng. R., April 1880, R. 32.

Notice of an injunction may be given by telegram and disobedience of such notice punished as a contempt: *Ex. p. Langley Re Bishop*, 13 Ch. D. 110; see also p. 59, *supra*.

5. Interim Preservation of Property, etc.

Order for interim preservation of property.

1131. Where by any contract a *prima facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court or a Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured. J. A. Rule 396.

Same as the Eng. R. 1875, O. 52, r. 1, (1883, R. 657).

This provision gives increased power to the Court for preserving the rights of the parties uninjured, during the pending of litigation, and an interlocutory order made under this *Rule* may be enforced by attachment: *Hutchinson* v. *Hartmont*, W. N. 1877, 29.

In *Russell* v. *Davies*, W. N. 1883, 109; 19 C. L. J. 273, an action to recover arrears of an annuity, an order made for payment of the annuity till the trial, the plaintiff being in destitution, was reversed in appeal, as it appeared in the evidence that the defendant had a *primâ facie* case for insisting that the annuity had determined.

There must be an action or matter pending: *Re Paris Skating Rink Co., Limited, No. 2*, 25 W. R. 767. Hall, V.-C., there said, "I have jurisdiction to issue a writ of mandamus in every cause or matter before me. In this case, however, while the motion has been standing over, the petition has been dismissed, and there is no longer any matter pending before me in which I can make an order."

As to the stage of the action at which an application may be made, see *Rule* 1132.

Application when may be made.

1132. An application for an order under the preceding Rule may be made by the plaintiff at any time after his right thereto appears from the pleadings, or, if there be no

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pleadings, is made to appear by affidavit or otherwise to the satisfaction of the Court or a Judge. J. A. Rule 400. Rules 1133, 1134.

Same as Eng. R. 1875, O. 52, r. 5, (1883, R. 663).

1133. It shall be lawful for the Court or a Judge, on the application of any party to an action, to make any order for the sale, by any person or persons named in the order, and in such manner and on such terms as to the Court or Judge may seem desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just or sufficient reason it may be desirable to have sold at once. J. A. Rule 397. Sale of perishable goods.

Same as the Eng. R. 1875, O. 52, r. 2, (1883 R. 658). The power given is new.

An order may be made for the sale of a chattel which, for a "just and sufficient reason, it may be desirable to have sold at once." Thus in *Bartholomew* v. *Freeman*, 3 C. P. D. 316, the Court ordered a horse to be sold, on the ground that it was consuming its value in food, and there was no reason why it should not be sold. In *Coddington* v. *Jacksonville P. & M. Ry. Co.*, 39 L. T. N. S. 12, an order was made for the sale of bonds as perishable property within the meaning of this *Rule:* (see that case in note to *Rule* 322).

A foreign ship was ordered to be sold on the report of the Marshal that the sale was desirable : *The Hercules*, 11 P. D. 10.

In an action for an unpaid balance on the sale of a horse, and for breach of warranty of another horse received in part payment, plaintiff applied for leave to sell the horse so received in part payment; it was held by Quain, J., that no order was necessary, and that the *Rule* was not applicable : *Anon*, 1 Charl. Ch. Ca. 127 ; 60 L. T. Jour. p. 84.

1134. An application for an order under section 53, sub-section 8, of *The Judicature Act*, or under the three preceding Rules, may be made to the Court or a Judge by any party. If the application be by the plaintiff for an order under the said sub-section 8, it may be made either *ex parte*, or on notice, and if for an order under the two preceding Rules, it may be made, after notice to the defendant, at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance, by the party making the application. J. A. Rule 399. Application under Rules.

Same as the Eng. R. 1875, O. 52, r. 4, (1883, R. 662).

See notes to section 53 (8), and *Rules* 1131-1133.

The original *Rule* was made applicable to the *Rules* now numbered 1131-1133, and 1135, but by the transposition of *Rule* 1135 in the Consolidation of the *Rules* it is not now one of the "three preceding *Rules*" referred to in the present *Rule* 1134 ; similarly, *Rule* 1131 is not now one of "the two preceding *Rules*." If it be considered that this *Rule* does not regulate the making of motions under *Rules* 1131 and 1135, *Rules* 532 and 533 will apply.

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Rule 1135. This *Rule*, it will be observed, authorizes the making of an order on the application of the plaintiff, either *ex parte* or on notice: it should not be made *ex parte* except in cases of emergency, as when immediate or irreparable damage is being done or apprehended: see *Anon per* Lindley, J., W. N. 1876, 12; *Meluish* v. *Milton*, 24 W. R. 679; *Tozer* v. *Walford*, W. N. 1875, 250: *Blewitt* v. *Dowling*, *Ib.*, 202; *Hennessey* v. *Rohmann*, 36 L. T. N. S. 51; W. N. 1877, 14, and *Taylor* v. *Eckersley*, 2 Ch. D. 302; *Re H's Estate*, 1 Ch. D. 276; *Hyde* v. *Warden*, 1 Ex. D. 309, cases of receivers.

A plaintiff may move at any time after issue of the writ: *Re Sceptre V. Co.*, 23 Sol. Jour. 230; or even before in cases of urgency: *Thornloe* v. *Skoines*, L. R. 16 Eq. 126, and notice of motion may be served with the writ: *Capes* v. *Brewer*, 24 W. R. 40; and see *Rule* 533.

A defendant may move at any time before judgment: *Sargant* v. *Read*, 1 Ch. D. 602; and this *Rule* does not prevent an application *ex parte* by a defendant under sec. 53, sub-sec. 8 of the Act: *Hick* v. *Lockwood*, W. N. 1883, 48.

Acquiescence or delay will generally prevent a plaintiff from obtaining an interlocutory injunction; but he is not bound to move till the hearing, and delay till then is not such acquiescence as will disentitle him then to relief: *Davies* v. *Marshall*, 4 L. T. N. S. 105.

The Court in cases of urgency and necessity may grant an injunction or receiver before service of the writ of summons, and on an *ex parte* application, as where it was alleged that trustees were on the eve of bankruptcy, a receiver was appointed: *Re H's. Estate*, 1 Ch. D. 276.

Where notice has been given, an injunction should not be granted *ex parte* even where from pressure of business the motion cannot be brought on: *Graham* v. *Campbell*, 7 Ch. D. 490; where however there is some defect in the notice served, the Court may, when injury is likely to ensue by delay in serving a new notice, grant an injunction *ex parte*.

The usual undertaking as to damages should be inserted in all interlocutory injunction orders: *Graham* v. *Campbell*, *supra*; and there is no exception in this respect in favour of the Crown: *Secretary for War* v. *Chubb*, W. N. 1880, 128; 43 L. T. N. S. 83; nor where the injunction is granted on notice: *Smith* v. *Day*, 21 Ch. D. 421. As to undertakings as to damages, see 21 C. L. J. 44.

Great unexplained delay in making an application to enforce an undertaking as to damages, was held to be a sufficient answer to it, though the applicant shewed a *primâ facie* case: *Ex. p. Hall*, *Re Wood*, 23 Ch. D. 644: see also *Smith* v. *Day*, 21 Ch. D. 421.

The defendant is entitled to the benefit of the undertaking even though the injunction may have been wrongly granted owing to the mistake of the Court itself: *Griffith* v. *Blake*, 27 Ch. D. 474. See also *Hunt* v. *Hunt*, 54 L. J. Chy. 289.

Where an interim injunction is granted over the next motion day or until further order, it signifies that the injunction may be dissolved before the day fixed, but cannot be extended beyond that period, except with the leave of the Court: *Bolton* v. *London School Board*, 7 Ch. D. 766.

A trustee appointed upon his own undertaking in a suit to act as receiver of the trust property, is not, under ordinary circumstances, in England, entitled to a salary as receiver: *Pilkington* v. *Baker*, *British Mutual Investment Co.* v. *Pilkington*, 24 W. R. 234. But in this Province trustees are entitled to compensation as such: R. S. O. c. 107, ss. 37, 41.

Order for detention and inspection of property.

1135. It shall be lawful for the Court or a Judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property, being the subject of the action; and for all or any of the purposes aforesaid to authorize any person or persons to enter upon

or into any land or building in the possession of any party to such action; and for all or any of the purposes aforesaid to authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. J. A. Rule 398. Rule 1135.

Identical with the Eng. R. 1875, O. 52, r. 3, (1883, R. 659).

The powers given by this *Rule* are very much wider than the mere power to allow inspection given by the C. L. P. Act (R. S. O. 1877, c. 50), s. 168.

Similar jurisdiction of Court of Chancery.

The Court of Chancery, under its similar jurisdiction, would not grant an inspection on the application of the plaintiff, unless satisfied that he had a case to be tried at the hearing; nor in any case unless the inspection asked for was necessary for the purpose of enabling the party applying for it to prove his case: *Piggott* v. *Anglo-American Telegraph Co.*, 19 L. T. N. S. 46; *Batley* v. *Kynock*, L. R. 19 Eq. 90.

Inspection cannot be granted to one defendant of property belonging to another defendant, when there is no right in question between them in the action: *Shaw* v. *Smith*, 18 Q. B. D. 193; and see *Rule* 508.

Inspection of samples was ordered in *Munn* v. *McConnell*, 7 C. L. T. 169.

In an action to restrain defendants (who were owners of a house fronting on the same street as a house owned by the plaintiff), from causing or permitting sewage to be discharged from their premises into a drain belonging to the plaintiff, and from permitting any connection to remain between their premises and the plaintiff's drain, an order was made under this *Rule* authorizing the plaintiff to enter on that part of the street, the soil of which belonged to the defendants, for the purpose of experimenting in order to discover whether the pipe which joined the plaintiff's drain proceeded directly from the defendant's house, and for this purpose to dig up the street as far as might be necessary: *Lumb* v. *Beaumont*, 27 Ch. D. 356.

Where the defendant in an action for obstruction of light and air, had not delivered his statement of defence, Archibald, J., refused an order for inspection until he had disclosed his defence: W. N. 1876, 53.

In a nuisance action, an application to inspect the defendant's works to ascertain how the nuisance was occasioned was refused, as proof of the nuisance could be obtained from external sources: *Barlow* v. *Bailey*, 18 W. R. 783; see also *Flower* v. *Lloyd*, W. N. 1876, 169, 230.

Mineral trespass.

Upon a *primâ facie* case of mineral trespass or encroachment by the defendant, or where the fact of trespass (which is denied) can only be ascertained by inspection, and no injury will result to the defendant therefrom, an interlocutory order will be made for the inspection of his mine; and the order will, when necessary, extend to the removal of the obstructions to the inspection: Seton 4th ed. 208; see *Cooper* v. *Ince, Hall & Co.*, W. N. 1876, 24.

Infringement of letters patent.

The rule in actions for the infringement of letters patent is, that where a plaintiff is unable to obtain clear and satisfactory evidence of infringement, the Court, upon a fair *primâ facie* case being made out, will order the defendant to permit an inspection to be made of his premises and machinery, by proper persons named on behalf of the plaintiff: Seton 351. In an action to restrain infringement of a patent for grinding grain so as to separate the germ from the flour, inspection of the plaintiff's process, to see how it was actually carried on under their patent, was granted. The plaintiffs did not claim any novelty in the machinery, their specification was confined to a new process or product: *The Germ Milling Co.* v. *Robinson*, 53 L. T. N. S. 696; 34 W. R. 194; 55 L. J. Chy. 287.

Preservation of subject of action.

In an action to recover jewellery, the defendant alleged that it belonged to a third party, and had been deposited by him to secure a debt due to the defendant. The Court ordered it to be given up to an officer of the Court: *Velati* v. *Braham*, 46 L. J. C. P. 415.

Rules 1136, 1137.

Receiver to preserve property.

On the affidavit of plaintiff, stating that the property was rapidly being damaged, the Court of Appeal appointed him receiver and manager, though no application for this purpose had been made, either to a Divisional Court or a Judge: *Hyde* v. *Warden*, 1 Ex. D. 309.

Injunction.

The Court has jurisdiction under this *Rule* to grant an interim injunction in a proper case, to restrain a defendant from ceasing to pump water out of a mine which the defendant was in possession of, and had agreed to lease, in order to prevent its destruction: *Strelley* v. *Pearson*, 15 Ch. D. 113.

As to authorizing the making of experiments: see *Badishe Anilin, etc.* v. *Levinstein*, 24 Ch. D. 156.

Practice.

An application under this *Rule* is generally made to the Court as in motions for injunctions: see *Rule* 399, and *English* v. *Camberwell*, W. N. 1875, 256; but an order has been made in Chambers: see *Cooper* v. *Ince Hall Co.*, W. N. 1876, 24. It should in general be upon notice: see the next *Rule*, and *Habershon* v. *Gill*, W. N. 1875, 231; but where circumstances rendered it proper, on an *ex parte* application, an order for the purpose of inspecting and taking samples was made: *Hennessey* v. *Rohmann*, 36 L. T. N. S. 51; W. N. 1877, 14; an order for detention and preservation of property: *Meluish* v. *Milton*, 24 W. R. 679; and an order for inspection of a mine, in an action for damages for withdrawing support to land: *Mitchell* v. *Darley Main Colliery Co.*, 31 W. R. 549.

A party is bound by an order for preservation of property as soon as he has notice of it: *Ex p. Langley*, 13 Ch. D. 110. See also p. 35, *supra*.

Amount of lien claimed may be paid into Court, and property delivered up.

1136. Where an action is brought to recover, or a defendant in his statement of defence seeks by way of counter-claim to recover, specific property, other than land, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for any sum of money, the Court or a Judge, at any time after such last mentioned claim appears from the pleadings, or, if there be no pleadings, by affidavit or otherwise to the satisfaction of the Court or Judge, may order that the party claiming to recover the property be at liberty to pay into Court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as the Court or Judge may direct, and that upon such payment into Court being made, the property claimed be given up to the party claiming it. J. A. Rule 402.

Same as the Eng. R. 1875, O. 52, r. 6, (1883, R. 664). The power given by this *Rule* is new.

5. Prohibition.

Application for order of prohibition may be made on affidavit only.

1137. It shall not be necessary to file a suggestion on any application for an order for prohibition. The application may be made on affidavit, subject to the general rules as to motions and evidence on motions. *New.*

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Rules 1138-1141.

The first clause of this *Rule* is taken from R. S. O. 1877, c. 52, s. 2, the remaining clause is new.

Prior to R. S. O. c. 52, s. 2, a mere surmise or suggestion of the ground for prohibition was enough to put the Superior Court in motion, and the suggestion was not required to be verified where there was a plea in the Court below, but if there was no plea, then an affidavit was required.

Section 2 of the R. S. O. c. 52, provided that it should not be necessary to file a suggestion on any application for writ of prohibition, but such application might be made on affidavit only. Provision was also made for a declaration in prohibition before the issue of the writ, where the Court so directed, and for demurrer or pleading by the defendant to such declaration. These provisions have all been omited, and by implication abrogated, by the present *Rule*. It would seem, therefore, that the right to the writ has to be tried now upon a motion, subject to the same rules as other motions. Amongst others, *Rules* 576 to 581 will be applicable, and, in such cases as the Court would formerly direct a declaration and subsequent proceedings in prohibition, a Court or Judge can now upon a motion direct that evidence be taken in such way as may seem proper, and if necessary that an issue be tried.

The motion has usually been made in Chambers to a Judge. The Master in Chambers and Local Judges and Masters have no jurisdiction : see *Rule* 30.

A successful party on an application for prohibition is entitled to, and should be awarded, costs, unless the Court, in the proper exercise of a wise discretion, can see good cause for depriving such party of them ; and such party should not be deprived of costs, unless there appears to have been impropriety of conduct, which induced the litigation, or impropriety in the conduct thereof : *Re McLeod* v. *Emigh*, (2), 12 P. R. 503.

1138. No writ of prohibition shall issue in any case, but the order for prohibition shall have the same effect as a writ of prohibition formerly had. *New.* Writ abolished.

1139. Any such order may be discharged or varied or set aside by a Divisional Court, subject to an appeal to the Court of Appeal. R. S O. 1877, c. 52, ss. 2 and 3. Order may be varied.

The right of appeal here given would seem to apply though the order for prohibition may have been made in Court. Usually orders made by a Judge in Court are not appealable to a Divisional Court except by consent, see *Rule* 219.

7. Certiorari.

1140. No writ of certiorari shall issue in any case, but an order may be made which shall have the same effect as a writ of certiorari formerly had. *New.* Certiorari.

8. Interpleader.

(i) *Generally.*

1141. Relief by way of interpleader may be granted. When relief by interpleader granted.

(*a*) Where the person seeking relief (hereinafter called the applicant) is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to

Rule 1161. be, sued by two or more parties (hereinafter called the claimants) making adverse claim thereto:

(*b*) Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels, lands or tenements, taken or intended to be taken in execution under any process, [or under an attachment against an absconding debtor,] or to the proceeds or value of any such goods or chattels, by any person other than the person against whom the process issued.

Taken from Eng. Rules 1883, R. 850.

The words in brackets are not in the Eng. R., having been taken from R. S. O. 1877, c. 54, s. 10, otherwise the *Rules* are the same.

Before this *Rule* the practice in force both in Common Law Courts and in Equity remained in force under the Judicature Act. The practice in the Common Law Courts was regulated by R. S. O. 1877, c. 54, as amended by 44 V. c. 7; 49 V. c. 16, s. 13; the jurisdiction in Equity except in the case of interpleader by Sheriff did not depend upon the statute: *McElheran* v. *London Masonic, etc.*, 11 P. R. 181.

The practice on interpleader by a Sheriff was the same in all the Courts, being regulated by R. S. O. 1877, c. 54, and amending Acts.

In the case of interpleader by a stake holder, in the Common Law Courts this was only possible where he was a defendant, having been actually sued; in Equity, it was sufficient if a claim was made against the applicant, and he was in danger of being molested by conflicting rights: Story, Eq. Jur. s. 808.

At Common Law a stake holder seeking relief could only do so, as above mentioned, when he was a defendant in respect of a claim for money or goods, of which he had to be in possession, as he had to be in a position to dispose of them in any manner directed by the Court; he also was required to have received a distinct notice of the adverse claim, and expectation of being sued was not enough. The claim of the third party had to be in respect of the same subject matter in respect to which the defendant was sued, but it was not necessary that it should be an absolute right of property in the subject matter.

Where rent was claimed from A. by B., and A. was garnished by creditors of C. (the father of B.), who, it was claimed, was the real lessor, A. refusing to to pay rent unless protected from these claims, and being sued in a County Court by B. for the full amount of rent, was held entitled to relief under this *Rule*: *Re Anderson & Barber*, 13 P. R. 21.

Affidavits. Affidavits entitled "In the H. C. J. Chy. D. Between A., applicant, and B. and others, claimants," were held sufficient: *Re Anderson & Barber, supra.*

Costs. The costs of proceedings are under *Rule* 1170 in the discretion of the Court, and were ordered to be paid by the person causing the litigation: *Re Anderson & Barber, supra.*

A stakeholder interpleading, and acting *bonâ fide*, is entitled to deduct from the fund in dispute the taxed costs occasioned by the interpleader: *Clench* v. *Dooley*, 56 L. T. N. S. 122, without prejudice to the question as to how the costs are to be ultimately borne: *Searle* v. *Matthews*, W. N. 1883, 176.

Interpleader by Sheriffs.—Under the present *Rule*, the practice in interpleader by Sheriffs is substantially the same as under the R. S. O. 1877, c. 54.

The disposition of the Court is to be more liberal in relieving the Sheriff than formerly: *Darling* v. *Collatton*, 10 P. R. 110.

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The Sheriff must have made a seizure before he can apply: *Ogden* v. *Craig*, 10 P. R. 378. **Rule 1141.**

Money paid under protest by a claimant was held to be proceeds or value of goods and chattels within the above *Rule*: *Smith* v. *Critchfield*, 14 Q. B. D. 873.

"Goods and chattels" in the *Execution Act*, and this *Rule* includes stock: *Brown* v. *Nelson*, 20 C. L. J. 390; 4 C. L. T. 594.

A Sheriff should exercise no discretion as to the disposition of the goods seized by him, but should come at once to the Court, otherwise he will disentitle himself to protection: *Boswell* v. *Pettigrew*, 7 P. R. 393; *Adams* v. *Blackwell*, 10 P. R. 168. He should, however, make some inquiry as to the nature of the claims made, and inform the execution creditor of them: *Walker* v. *Niles*, 3 Chy. Ch. 59. Inquiries to be made, and bringing in claimants.

Where the Sheriff had sold with the consent of both parties, it was considered that he had not improperly exercised any discretion of his own: *Darling* v. *Collatton*, 10 P. R. 110.

All claimants of whom the Sheriff is aware should be brought in: *Clarke* v. *Farrell*, 8 P. R. 234. Division Court execution creditors are proper parties, and should be brought in by the Sheriff along with Superior and County Court execution creditors: *MacFie* v. *Hunter*, 9 P. R. 149.

Where some writs are in the High Court the interpleader application should be in the High Court, though the seizure was under a County Court writ and before the High Court writ came to the Sheriff's hands: *Strange* v. *Toronto Telegraph Co.*, 8 P. R. 1. Forum.

A Sheriff was held not entitled to interplead by reason of a claimant disputing the right of subsequent execution creditors to the goods seized, where there would be no fund to satisfy such subsequent executions: *Canadian Bank of Commerce* v. *Bruce*, 2 C. L. T. 92. When entitled, or not, to interplead.

A claimant out of the jurisdiction may be served and compelled to interplead: *Belmont* v. *Aynard*, 4 C. P. D. 354; *Credit Gerundeuse* v. *Van Weede*, 12 Q. B. D. 171.

Where a Sheriff seized but put no bailiff in possession of the goods, and then the landlord seized them for rent, it was held that a second seizure by the Sheriff was illegal as they were *in custodiâ legis*, and also that the validity of the landlord's claim could not be decided in Chambers: *Craig* v. *Craig*, 7 P. R. 209.

The Sheriff was held entitled to interplead a second time in respect of a claim by the same claimant, alleging a different title: *Gaynor* v. *Salt*, 24 U. C. Q. B. 180; but not to contest the claim of a landlord, which might have been disposed of on a first application: *Clark* v. *Farrell*, 8 P. R. 234. A claimant cannot set up another title in the same issue, but must make a subsequent application to the Court: *Barker* v. *Leeson*, 1 Ont. 114.

Goods in possession of an Assignee in Insolvency under the Insolvent Act of 1875 could not be taken in execution, and neither a Sheriff nor an execution creditor could sue the Assignee and oblige him to interplead, though the debtor might do so: *McMaster* v. *Meakin*, 7 P. R. 211.

Interpleader may be directed respecting the proceeds of a sale in the Sheriff's hands: *Booth* v. *Preston &c. Ry. Co.*, 3 P. R. 90; and respecting money paid under protest by a claimant whose goods were seized, and who claimed the money; he was also held to be entitled to protection against an action for trespass for entering upon the premises of a person other than the debtor: *Smith* v. *Critchfield*, 14 Q. B. D. 873; see also *Edmonds* v. *Wallingford*, 33 W. R. 647.

In *Duncan* v. *Tees*, 11 P. R. 66, it was said that interpleader orders should only be made with caution, and, where goods were in the possession of a third person, there should be strong presumptive evidence of the goods being the debtor's, which should ordinarily appear on affidavit of the belief of the Sheriff, and also of the execution creditor. This opinion has not been to the full extent followed in practice, the affidavit of the execution creditor is not considered necessary: and see *Ib.* 296; also *Edmonds* v. *Wallingford*, 33 W. R. 647.

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Rule 1141.

Delay.

A Sheriff may disentitle himself to an interpleader order by not coming promptly to the Court when claims are made to the goods seized. He must come within reasonable time; improper delay will be an answer to the application: *Thompson* v. *Ward*, 1 P. R. 269; *McMaster* v. *Milne*, 2 P. R. 386. What will amount to such laches will depend upon the circumstances of each case: see *Boswell* v. *Pettigrew*, 7 P. R. 393; *Wilkins* v. *Peatman*, *Ib.* 84. He is not justified by the fact that the first seizure does not embrace all defendant's goods, in delaying to apply till he can get possession of the residue: *Miller* v. *Nolan*, 1 C. L. J. 327.

Where the claimant of the goods paid the Sheriff the amount of the execution, and the latter then withdrew; it was held that he had not disentitled himself to relief by interpleader: *Paris Manufacturing Co.* v. *Walls*, 10 P. R. 138.

The interpleader order usually protects the Sheriff only from actions, without special provision the order is no protection to the execution creditor: *Park* v. *Taylor*, 1 C. P. 414; *McCollum* v. *Kerr*, 8 U. C. L. J. 71; but the Judge has authority to restrain by the interpleader order actions against the execution creditor as well as against the Sheriff: *Buffalo & Lake Huron Railway Company* v. *Hemmingway*, 22 U. C. Q. B. 562.

Accepting and contesting an interpleader issue will not make execution creditors liable for the previous seizure by the Sheriff, the execution creditor cannot thus be made a trespasser by relation, or liable for the original seizure: *Kennedy* v. *Patterson*, 22 U. C. Q. B. 556: *Phillips* v. *Findlay*, 27 U. C. Q. B. 32. Where special directions are given to the Sheriff by the execution creditor, or in writing on the writ, by his solicitor, to make the seizure, an action lies against the execution creditor: *Morris* v. *Salberg*, 22 Q. B. D. 614; but directions verbally given by the solicitor's clerk were held not sufficient to render the execution creditor liable: *Smith* v. *Keal*, 9 Q. B. D. 340.

Issue.

Issues between the plaintiff and attaching creditors as to the validity of the the plaintiff's judgment and execution, and the validity of the plaintiff's judgment against creditors generally, and as to the attaching creditors for fraud, or as being a preference, were held warranted by R. S. O. 1877, c. 54, ss. 3, 10: *Leetch* v. *Williamson*, 10 P. R. 226; see also *Standard Insurance Company* v. *Hughes*, 11 P. R. 220; and *Doyle* v. *Lasher*, 16 C. P. 263; and the present *Rule* preserves the same power as was contained in the R. S. O. 1877, c. 54, s. 10: see the clause in brackets in clause (*b*) *supra*.

Where a bank, one of several execution creditors, made parties to an interpleader issue, did not desire to contest the right of the claimant to its share of the proceeds of the goods seized and sold, but was willing that such share should be paid over to the claimant in the event of the latter not succeeding in the issue; it was held that the bank was not under the circumstances liable to contribute to the costs of the issue; but, nevertheless, was properly made a party to the issue and would be entitled, if the claimant failed, to its proportion of the proceeds arising from the sale of the goods: *Dundas* v. *Darvill*, 12 P. R. 347.

Where on an interpleader by the Sheriff an order is made for satisfaction of the claimant's claim, the claimant is limited to his claim put forward in the proceedings, and cannot demand any amount not included in his particulars of claim, on which the order was made: *Hockey* v. *Evans*, 18 Q. B. D. 390.

Where the claimant is in possession of the goods at the time of seizure, the execution creditor is made plaintiff in the interpleader: see *Duncan* v. *Tees*, 11 P. R. 66; *Dominion S. & I. Company* v. *Kilroy*, 7 C. L. T. 87; and see *Winfield* v. *Fowlie*, 14 Ont. 105, 107. The form of issue in such case is "whether at the time of the seizure the goods in question were exigible under the execution of (the execution creditors) as against the claimant": see *Duncan* v. *Tees*, 11 P. R. 296.

The proper issue is whether the goods at the time of the seizure, not at the time of the delivery of the writ to the Sheriff, were the goods of the claimant: *Van Every* v. *Ross*, 11 C. P. 133.

An issue is to be taken distributively, so that the claimant may succeed as to part of the goods, though not as to the rest: *Feehan* v. *Bank of Toronto*, 10 C. P. 32. The question on the issue is not whether the execution creditor has a right to seize, but whether the claimant had such an interest in them as entitled him to resist the seizure: *Grant* v. *Wilson*, 17 Q. B. 144. **Rule 1141.**

The form of issue between a claimant and attaching creditor is whether the goods attached were at the time of the seizure the property of the claimant as against the attaching creditor, and not as against the absconding debtor: *Doyle* v. *Lasker*, 16 C. P. 263; see form of issue where there were two execution creditors and three claimants: *Merchants Bank* v. *Herson* 10 P. R. 117.

See also *Leetch* v. *Williamson*, 10 P. R. 226; *Standard Insurance Company* v. *Hughes* 11 P. R. 220.

The issue is to be filed as soon as settled, and filed in the county in which it is directed to be tried: *Rule* 280.

Where an action had been brought by the execution creditor against a claimant under an assignment, to set aside the assignment, on an interpleader application, the trial of the issue directed to be tried was postponed till after the trial of the action: *Brown* v. *Nelson*, 10 P. R. 421.

A judgment by one creditor cannot be impeached by other creditors on grounds of defence which the defendant might have, but has not, raised: see *Re Hague, Traders' Bank* v. *Murray*, 13 Ont. 727; *Bowerman* v. *White*, 15 Ont. App. 679.

Where claimants' rights among themselves were in dispute, they were all made defendants, and the execution creditors plaintiffs, it being held that the Court would not try the title of the claimants between themselves, the purpose of the issue being answered if it was determined that the execution creditors were, or were not entitled to have their execution satisfied out of the goods seized: *Merchants Bank* v. *Herson*, 10 P. R. 117.

A jury notice not served with the issue but with notice of trial, was held to be an irregularity only and not a nullity: *Leeson* v. *Lemon*, 9 P. R. 103. A jury notice will now be served pursuant to sec. 78 (2) of the Act, *supra* p. 85.

Issues involving $400 or less are to be tried at a County Court sittings: see *Rule* 1163.

Under *The Creditors' Relief Act*, R. S. O. 1887, c. 65, s. 4 (3), where the Sheriff takes interpleader proceedings those creditors only who are parties and agree to contribute *pro rata* to the expense of contesting adverse claims, are entitled to share in any benefit derived from the contestation. The Court or Judge may direct that one creditor shall have the carriage of the interpleader proceedings, and in such case his costs as between solicitor and client form a first charge upon the moneys or goods which may in the proceedings be found applicable to pay creditors.

As to whether these provisions apply only after an issue is directed, or are also applicable where, under *Rule* 448, the contest is by consent disposed of summarily, the Court of Appeal was equally divided, in *Hamilton* v. *Durrell*, 15 Ont. App. 500.

On the trial of the issue the execution creditor is not required to prove his judgment; *Hammill* v. *DeWolf*, 10 C. P. 419; *Holden* v. *Langley*, 11 C. P. 407, 411; *McWhirter* v. *Learmouth*, 18 C. P. 136.

Where the claimant's case is upon a chattel mortgage, evidence is necessary to identify the goods mortgaged as those which were seized by the sheriff and claimed; *Jones* v. *Jenkins*, 25 U. C. Q. B. 151. This, coupled with proof of the due execution of the mortgage, on its face purporting to be made for value, constitutes a good *primâ facie* case, the consideration for the mortgage need not be proved until evidence has been given impeaching it: *Furlong* v. *Reid*, 12 Ont. 607.

The execution creditor may show that the goods are not the claimant's by setting up the title of a third party, *e.g.*, a trustee in bankruptcy: *Richards* v. *Duncan*, 17 Q. B. D. 544; 18 Q. B. D. 451.

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Rule 1141. Where the plaintiff neglects to bring the issue to trial, the course is to move to rescind the interpleader order: *Sewlel* v. *Buffalo, etc., Railway Company*, 3 U. C. L. J. 29. The application is made in the original cause: *Salter* v. *McLeod*, 10 U. C. L. J. 299.

Sheriffs expenses. Where the Sheriff sells under the order, pending the trial of an issue, it was held in *Ontario Bank* v. *Revell*, 11 P. R. 249, that he must pay into Court the gross proceeds of sale, without deducting his charges, but in *Reid* v. *Murphy*, 12 P. R. 246, 338, it has been held that the net proceeds only need be paid in. In the event of the claimant succeeding in the trial of the issue, he will not be entitled to recover from the Sheriff the amount deducted for possession money and expenses of sale. The claimant's remedy is to apply, in a summary way in the proceedings, for recovery of the amount deducted for charges from the execution creditor.

The claimant, if successful, is entitled to recover from the execution creditor, as costs, the Sheriff's charges subsequent to the interpleader order: *Goodman* v. *Blake*, 19 Q. B. D. 77, and cannot be ordered to pay the the costs of taking possession, or possession money prior to the interpleader order: *Massey Mfg. Co* v. *Gandry*, 7 C. L. T. 127.

A Sheriff was held liable to attachment by an execution creditor for not taking security or selling, pursuant to an interpleader order, there being no claim for rent or taxes which the Sheriff was justified in acknowledging: *McLean* v. *Anthony*, 6 Ont 330.

Where a Sheriff, with the consent of the execution creditor and the claimant, after an interpleader order, temporarily withdrew from possession, it was held that the landlord might distrain, though he knew of the interpleader proceedings: *Cropper* v. *Warner*, 1 Cab. El. 152.

In *Howell* v. *Dawson*, 13 Q. B. D. 67, a receiver of property seized in execution was appointed, pending an interpleader issue.

Costs of execreditor. An execution creditor is entitled to see the claimant's affidavit in support of his claim to ascertain the *bona fides* of the claim and may then abandon without incurring any liability for costs: *Wilkins* v. *Peatman*, 7 P. R. 84; unless he has specially directed the seizure: *Canadian Bank of Commerce* v. *Tasker*, 8 P. R. 351: whether or not the special directions were given in contemplation of an adverse claim: *Vanstaden* v. *Vanstaden*, 10 P. R. 428.

Costs of Sheriff. The Sheriff is not in general entitled to costs where the execution creditor abandons; see *Wilkins* v. *Peatman*, *supra*; *Can. Bank of Commerce* v. *Tasker*, *supra*; *C.* v. *D.*, W. N. 1883, 207; Arch. 12th ed., 1411; Churchill on Sheriff's, 183. But he is entitled to costs from the execution creditor where the latter has given special directions to the Sheriff to seize particular goods, and such special directions need not have been given in contemplation of an adverse claim: *Vanstaden* v. *Vanstaden*, 10 P. R. 428. If special directions are sworn to and denied, it must be considered that the Sheriff acted on the writ: *Ib.*

For rules generally as to Sheriff's costs, see *Searle* v. *Matthews*, W. N. 1883, 176.

As to the Sheriff's costs where an issue is directed: see *Rule* 1158 and *Smith* v. *Darlow*, 26 Ch. D. 605.

Costs were formerly by the usual interpleader order reserved, and disposed of in Chambers after the trial of the issue: see *Carter* v. *Stewart*, 7 P. R. 85; *Wilson* v. *Wilson*, *Ib.*, 407; 3 Ont. App. 400; *Hartmont* v. *Foster*, 8 Q. B. D. 82; and this form of order is still continued in the App. Forms Nos. 149, 150: see, however, new *Rule* 1153 and notes.

Scale of costs. The Judge or officer who disposes of the costs may direct what scale of taxation is to be followed: *Beaty* v. *Bryce*, 9 P. R. 320.

Where the interpleader proceedings are properly instituted in the High Court, though an issue be directed to be tried in a County Court, the Sheriff's costs will be taxable on the scale of the High Court, and *semble* also the costs of the parties up to the interpleader order: *Arkell* v. *Geiger*, 9 P. R. 523. The costs before the issue will ordinarily be on the scale of the forum to which the Sheriff is compelled to resort, and after the issue, on the scale applicable to the forum

in which the issue is directed to be tried: see *Beaty* v. *Bryce*, 9 P. R. 325; **Rule 1141.** *Christie* v. *Conway*, 9 P. R. 529.

Sec. 65 of the Jud. Act, applies to interpleader matters as well as to actions, so that no appeal lies from the decision of a Judge as to the disposition of the costs: *Hartmont* v. *Foster, supra*; *Beaty* v. *Bryce*, 9 P. R. 323; an appeal lies from the Master in Chambers to a Judge as in other cases: *Christie* v. *Conway*, 9 P. R. 529.

As to how far County Courts have jurisdiction under this *Rule*, see note to *Rule* 1162.

The District Court of Thunder Bay has jurisdiction in interpleader since R. S. O. c. 91, s. 56; its jurisdiction is "the jurisdiction possessed by the County Courts" and this is determinable by the fact whether the process, under which the goods were seized, issued out of the District Court and not by the amount for which the recovery was had: *Isbister* v. *Sullivan*, 9 C. L. T. 3. The High Court has no jurisdiction to entertain a motion against a verdict or judgment of the District Court in the trial of an interpleader issue: *Ib.*

Interpleader by Stakeholders.—Under the present *Rule*, which in effect follows the Equity practice, the person seeking relief is only required to be under liability for the subject matter, it is not necessary that he be first sued, before applying for relief. Probably this *Rule* does not extinguish any power to compel interpleader existing formerly in Equity by bill filed, and now possessed by the High Court: see *McElheran* v. *London Masonic, etc.*, 11 P. R. 181; *Western Canada L. & S. Co.* v. *Court*, 25 Gr. 151; *Henderson* v. *Watson*, 23 Gr. 355.

Formerly, if the defendant might be liable to both the plaintiff and the third party, he could not interplead. This may be still the case under this *Rule*: see *Farr* v. *Ward*, 2 M. & W. 844.

The Crown cannot be compelled to interplead, not having been mentioned: see *Candy* v. *Maughan*, 1 D. & L. 745.

A person outside the jurisdiction may be compelled to interplead: *Belmont* v. *Aynard*, 4 C. P. D. 352.

It would seem to be immaterial whether the titles on which the adverse claimants rely are legal or equitable, see Jud. Act, sec. 53 (12), and *Ruston* v. *Pope*, L. R. 3 Ex. 269; *Bank of Ireland* v. *Perry*, L. R. 7 Ex. 14; *Duncan* v. *Cassion*, L. R. C. P. 554; *Engleback* v. *Nixon*, L. R. 10, C. P. 645.

A debtor who is being sued, and who has notice of an assignment of the debt, may interplead as to part and dispute the residue; and his application may be either under this *Rule* or under the Judicature Act, section 53 (5), and the proceedings in the action may be stayed under the latter provision: *Reading* v. *London School Board*, 16 Q. B. D. 686.

Where the claim of one of the claimants is for damages for the detention of the subject matter in dispute, the applicant is entitled to interplead: *Attenborough* v. *St. Katharines Dock Co.*, 3 C. P. D. 450.

Query, whether interpleader is a proper remedy for trying the right to securities as between co-sureties: *Trerice* v. *Burkitt*, 1 Ont. 80.

Interpleader was ordered at the instance of an auctioneer; *Watson* v. *Henderson*, 12 U. C. L. J. 149; *Tanner* v. *European Bank*, 10 R. I. Ex. 261, and of a bailee a policy of insurance; *Attenborough* v. *St. Katharines Dock Co.*, 3 C. P. D. 450.

A solicitor who has recovered judgment for a client under an ordinary retainer has no authority, without special instructions, to engage in proceedings in interpleader: *James* v. *Ricknell*, 20 Q. B. D. 164.

The Local Judges were under the former *Rules* held to have jurisdiction in interpleader matters, they being proceedings in an action: see *Coulson* v. *Spiers*, 9 P. R. 491; *Swain* v. *Stoddart*, 12 P. R. 490. The Master in Chambers, and officers having like jurisdiction, would seem to have power in interpleader matters, under the present *Rules*, so far as interpleader by Sheriffs and Bailees, and Carriers, at all events is concerned. Interpleader in other cases was perhaps not at the date of the new *Rules* a matter dealt with by a Judge in

Rules 1142-1144.

Chambers and therefore under *Rule* 30 may not be a subject within the powers of the Master in Chambers, and such other officers. In *Re Anderson & Barber*, 13 P. R. 21, the application was made to a Judge in Chambers.

Security for costs.

Security for Costs.—Either party to an interpleader issue may be ordered to give security for costs: *Swain* v. *Stoddart*, 12 P. R. 490; over-ruling the dictum in *Canadian Bank of Commerce* v. *Middleton*, 12 P. R. 121.

An execution creditor made defendant in the issue was ordered to give security, in *Lovell* v. *Wardroper*, 4 P. R. 265; and the claimant in *Walker* v. *Niles*, 3 Chy. Ch. 59.

Under R. S. O. 1877, c. 54, s. 10, provision was expressly made for requiring security for the Sheriff's costs to be given. Under this provision it was held that the Sheriff was only entitled to such security under circumstances where it would be ordered between ordinary litigants: *Sweetman* v. *Morrison*, 10 P. R. 446. Without such express provision, the Sheriff would appear under the present *Rules* to have the same right as formerly. The fact that the claimant was a married woman, and in straitened circumstances, was held an insufficient reason for ordering security: *Rhodes* v. *Dawson*, 34 W. R. 240, 55 L. J. Q. B. 134.

Matters to be proved by applicant.

1142. The applicant must satisfy the Court or a Judge by affidavit, or otherwise—

(*a*) That the applicant claims no interest in the subject-matter in dispute, other than for the charges or costs; and

(*b*) That the applicant does not collude with any of the claimants; and

(*c*) That the applicant is willing to pay or transfer the subject-matter into Court, or to dispose of it as the Court or a Judge may direct.

Taken from Eng. Rules 1883, R. 851.

A lien for "costs or charges" did not formerly deprive the applicant of his right to interplead: see *Best* v. *Hays*, 1 H. & C. 718, also *Attenborough* v. *St. Katharines Dock Company*, 3 C. P. D. 450, 466.

The objection that a stakeholder has, by taking indemnity from one claimant, disentitled himself to relief, cannot be taken by the claimant who gave the indemnity: *Thompson* v. *Wright*, 13 Q. B. D. 632.

A form of affidavit will be found in the Appendix, Form No. 52.

Adverse titles of claimants.

1143. The applicant shall not be disentitled to relief by reason only that the titles of the claimants have not a common origin but are adverse to and independent of one another.

Taken from Eng. Rules 1883, R. 852.

When application to be made by defendant.

1144. Where the applicant is a defendant, application for relief may be made at any time after service of the writ of summons.

Taken from Eng. Rules 1883, R. 853.

The form of affidavit in the Appendix, Form No. 52, seems to contemplate the application being made before defence; but probably this will not limit the terms of the *Rule*.

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Rules 1145-1150.

1145. The applicant may make a motion calling on the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them. Motion by applicant.

Taken from Eng. Rules 1883, R. 854.

1146. If the application is made by a defendant in an action the Court or a Judge may stay all proceedings in the action. Stay of action.

Taken from Eng. Rules 1883, R. 855.

1147. If the claimants appear on the motion, the Court or a Judge may order either that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff, and which defendant. Order

Taken from Eng. Rules 1883, R. 856.

1148. The Court or a Judge may, with the consent of both claimants or on the request of any claimant, if, having regard to the value of the subject-matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and [subject to appeal,] decide the same in a summary manner and on such terms as may be just. Disposal of matters in summary manner.

Taken from Eng. Rules 1883, R. 857.

Under the English Rules 857 and 860, a decision by the Judge summarily is not appealable: see *Lyon* v. *Morris*, 19 Q. B. D. 139. The words in brackets in this *Rule* are not in the English Rule, so that in Ontario the decision will be appealable as in other cases.

As to whether it is necessary that the consent, which gives jurisdiction under this *Rule* should appear on the face of the order, see *Hamilton* v. *Durrell*, 15 Ont. App. 500, 513-516.

The Court has no power to impose conditions on the claimant without his consent, affecting his right to raise defences: *Gerhard* v. *Montagu*, 61 L. T. N. S. 564; unless the claimant is seeking any indulgence from the Court.

1149. Where the question is a question of law, and the facts are not in dispute, the Court or a Judge may either decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the Court. Questions of law.

Taken from the Eng. Rules 1883, R. 858, which, however, further provides expressly that the provisions of the Eng. Rules corresponding to *Rules* 554 *et seq.* shall apply to the special case.

1150. If a claimant, having been duly served with a notice of motion calling on him to appear and maintain, or relinquish, his claim, does not appear in pursuance of the Failure of claimant to appear, or neglect to obey summons.

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Rules 1151-1153.

notice, or, having appeared, neglects or refuses to comply with any order made after his appearance, the Court or a Judge may make an order declaring him and all persons claiming under him for ever barred against the applicant, and persons claiming under him, but the order shall not affect the rights of the claimants as between themselves.

Taken from Eng. Rules 1883, R. 859.

In making an order barring a claimant, where the applicant is a defendant in an action, there is no power to make it a term of the order that the plaintiff shall pay the costs of the defendant in the original action, apart from those in the interpleader proceedings: *Hansen* v. *Maddox*, 12 Q. B. D. 100.

Order for sale of goods seized in execution.

1151. Where goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the Court or a Judge may order a sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just.

Taken from Eng. Rules 1883, R. 861.

1152. In case a Sheriff or other officer applies to a Court or Judge for relief by interpleader proceedings, and any execution creditor declines to join in contesting the claim of the adverse claimant, the Court or Judge may direct that such creditor shall be excluded from any benefit which may be derived from the contestation of such claim. 48 V. c. 13, s. 27.

The Creditors Relief Act (R. S. O. c. 65), s. 4 (3) provides that those creditors only who are parties to interpleader proceedings and agree to contribute *pro ratâ* to the expense of contesting any adverse claims shall be entitled to share in any benefit derived from the contestation of such claims, so far as it may be necessary to satisfy their executions or certificates.

Final disposition of all matters.

1153. The Court or Judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for. *New.*

Taken from Eng. Rules 1883, R. 862.

Formerly the interpleader order reserved the question of costs and all other questions to be disposed of in Chambers after the trial of the issue. This provision is still contained in the forms of order in the App. Forms Nos. 148-150.

In some cases it may be necessary however to reserve questions, for instance, if any questions in which the Sheriff is concerned are not disposed of, otherwise, unless the Sheriff is made a party to the issue, the Judge who tries the issue cannot finally dispose of the whole matter.

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The Sheriff need not receive notice of a motion respecting the costs of the parties to the issue: *O'Brien* v. *Bull*, 9 P. R. 494. Rules 1154-1156.

The parties were directed to pay their own costs, and directed each to pay half the costs of the Sheriff, in *McLaren* v. *Central Railway Co.*, 10 P. R. 329. A claimant partially succeeding was given the general costs of the issue, with a deduction of one-sixth in respect of the goods as to which he failed: *Segsworth* v. *Meriden Silver Plating Co.*, 3 Ont. 413.

Title of order.

1154. Where in any interpleader proceedings it is necessary or expedient to make one order in several actions or matters pending in several Divisions, or before different Judges of the same Division, such order may be made by the Court or Judge before whom the interpleader proceeding may be taken, and shall be entitled in all such actions or matters; and any such order (subject to the right of appeal) shall be binding on the parties in all such actions or matters.

Taken from Eng. Rules 1883, R. 863.

In case of several executions, all may be embraced in one application for interpleader.

1155. In case a Sheriff has more than one writ at the suit or instance of different persons against the same property, it shall not be necessary for him to make a separate application on each writ, or in each action; but he may make one application, and may make all the persons who are execution creditors parties to said application, and the Court or Judge before whom the application is made shall take such proceedings, and make such order thereon and therein, as if a separate application had been made upon and in respect of each writ. R. S. O. 1877, c. 54, s. 11.

Cases of executions from several Courts, to whom application to be made.

1156. In case there are writs from several Courts, including the High Court of Justice and one or more County Courts or including the High Court and one or more Division Courts against the same goods, and whether at the suit or instance of the same plaintiff, or of different plaintiffs, the application for such interpleader shall be made to the High Court, or to one of the Judges thereof; and such Court or Judge shall dispose of the whole matter, as if all of the writs against the goods had been issued from the said Court; and in such case the County Court or Division Court shall have no cognizance or jurisdiction whatever in the matter. R. S. O. 1877, c. 54, s. 12; 49 V. c. 16, s. 13.

The application is properly in the High Court, though the first seizure is made in a County Court: *Strange* v. *Toronto Telegraph Co.*, 8 P. R. 1.

Where the writs are all from County Courts, the Sheriff is now to apply in a

Rules 1157-1161.

County Court under *Rule* 1162, and the costs will be on the scale of that Court: *Rule* 1165; see formerly *Phipps* v. *Beamer*, 8 P. R. 181; *Masuret* v. *Landville*, 8 P. R. 57. Where one of the writs is in the High Court, the costs of the motion should be on the High Court scale: *Ib.*

Orders as to sale, etc., in cases under the two last sections.

1157. In any such case as in the next preceding two sections mentioned, the High Court, or a Judge thereof, shall make such order with respect to staying proceedings on the several writs, or with respect to directing a sale of the goods or property in question, as may be necessary, and with respect to the final disposition or order to be made as to the goods or the proceeds thereof, and in all other matters whatsoever, as fully as if all the writs had been issued from the said Court. R. S. O. 1877, c. 54, s. 13.

By the word "Sections" '*Rules*' is probably intended.

When an issue is ordered, the Sheriff may tax his costs and serve *allocatur* on each party, etc.

1158. In case an issue is directed to be tried for the determination of the adverse claim in respect of property seized or taken under an order of attachment or writ of execution, the Sheriff (or other officer) to whom such order is delivered or such writ is directed may tax the costs incurred by him in consequence of such adverse claim, and may, when taxed serve a copy of the certificate of the same upon each of the parties to such issue, and the successful party upon the issue shall tax such costs among his costs of the cause, and upon receipt thereof shall pay over the same to such Sheriff or other officer. R. S. O. 1877, c. 54, s. 15.

The successful party liable to the Sheriff for costs.

1159. If after the service of such certificate the party succeeding upon the issue neglects or refuses to tax such costs, the Sheriff or other officer may obtain an order that the successful party shall pay the same. R. S. O. 1877, c. 54, s. 16.

If case compromised, who to be liable to the Sheriff for his costs.

1160. In case of any such proceedings being compromised between the parties thereto, such costs of the Sheriff or other officer shall be paid by the party, plaintiff, or defendant, by whom the execution or attachment was sued out. R. S. O. 1877, c. 54, s. 17.

If goods seized remain in the Sheriff's custody, the Court may award remuneration.

1161. In case, after the seizure of any property under attachment or in execution, an issue is directed, and the property seized remains, pending the trial of the issue, in the custody of the Sheriff or other officer who seized the same, the Court from which the writ or order of attach-

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ment issued, or any Judge thereof may make an order for the payment to the Sheriff or other officer of such sum for his trouble in and about the custody of the property as the Court or Judge deems reasonable; and the Sheriff or other officer shall have a lien upon the property for payment of the same in the event of the issue being decided against the claimant and only to the extent to which such issue shall be so decided. R. S. O. 1877, c. 54, s. 18; 49 V. c. 16, s. 13. Rules 1162, 1163.

(ii) ~~*Interpleader in County Courts.*~~

1162. In case any claim is made to any goods or chattels taken or intended to be taken under an attachment against an absconding debtor or in execution, under any process issued out of any County Court, or to the proceeds or value thereof, all the proceedings shall be had and taken in the County Court of the county or union of counties in which such goods or chattels are so taken or intended to be taken, or before the Judge of such Court notwithstanding that there are writs from two or more County Courts against the same goods, and whether at the suit or instance of the same plaintiff or different plaintiffs; or the said Court or Judge in any such case, if it appears more convenient and more conducive to the ends of justice so to do, may order that the said proceedings be had and taken in the County Court from which such process issued, or before the Judge of such Court. R. S. O. 1877, c. 54, s. 22. 49 V. c. 16, s. 13. In what County Court the proceedings in interpleader shall be had.

The jurisdiction of County Courts under this *Rule* is confined to proceedings against absconding debtors, and after judgment where execution has issued; there is therefore no jurisdiction in other cases in which under *Rule* 1141 the High Court may give relief by interpleader: *Re Anderson & Barber*, 13 P. R. 21.

1163.—(1) Where the amount claimed under or by virtue of an execution, or of an attachment against an absconding debtor in the Sheriff's or other officer's hands, issued out of the High Court or under executions or attachments in the Sheriff's or other officer's hands, issued out of different County Courts, or out of one or more County Courts, or one or more Division Courts, does not exceed the sum of $400, exclusive of interest and Sheriff's or other officer's costs, or when the goods seized are not, in the opinion of the Judge, or other person making the order, of the value of more than $400, the order directing an issue to When issue may be tried in County Court.

Rules 1164, 1165.

be tried may direct that the issue shall be drawn up and tried in the County Court of the county in which the issue would, under the provisions of the preceding Rule be tried, and in such case the issue shall be drawn up, filed and tried in the County Court, and all subsequent proceedings therein, up to and inclusive of judgment and execution, shall be had and taken in the County Court which shall have jurisdiction in the premises as fully as though the writ of execution or attachment had issued out of a County Court.

(2) When an application is made for an order, under this Rule upon the ground that the goods seized are not of the value of more than $400, a list of the goods and of the value placed upon them shall be set out in the affidavit or affidavits, upon which the application is based. 44 V. c. 7, s. 1; 49 V. c. 16, s. 42.

The Act from which this *Rule* is taken conferred upon the High Court a power which the Court of Chancery had before by previous legislation: *Gourley* v. *Ingram*, 2 Chy. Ch. 238, 309; *Wilson* v. *Wilson*, 3 Ont. App. 408; *Beaty* v. *Bryce*, 9 P. R. 323; and since the Act all interpleader issues involving less than $400, in whatever Division arising, are to be disposed of by reference to a County Court: *Beaty* v. *Bryce*, 9 P. R. 320.

Where to be tried.

Where an interpleader issue is directed by the High Court to be tried at County Court sittings under this *Rule*, the subsequent proceedings such as *e.g.* a motion to postpone the trial must be taken in the County Court: *London & Can. L. J. & Co.* v. *Murphy*, 11 P. R. 86; and applications against the verdict or for a new trial must be by way of appeal to the Court of Appeal as in other County Court cases; a Divisional Court of the High Court has no jurisdiction in the action in which the interpleader was directed: *Close* v. *Exchange Bank*, 11 P. R. 186, distinguishing *Barker* v. *Leeson*, 9 P. R. 107.

(3) The Judge making the order shall have the like powers as are provided in Rule 1157 with regard to the proceedings therein mentioned. 49 V. c. 16, s. 42 (*a*).

Order for costs to be made by Judge of County Court.

1164. The proceedings for and relating to the order for costs, and for obtaining money out of Court, when the same has been paid into Court by the Sheriff, and for such other purposes as may be necessary, may, in the cases provided for in the preceding Rule, be made to the Judge of the County Court who tried the issue, and he shall have power and authority to make such order in the premises as a Judge has heretofore had in such cases, but the application for such order may be made as now in the original cause. 44 V. c. 7, s. 2.

Costs of proceedings in County Court.

1165. In respect of all such proceedings as shall be had in the County Court, the costs and disbursements shall be taxed upon the County Court scale. 44 V. c. 7, s. 3.

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Rules 1166, 1167.

Appeal given to parties dissatisfied in interpleader cases in County Courts.

1166. Any party who is dissatisfied with the decision of the Judge of a County Court upon any question of law or fact arising in the course of interpleader proceedings, may appeal from such decision to the Court of Appeal, and sections 40 to 52 inclusive of *The County Courts' Act* shall extend and apply to and shall regulate and govern the manner of prosecuting and determining such appeal. R. S. O. 1877, c. 54, s. 23.

(iii) *Interpleader by Bailees and Carriers.*

Bailee or carrier may interplead on certain affidavit.

1167.—(1) Any common carrier or other bailee of goods and chattels, whether under a special contract or otherwise howsoever upon whom any claim is made to any goods or chattels in the possession of such carrier or bailee by any one or more claimants, whether such claims have or have not a common origin, may either before or at any time after action is brought by any such claimants respecting the said goods, upon affidavit showing how the said goods and chattels came to his possession, the nature and extent of any lien which the said carrier or bailee has upon the said goods and chattels for services rendered and money advanced thereon, if any such claim exists, and the value or supposed value thereof, also showing, who said claimants respectively are, and the nature (as far as said carrier or bailee knows) of the claims respectively made to said goods, and that he the said carrier or bailee has good reason to believe, and does believe, that if he delivers such goods to either of the claimants he will be sued by the other or others of them, and that he does not collude with any or either of the parties claiming possession of said goods and chattels, apply to any Judge of the High Court of Justice, or, where the value of the goods does not exceed $200, to anyJudge of a County Court of the county within which such goods are at the time of the application, by motion calling upon all the parties respectively claiming the said goods and chattels, to appear and state the nature and particulars of their respective claims, and to maintain or relinquish the same.

(2) The Judge in disposing of said application, shall have and exercise all the powers given to a Judge in interpleader matters. R. S. O. 1877, c. 54, s. 24.

See notes to *Rule* 1141.

Rules 1168, 1169.

When and how claimant served may be barred.

1168. In case any such claimant, being duly served with notice of the said motion does not appear to maintain or relinquish his claim or right, or refuses to comply with any order made after appearance, the said Judge may declare him barred from making or prosecuting his claim against the said carrier or bailee, saving the right or claim of such party against the person or party to whom, under said order, said goods, or the proceeds thereof, may be delivered; and the said Judge may make such order between the parties to the said application as may seem just. R. S. O. 1877, c. 54, s. 25.

See note to *Rule* 1147.

The Court may provide for satisfaction of lien of bailee.

1169. It shall not be necessary, in order to entitle any such carrier or bailee to relief by way of interpleader, that he should abandon any lawful lien he may have upon the goods and chattels the subject of such application; and in disposing of such application, the Judge, in case of any such lien, may make such order respecting the satisfaction or payment thereof, and as to the relief asked and sought thereby, and as to the costs of the parties and the payment thereof, as the right and justice of the case may require. R. S. O. 1877, c. 54, s. 26.

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CHAPTER XIII.

COSTS.

1. General Rules, 1170-1196.
2. Taxation, 1197-1231.
3. Sheriff's Fees, 1232-1241.
4. Security for Costs, 1242-1252.

1. General Rules.

1170. Subject to the provisions of *The Judicature Act*, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court, but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity: Provided, that where any action or issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shown, the Judge before whom the action or issue is tried or the Court otherwise orders. J. A. Rule 428.

To be in discretion of Court.

Savings as to trustee, etc.

Of issue tried before jury.

(*a*) Costs of proceedings before judicial officers, unless otherwise disposed of, shall be in their discretion, subject to appeal. *See* Chy. O. 275, 585.

The first clause is identical with the Eng. R. 1875, O. 55, r. 1. Rule 976 of the Rules of 1883 is different in substituting for "the High Court," "the Supreme Court," and in regard to the costs of trustees, etc.

Under the various statutes affecting costs, the rule in the Common Law Courts was, that costs followed the event, except in the cases in which it was otherwise provided by statute. In Chancery, except in the cases referred to in the *Rule* of a trustee or mortgagee, etc., they were in the discretion of the Court; but the rule acted upon was, that in the absence of special circumstances the party failing paid the costs: *James* v. *Norton*, 1 Charl. Ca. [Court] 161; *Downey* v. *Roaf*, 6 P. R. 89.

Rules before the Jud. Act.

The effect of the present *Rule* is to repeal all former statutes which regulated the disposition of costs instead of leaving them in the discretion of the Court (except perhaps such as give double or treble costs by way of a penalty: see R. S. O. 1887, c. 71, s. 20; *Wellbanks* v. *Conger*, 12 P. R. at p. 448; *Hasker* v. *Wood*, 78 L. T. Jour. 412; 33 W. R. 697; 54 L. J. Q. B. 419; or confer a right to costs in the case of particular classes of persons: see *Garnett* v. *Bradley*, 3 App. Cas. 944; and *Arscott* v. *Lilley*, 14 Ont. App. 283, 294); and to enable the Court except in the cases here mentioned, to deal with costs as it may think proper: *Garnett* v. *Bradley*, *supra*; *Parsons* v. *Tinling*, 2 C. P. D. 119; *Tenant* v. *Ellis*, 6 Q. B. D. 46; see *Parnell* v. *Mort Liddell & Co.*, 29

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Rule 1170. Ch. D. 325. But where the Court had not power, original or statutory, before the Act, to award costs, jurisdiction to do so is not conferred by this *Rule*: *Re Mills*, 34 Ch. D. 24, questioning *Ex p. Mercers Co.*, 10 Ch. D. 481; *Re Holliday & Mayor of Wakefield*, 20 Q. B. D. 699; *Ex p. Hospital of St. Katherines*, 17 Ch. D. 378; *Re Lee* v. *Hemingway*, 24 Ch. D. 669; see also *Arscott* v. *Lilley*, 14 Ont. App. 295; *Re Knight's Trusts*, 26 Ch. D. 82; *Re Wood*, 31 Ch. D. 607; *Kingston* v. *Murphy*, 11 P. R. 304. Where an Act gives jurisdiction to determine questions but is silent as to costs, the Court has inherent jurisdiction to order a person wrongly putting it in motion to pay costs: *Re Bombay Civil Fund Act*, 40 Ch. D. 288. So where costs were not asked for by a rule *nisi* though they were at bar, this is no objection, the costs being in the discretion of the Court without any mention of them where the opposite party appears: *Re Peck & Galt*, 46 U. C. Q. B. 211; but where the opposite party does not appear the Court will not usually give costs if they have not been asked by the notice of motion. In England neither an interpleader order for an issue: *Wicks* v. *Wood*, 26 W. R. 680; *Hartmont* v. *Foster*, 8 Q. B. D. 82, nor sending a case for trial to a County Court: *Farmers* v. *May*, 44 L. T. N. S. 148, removes the case from the jurisdiction of the High Court as to costs: but see *Rules* 1162, 1165, and secs. 96 and 97 of the Act.

This *Rule* also repeals all former *practice* which laid down any special rule as to costs: *The Friedeberg*, 10 P. D. 112.

The proceedings must have actually come into Court: *Re Brandreth's Trade-mark*, 9 Ch. D. 618; and it is to be observed that this *Rule* only has reference to costs of proceedings in the High Court, not in the Court of Appeal. The Eng. Rule of 1883, r. 976, is different in this respect.

General Outline of the Rules.—The *Rules* as to costs make provision for—

(1) Costs generally of proceedings in the High Court: see p. 892.

(2) The disposal of the costs of the action where tried without a jury: see *infra* p. 893, and

(3) Where tried with a jury: see p. 895.

Generally. Non-jury cases.

The two last classes of cases are further separately considered. In actions tried without a jury the costs are (subject to certain special exceptions) in the discretion of the trial Judge, and without an order made in the exercise of such discretion, no costs will be taxable to any party: *Rule* 1170.

Jury cases. Scales of costs.

In actions tried by a jury, the costs are not entirely in the discretion of the trial Judge. *Prima facie* they must follow the event, but the Judge has a discretion to make a different order "upon good cause shown," but only in that event: *Rule* 1170.

Non-jury cases.

In the case of actions brought in the High Court, which might have been brought in an inferior Court—(1) If the action is tried without a jury, the scale upon which the costs are to be allowed is in the discretion of the Judge entirely; it was said in *Bennett* v. *White*, 13 P. R. 152, that there was no better guide than the rule which prevails where the action is tried by a jury, (see *Rule* 1172), but the Judge's discretion is not fettered by any *Rule*. (2) If

Jury cases.

the action is tried by a jury, *Rule* 1172 applies, and where the costs follow the event, the costs are recoverable as defined by *Rule* 1172. (3) In actions tried by a jury, where good cause is shown, the scale of costs is in the discretion of the Judge in the same way as if the action were tried without a jury.

Where judgment without a trial.

Where judgment is entered without a trial, and therefore without any expressed direction as to costs, the scale of costs is determined by the Taxing Officer, under *Rule* 1174.

(1) **Costs generally of Proceedings in the High Court.**—The following are miscellaneous cases which illustrate the discretion of which the Court has to dispose of the costs of proceedings before it.

The discretion extends to costs dealt with on interlocutory proceedings before the trial, so that they may be directed to be borne by one party in any event: *Vicary* v. *Great Northern Ry. Co.*, 9 Q. B. D. 168.

The dismissal of an action for want of prosecution without costs is within the discretion of the Judge, notwithstanding 4 Anne c. 16, s. 23, and there is no appeal: *Snelling* v. *Pulling*, 29 Ch. D. 85.

Where in an action of covenant the defendant paid money into Court and denied the breach, and a referee to whom the issues were referred, reported that the money paid in was sufficient to satisfy the claim, it was held that the costs were in the discretion of the Court, and that the proper method of exercising it was by allowing plaintiff his costs up to the time of payment into Court, and defendant the costs of the action after that time: *Buckton* v. *Higgs*, 4 Ex. D. 174. **Rule 1170.**

But where a cause was referred by consent at a trial to the Master under the C. L. P. Act, as a matter of account, formal judgment being entered for the plaintiff, and the order of reference was silent as to costs, after an award that nothing was due to plaintiffs beyond money paid into Court, it was held that the proceedings were not "proceedings in the High Court" within this *Rule*, but withdrawn from it by an agreement of the parties, and, the parties having agreed to its terms, the Court could not add to it, and had no power to give costs: *Winshurst* v. *Barrow Ship Building Co.*, 2 Q. B. D. 335.

A defendant cannot escape the costs of a writ of summons by tendering the amount sued for before service but after the issue of the writ: *O'Malley* v. *Killmallock*, 22 L. R. Ir. 326.

Where upon an interlocutory motion the plaintiff obtains the relief he seeks in the action, he should make application to the defendant to consent to have the costs disposed of on motion, otherwise he will not be allowed the extra costs occasioned by going to trial. Without defendant's consent the costs cannot be disposed of on motion; *Sonnenschein* v. *Barnard*, 57 L. T. N. S. 712; see *Blakeley* v. *Ingram*, 9 C. L. T. 143; *Starr* v. *Maidstone*, W. N. 1878, 219; *Dicks* v. *Yates*, 18 Ch. D. 77; *Landed Estates Company* v. *Weeding*, W. N. 1871, 148.

In *Bowker* v. *Kesteven*, 47 L. T. N. S. 545, the plaintiff claimed £49 17*s.*, the defendant admitted the claim and counter-claimed for £75, judgment was for the plaintiff on the claim admitted and costs, and for the defendant for £40 and costs. It was held that the plaintiff was entitled to costs up to, and including the statement of defence, and the defendant to costs after that time: see also *O'Riordan* v. *Kelly*, 16 L. R. Ir. 263.

By various *Rules* special provision is made as to costs in particular cases—where the Court has no jurisdiction: see *Rule* 1256 and *Great Northern, etc.* v. *Inett*, 2 Q. B. D. 284; *Crowther* v. *Boult*, 33 W. R. 150; of proceedings to attach debts: *Rule* 1180; on the granting or refusing a peremptory mandamus: Rule 1122*a*; on confession of defence: *Rule* 440; on discontinuance: *Rule* 641; on accepting money paid into Court in satisfaction: *Rule* 637; of preliminary examinations of parties: *Rule* 1177; of inspection of documents: *Rule* 1196; of proving documents where notice to admit not given: *Rule* 1190; of applications to extend the time for taking a proceeding: *Rule* 1191; by reason of a party not making admissions: *Rule* 1189; of proceedings relating to "third parties": *Rule* 332 and *Blore* v. *Ashby*, 42 Ch. D. 682.

Non-jury Cases.—*Discretion of Judge.*—No hard and fast rules can be laid down as to the manner of exercising discretion as to the costs: see *The Friedberg*, 10 P. D. 112; *Badische Anilin, etc.* v. *Levinstein*, 29 Ch. D. 366. Non-jury cases.

The discretion is a judicial one, and a plaintiff who successfully enforces a legal right, and in no way misconducts himself, may not be deprived of costs, but is entitled to them as of right: *Cooper* v. *Whittington*, 15 Ch. D. 501; *The Condor*, 4 P. D. 120; *The Monkseaton*, 14 P. D. 51; *Upmann* v. *Forester*, 24 Ch. D. 231; *Goodhart* v. *Hyett*, 25 Ch. D. 182; *Witmann* v. *Oppenheim*, 27 Ch. D. 260; 54 L. J. Chy. 56; see also *Mitchell* v. *Vandusen*, 15 Ont. App. 517, where the question of the power to make a successful party pay costs was also raised but not decided.

So the Judge cannot, except under some special Statute, impose costs beyond the costs of suit by way of penalty. His discretion, however, extends to ordering a defendant to pay half the costs or a fixed sum in lieu of costs: *Rule* 1178; *Wilmott* v. *Barber*, 17 Ch. D. 772; *Ryan* v. *Fish*, 4 Ont. 335, 344; see *Cockburn* v. *Edwards*, 18 Ch. D. 449, 459; *Harrison* v. *McSheehan*, W. N. 1885, 207; or no more costs than the verdict: *Hancock* v. *Hale*, 28 Sol. Discretion of Court.

Rule 1170. Jour. 230, where only £21 was recovered on a much larger claim; or costs between solicitor and client (in matters of equitable jurisdiction at any rate): *Andrews* v. *Barnes*, 39 Ch. D. 133; *Sandford* v. *Porter*, 10 [illegible] App. 565, 577; or to giving no costs where the action was within the jurisdiction of an inferior Court: *Vandewaters* v. *Horton*, 9 Ont. 548; *Kay* v. *Tighe*, 18 L. R. Ir. 40; or to directing a solicitor to pay costs personally: *Barnard* v. *Scoles*, 37 W. R. 668; or to refusing costs to a party, though successful, whose conduct has been discreditable: *Darby* v. *City of Toronto*, 9 C. L. T. 371; *Beatty* v. *O'Connor*, 5 Ont. 744; or where improper charges are made and not sustained: *Fry* v. *Lane*, 40 Ch. D. 312; (or to directing payment of the opposite party's costs of such charges: see *Neil* v. *Winter*, 9 Gr. 261; *Hodgins* v. *McNeil*, *Ib.* 305; *McKenzie* v. *Yielding*, 11 Gr. 406;) or where a party otherwise misconducts himself, as by making an untruthful defence: *Finlayson* v. *Mullard*, 10 Gr. 130; or unnecessarily bringing a suit: *Darling* v. *Wilson*, 16 Gr. 255; *Springer* v. *Clarke*, 15 Gr. 664; *Fane* v. *Fane*, 13 Ch. D. 228; *Re Cabburn*, 46 L. T. N. S. 848; W. N. 1882, 92; even in the case of a mortgagee: *McLean* v. *Cross*, 3 Chy. Ch. 432; *Ashworth* v. *Lord*, 36 Ch. D. 545; *Boulton* v. *Rowland*, 4 Ont. 720; *Graham* v. *Ross*, 6 Ont. 154; see also *Smallpiece* v. *Lee*, in note to sec. 65 of the Act.

Where a defendant succeeds generally he may have the costs of some of his defences on which he has not succeeded; but where he has raised a distinct issue and failed he ought not to have the costs of that issue: *Blank* v. *Footman*, 39 Ch. D. 678.

Where in an action tried by a Judge without a jury no order is made as to costs, none are recoverable by either party: *Re Great Western Advertising Co.* v. *Rainer*, 9 P. R. 494; *Lewin* v. *Trimming*, 21 Q. B. D. 230.

A Judge has no power to delegate his discretion: *Lambton* v. *Parkinson*, 35 W. R. 545.

The fact that the action was brought without first making an application to the defendant for the relief sought, was not considered sufficient to deprive plaintiff of costs: *Goodhart* v. *Hyett*, 25 Ch. D. 182; *Wittman* v. *Oppenheim*, 27 Ch. D. 260; *Ruskin* v. *Robinson*, 2 Times Rep. 18; but see *Holt* v. *Smith*, 3 Times Rep. 329.

A Judge before whom a second trial is held, has power to order a plaintiff who recovers a nominal sum to pay the costs of both trials, even where the action is tried with a jury: *Harris* v. *Petherick*, 4 Q. B. D. 611; see *Fane* v. *Fane*, 13 Ch. D. 228.

Quære, whether, when the plaintiff fails, the defendant can be ordered to pay the whole costs: *Dick* v. *Yates*, 18 Ch. D. 76; *Foster* v. *G. W. Ry.*, 8 Q. B. D. 25, 515; *Butcher* v. *Pooler*, 24 Ch. D. 273; *Lambton* v. *Parkinson*, 35 W. R. 545; *Mitchell* v. *Vandusen*, 14 Ont. App. 517; in such case the defendant may be ordered to pay a co-defendant's costs, though there is no issue between them: *Church* v. *Fuller*, 3 Ont. 417.

The Official Guardian's costs of defending an action on behalf of an infant defendant were ordered to be paid by the plaintiff, notwithstanding judgment in favour of the plaintiff against the infant who was found to be party to the fraud which occasioned the action: *Westgate* v. *Westgate*, 11 P. R. 62.

In an action tried without a jury, judgment being given for plaintiff, on the claim and counter-claim, but for defendant against third parties with "such costs as defendant would be entitled to by law," it was held that the costs being in the discretion of the Judge, and no discretion being exercised in favour of defendant against the third parties, the defendant was not "entitled by law" to costs: *Lewin* v. *Trimming*, 21 Q. B. D. 230.

For the effect on costs of a refusal of a reasonable sum tendered before suit, see *The William Symington*, 10 P. D. 1.

In an action for infringement of trademark, an offer of full compliance with the plaintiff's demands was made after action commenced, but, notwithstanding this, a motion for injunction was brought on. The motion was held not

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unnecessary, the compromise being insufficient, and the plaintiff was held entitled to costs: *Fenessy* v. *Day & Martin*, 55 L. T. N. S. 161; see also *Trotter* v. *Maclean*, 13 Ch. D. 574. **Rule 1170.**

Where a motion by plaintiff is adjourned till the trial and no mention is made of the costs of it then or at the trial, a judgment dismissing the action with costs carries with it the costs of the motion: *Gosnell* v. *Bishop*, 38 Ch. D. 385. See also as to costs reserved to be disposed of at the trial: *Hodges* v. *Hodges*, 25 W. R. 162; *Fritz* v. *Hobson*, 14 Ch. D. 542. But orders disposing of interlocutory costs are not interfered with by a general award of costs at the trial: *Beynon* v. *Godden*, 4 Ex. D. 246.

In *Fritz* v. *Hobson*, 14 Ch. D. 542, where costs of an injunction had been reserved till the trial, but counsel had then omitted to ask for them, the omission was supplied on subsequent motion under *Rule* 780.

Where upon a reference by consent but not in a cause the costs of the reference are left in the discretion of the arbitrator the costs of negotiating and settling terms of the submission may be taxed as "costs of the reference": *Re Autothreptic etc., Co., & Townsend & Co.*, 21 Q. B. D. 182.

Jury Cases—Where Costs Follow the "Event."—The observations following are in regard to the cases where the costs follow the "event," *i.e.*, where the Judge has not for "good cause" otherwise ordered. Jury cases.

Where the "event" is the result of a single issue, no difficulty occurs in the application of the *Rule*. It is where there are several issues, or there is a counter-claim that difficulty arises.

Where there are several issues, and neither plaintiff nor defendant is wholly successful, the question arises, what the "event" is which the costs are to follow. It has been held that the word "event" in this *Rule* is complex, and must be read distributively as regards distinct causes of action. The general costs of the cause follow the judgment, but the costs of the particular issues must be respectively taxed in favour of the party who has succeeded on them: *Myers* v. *Defries*, 4 Ex. D. at p. 180; *Stooke* v. *Taylor*, 5 Q. B. D. 569; in which the previous case of *Staples* v. *Young*, 2 Ex. D. 324, was not approved of: see also *Ellis* v. *Desilva*, 6 Q. B. D. 521; *Waring* v. *Pearman*, 32 W. R. 429; *Lund* v. *Campbell*, 14 Q. B. D. 821; *Hawke* v. *Brear*, *Ib.*, 841; *Goutard* v. *Carr*, 13 Q. B. D. 59*n*; *Ahrbecker* v. *Frost*, 17 Q. B. D. 606; *Bertram* v. *Massey Mfg. Co.*, 13 P. R. 184. Where several issues.

In each issue the "event" is the result of all the proceedings incidental to the litigation, and the costs which follow the event include the costs of all the stages of that litigation; and therefore where a new trial was had and the plaintiff on the second trial recovered a verdict, he was held entitled to the costs of the first trial as part of the costs of the action: *Field* v. *Great Northern Ry.*, 3 Ex. D. 261; *Creen* v. *Wright*, 2 C. P. D. 354; *Waring* v. *Pearman*, 32 W. R. 429; *Wight* v. *Shaw*, 19 Q. B. D. 396. So where at the first trial the jury disagreed: *Copeland* v. *Blenheim*, 11 P. R. 54.

In *Abbott* v. *Andrews*, 8 Q. B. D. 647, where the plaintiff succeeded on some issues but was non-suited on others, no order being made as to costs, the defendant was held entitled to costs of issues on which the plaintiff was nonsuited, and the plaintiff to the other costs, including the general costs of the cause. Where a judgment is ambiguous as to costs, application should be made, to the Judge who pronounced it, to correct the ambiguity. It is not proper to bring the matter up on an appeal from the taxing officer: *Ib*; *Sparrow* v. *Hill*, 8 Q. B. D. 479, may also be referred to, though in that case the Judge made an order as to costs, and the question was the right interpretation of it. There the plaintiff succeeded on three heads of his claim and was awarded costs in respect of the amounts recovered, and the defendant was given costs in respect of the rest. Therefore the plaintiff was held entitled to the general costs of the cause excepting those which related to the issues on which he had failed, and the defendant was given his costs of the latter issues.

In cases where there are counter-claims most difficulty has occurred. Cases of counter-claims.

Rule 1170.
Cases of counter-claim.

There is a distinction between cases where a defendant sets up a counter-claim in the nature of a set-off of a debt or liquidated claim, and a counter-claim for unliquidated damages.

Under the present *Rule* 373 both kinds of claims may be presented by the defendant in the pleading called a counter-claim: see *Bennett* v. *White*, 13 P. R. 151; but a true set-off does not lose its real character by being pleaded as a counter-claim: *Ryan* v. *Fraser*, 16 L. R. Ir. 253; *Cutler* v. *Morse*, 12 P. R. 594; *Bennett* v. *White*, 13 P. R. 149; *Sanderson* v. *Ashfield*, 13 P. R. 230; and the costs are taxable on the same principles as they would have been taxed in like case under the Jud. Act: *Cutler* v. *Morse*, *supra*; see also *Wight* v. *Shaw*, 19 Q. B. D. 396.

For the purposes of taxation a counter-claim properly so called is now to be treated as a cross action and the costs thereof may be taxed separately from those of the action: *Emerson* v. *Gearin*, 12 P. R. 399; *Shrapnel* v. *Laing*, 20 Q. B. D. 334; *Amon* v. *Bobbett*, 22 Q. B. D. 543.

Where there is a counter-claim in respect of matters which could not be pleaded as a set-off, and the defendant recovers on his counter-claim a sum exceeding that which the plaintiff recovers on his claim, the claim and counter-claim having for purposes of taxation to be treated as independent actions the costs in each should be taxed in favour of the successful party, subject to a deduction in respect of the costs of any issues on which he has not succeeded: *Shrapnel* v. *Laing*, 20 Q. B. D. 334. It is immaterial for purposes of taxation whether the form of the judgment be for recovery by each party of the amount found due to him, or by plaintiff or defendant for the balance in his favour: *Ib.*

In the case of a true counter-claim the plaintiff cannot foresee that the defendant will set up the counter-claim, but may prefer to bring a cross-action, while in the case of a set off, he must know of the existence of the claim and should give credit for it, if good: see *Heritage* v. *Ford*, 71 L. T. Jour. 313; *Stooke* v. *Taylor*, *infra*.

Therefore where the plaintiff establishes his claim and the defendant a set-off of an equal or greater amount, the defendant has succeeded and the plaintiff failed, and the defendant is therefore entitled to costs of the action: *Stooke* v. *Taylor*, 5 Q. B. D. 576; *Baines* v. *Bromley*, 6 Q. B. D. 794; *Heritage* v. *Ford*, *supra*.

On the other hand where the plaintiff establishes a claim and the defendant establishes a counter-claim in the nature of a cross-action, *i.e.*, both claim and counter-claim are successful, the plaintiff is entitled to the costs of the action (without any apportionment of charges common to both claim and counter-claim), and the defendant to such costs only as are properly attributable to the counter-claim: *Re Brown*, *Ward* v. *Morse*, 23 Ch. D. 377; *Stooke* v. *Taylor*, *supra*; *Gray* v. *Davidson*, 5 Ex. D. 189; *Ellis* v. *Desilva*, 6 Q. B. D. 521. This gives the general costs of the action not to the party recovering the most, or to the party to whom the litigation is on the whole favourable, but to the plaintiff: *Baines* v. *Bromley*, *supra*; *Pearson* v. *Ripley*, 32 W. R. 463; 50 L. T. N. S. 629, (because his costs are those of the action), whether the balance is in favour of the plaintiff: *Hallinan* v. *Price*, 41 L. T. N. S. 627; 27 W. R. 490; or of the defendant: *Re Brown*, *Ward* v. *Morse*, *supra*. See also *Waring* v. *Pearman*, 32 W. R. 429; 50 L. T. N. S. 633; and *Coughlin* v. *Hollingsworth*, 5 Ont 207, where costs were directed to be taxed upon this principle and judgment was directed to be entered for the party in whose favour the balance should be found.

Similarly, where the claim and counter-claim are both dismissed, the plaintiff is to pay the defendant the general costs of the action, and the defendant has only to pay the sum by which the costs have been increased by the counter-claim: *Sauer* v. *Bilton*, 11 Ch. D. 416; *Mason* v. *Brentini*, 15 Ch. D. 287.

Where the claim was dismissed without costs, and the counter-claim with costs, the Judge ordered defendant to pay half plaintiff's costs, as a convenient mode of settling the matter: *Wilmott* v. *Barber*, 15 Ch. D. 96; 17 Ch. D. 774.

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Where at a jury trial the plaintiff's claim was admitted on the pleadings, but a counter-claim for damages to a larger amount was set up, it was held that costs should follow the event, and be taxed as in *Baines* v. *Bromley*, and that the Judge had no jurisdiction in the absence of good cause to order costs to the plaintiff down to the counter-claim and to the defendant of the counter-claim and subsequent proceedings: *Wight* v. *Shaw*, 19 Q. B. D. 396. **Rule 1170.**

In *Chatfield* v. *Sedgwick*, 4 C. P. D. 459, the plaintiff claimed a sum exceeding £50. The defendant pleaded a set-off, and also made a counter-claim for goods to the amount of about £24. The action was referred to a Master, costs to abide the event. The Master certified that there was due to the plaintiff on the claim £16, and to the defendant on the counter-claim £23, and that the balance due to the defendant was £7. It was held that defendant was entitled to his costs, as the question was, taking claim and counter-claim together, which was creditor and which was debtor, and, the finding being in favour of the defendant, that was the event which the costs were to follow. The reasons for this decision are dissented from by Cockburn, C.J., in *Stooke* v. *Taylor*, 5 Q. B. D. 582, though the decision itself is approved of as in accordance with the principles above mentioned, because the defendant succeeded, but the plaintiff failed, as to costs, not having recovered £20, so as to be entitled to costs under the County Court Act. See also *Lowe* v. *Holme*, 10 Q. B. D. 286; *Ryan* v. *Fraser*, 16 L. R. Ir. 253; *Lund* v. *Campbell*, 14 Q. B. D. 821.

Where, in an arbitration, costs were to follow the "event" and the defendant recovered more on his counter-claim than the plaintiff, it was held that the defendant was entitled to the general costs and the plaintiff to costs of the issue on which he succeeded: *Lund* v. *Campbell*, 14 Q. B. D. 821, where *Baines* v. *Bromley* is explained: *Hawke* v. *Brear*, *Ib.*, 841; see also *Ahrbecker* v. *Frost*, 17 Q. B. D. 606.

Where the plaintiffs claimed £304 17s. 9d. and the defendants set up a counter-claim for £480, the arbitrator to whom the matter was referred found in favour of the plaintiffs for £371, and in favour of the defendants for £375. The Court, on appeal from the District Registrar who had given the costs of the cause to the defendants, ordered "the costs of, and relating to the plaintiff's claim, and the proof thereof to be paid by the defendants, and the costs of, and relating to the defendants' counter-claim, and the proof thereof, to be paid by the plaintiffs": *Cole, Marchant & Co.* v. *Firth*, 4 Ex. D. 301; 40 L. T. N. S. 851.

It has been held in England that the costs of an action in which judgment has been signed in default of defence, and the damages have been assessed by a jury upon a writ of inquiry, do not follow the event, but are in the discretion of the Judge, there having been no trial with a jury: *Gath* v. *Howarth*, 28 Sol Jour. 427; W. N. 1884, 99. See *Rule* 1174.

Depriving a party of costs for "good cause."—The Judge has no jurisdiction to deprive the successful party of costs or make order as to the costs so that they do not follow the event unless there be 'good cause': *Jones* v. *Curling*, 13 Q. B. D. 262; *Wight* v. *Shaw*, 19 Q. B. D. 396; *Huxley* v. *West London*, 17 Q. B. D. 373; 14 App. Cas. 26; *Bertram* v. *Massey*, 13 P. R. 184.

"Good cause" means some misconduct tending to the litigation, or in the course of the litigation, which requires the Court in justice to interfere; and there is a marked distinction between interfering with costs going to a plaintiff, and costs going to a defendant: *Farquhar* v. *Robertson*, 13 P. R. 156. It embraces everything for which the party was responsible connected with the institution or conduct of the suit and calculated to occasion unnecessary litigation or expense: *Huxley* v. *Robertson*, 14 App. Cas. 26. The Judge is not confined to the consideration of the conduct of the party in the course of the litigation, but may consider his conduct previous to and conducing to the litigation. He must, however, assume the truth of the facts found by the jury: *Harnett* v. *Vise*, 5 Ex. D. 307; see also *Wellbanks* v. *Conger*, 12 P. R. 447.

Letters or conversations written or declared to be without prejudice cannot be taken into consideration: *Walker* v. *Willsher*, 23 Q. B. D. 335.

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Rule 1170. The recommendation of the jury that each party should pay his own costs was not considered, and affidavits by some of the jurymen that they would not have acquiesced in a verdict for defendant if they had supposed the result would be to throw all the costs on the plaintiff were held inadmissible: *Farquhar* v. *Robertson*, 13 P. R. 156; *Weaver* v. *Sawyer*, 16 Ont. App. 422.

But in an action of seduction where the wrong complained of was partly attributable to the girl's parents and the jury gave a verdict for the defendant, but declared that they desired him not to get costs, whereupon judgment was so entered, it was held that "good cause" was shown for depriving him of costs: *Widmsley* v. *Mitchell*, 5 Ont. 427.

The jurisdiction to deprive of costs for good cause has been held to be rightly exercised where defendant has by misstatements, made under circumstances imposing an obligation on him to be truthful, brought litigation on himself and rendered an action against him reasonable: *Sutcliffe* v. *Smith*, 2 Times 881; and where the action was frivolous and vexatious: *Macgregor* v. *Clay*, 4 Times 715.

The fact that only a farthing damages is given is not conclusive that good cause existed, but is an element to be considered: *Moore* v. *Gill*, 4 Times 738.

Oppression or misconduct on the part of the successful party is good cause; but not the recovery by the plaintiff of part only of what he claims: *Jones* v. *Curling*, 13 Q. B. D. 262; *Williams* v. *Ward*, 55 L. J. Q. B. 566; *Pool* v. *Lewin*, 1 Times 165; *Canning* v. *Turner*, 3 Times 684; *Pearman* v. *Burdett Coutts*, *Ib.*, 719; nor the fact that the recovery is for a sum within the jurisdiction of an inferior Court: *Foster* v. *Viegel*, 13 P. R. 133.

Time for making application. The discretion as to costs provided for by this *Rule* to direct the costs to be otherwise than according to the event when an action is tried by a jury, can be exercised only by the Judge who tries the case upon an application made at the trial, or by a Divisional Court.

"At the trial" would seem to mean at the same sitting of the Court: *Tyne Alkali Co.* v. *Lawson*, 36 L. T. N. S. 100; *Kynaston* v. *Mackinder*, 37 L. T. N. S. 390; or "substantially at the trial": *Collins* v. *Welch*, 5 C. P. D. at p. 33; and the Judge may reserve his decision on the application and give judgment at a subsequent time: see *Wise* v. *Hewson*, 1 P. R. 232.

It has been said in some cases that the Judge cannot entertain an application made subsequently to the pronouncing of judgment at the trial, nor can the same or another Judge at Chambers: *Baker* v. *Oakes*, 2 Q. B. D. 171; *Tyne Alkali Co.* v. *Lawson*, 36 L. T. N. S. 100; *Re G. W. Advertising Co.* v. *Rainer*, 9 P. R. 494. The application should be made immediately after the verdict: see *Collins* v. *Welch*, *supra*; *Mallock* v. *Johnson*, 4 U. C. Q. B. 352; *Major* v. *McKenzie*, 23 C. P. 261; or at any rate at the time of any motion for judgment.

But where the Judge at the trial refused to exercise his discretion but some weeks afterwards heard both sides on an application and made an order depriving plaintiff of costs, it was held that he had power to do so and was not *functus officio* by his refusal at the trial: *Huxley* v. *West London*, 14 App. Cas. 26. And where the Judge at the trial had omitted to exercise his discretion as to costs, it was held that even after his judgment had been appealed from, he might make an order as to costs: *Hardy* v. *Pickard* 12 P. R. 428.

Where the Judge at the trial anticipates an application, in the presence of counsel on both sides, or without any application: *Turner* v. *Heyland*, 4 C. P. D. 432, he has power to make an order depriving the successful party of costs, though the counsel for the other side has not in terms applied to him to do so: *Collins* v. *Welch*, 5 C. P. D. 27; *Marsden* v. *Lancashire and Yorkshire Ry. Co.*, 7 Q. B. D. 641.

Appeal from the Judge's decision. Where the Judge at the trial has made no order, the Divisional Court has original jurisdiction under this *Rule* to make an order to deprive a successful party of the costs of an action tried before a jury: *Meyers* v. *Defries*, and *Siddons* v. *Lawrence*, 4 Ex. D. 176; upon an application made within reasonable time after the trial: *Bowey* v. *Bell*, 4 Q. B. D. 95. But where the Judge has exercised his alternative jurisdiction the Divisional

Court has no jurisdiction to entertain an appeal from his order: *Marsden* v. *Lancashire & Yorkshire Railway Company*, 7 Q. B. D. 641; see, however, p. 643 and *dicta* in *Collins* v. *Welch*, 5 C. P. D. at p. 33. These *dicta* are based upon the English practice which requires an appeal from the decision of a Judge, to be to the Court of Appeal: see Rules of 1875, O. 40, r. 4, (1883, r. 563). In this Province since a decision of a Judge may be reviewed by the Divisional Court under *Rule* 798, cases may occur where an appeal will lie to the Div. Court, as to the Court of Appeal in England: see 7 Q. B. D. 644; *e.g.*, by leave of the Judge *Tomlinson* v. *Northern Ry. Co.*, 11 P. R. 527; *Mitchell* v. *Vandusen*, 14 Ont. App. 517; or on the question whether there was good cause: see cases *infra*; but see *Kearney* v. *Harrison*, 10 L. R. Ir. 17, and *Church* v. *Fuller*, 3 Ont. 417; *Richardson* v. *Jenkins*, 10 P. R. 292. **Rule 1170.**

If there is "good cause" within the meaning of the *Rule* the Judge's discretion is absolute and cannot be reviewed, but the question whether there is good cause or not is subject matter of appeal: *Huxley* v. *West London*, 17 Q. B. D. 373; 14 App. Cas. 26; *Walker* v. *Willsher*, 23 Q. B. D. 336; *Williams* v. *Ward*, 55 L. J. Q. B. 566; *Rooke* v. *Czarnikow*, 4 Times 669. If he holds that there was no good cause the Court on appeal cannot interfere: *Moore* v. *Gill*, 4 Times 738.

Appeals Respecting Costs.—This *Rule* combined with s. 65 of the Act has the effect, that (except in the case of trustees, mortgagees, etc.,) no appeal in respect of costs will be allowed, without leave, since s. 65 prohibits appeals, except by leave of the Court or Judge appealed from, in respect of costs, which are by law left to the discretion of the Court: *Mitchell* v. *Vandusen*, 14 Ont. App. 517, where on an appeal by leave the decision was reversed. **Appeals for costs.**

Orders have therefore been held unappealable in respect of costs of inspection of a mine allowed under *Rule* 1135: *Mitchell* v. *Darley Main Colliery Co.*, 10 Q. B. D. 457; costs directed to be paid by a solicitor personally by reason of misconduct or negligence; but an appeal lies as to whether there has been misconduct or negligence: *Re Bradford*, 15 Q. B. D. 635, over-ruling *S. C.*, 11 Q. B. D. 373; costs directed to be paid to a defendant by a co-defendant though there was no issue between them: *Church* v. *Fuller*, 3 Ont. 417; see also *Rudow* v. *Great Britain Assurance Co.*, 17 Ch. D. 600; costs directed to be paid by defendant and given over against a third party: *Hornby* v. *Cardwell*, 8 Q. B. D. 329; and costs dealt with before the trial and directed to be borne by one party "in any event": *Vicary* v. *Great Northern Ry. Co.*, 9 Q. B. D. 168.

See also notes to sec. 65, and *Bazett* v. *Morgan*, 24 Q. B. D. 28; *Harpham* v. *Shacklock*, 19 Ch. D. 207.

Costs are not in the discretion of the Court, and therefore the proper subject of an appeal where they come within the exceptional cases in this *Rule*.

Thus where a residuary legatee or executor takes proceedings for the administration of his testator's estate, he is entitled to costs out of the estate unless there are special grounds for depriving him of them, and this rule is preserved by the present *Rule* so that these costs are not in the discretion of the Court: *Farrow* v. *Austin*, 18 Ch. D. 58; followed as to the costs of residuary legatees in *Re Woodhall, Garbutt* v. *Hewson*, 2 Ont. 456; see also *Croggan* v. *Allen*, 22 Ch. D. 101; *Johnstone* v. *Cox*, 19 Ch. D. 17; *Turner* v. *Hancock*, 20 Ch. D. 303; *Re Chennell*, 8 Ch. D. 492; *Re McClellan*, 29 Ch. D. 495, and *Sandford* v. *Porter*, 16 Ont. App. 565. Where a settlement is set aside: see as to the trustees' costs *Dutton* v. *Thompson*, 23 Ch. D. 278, in note to Jud. Act, sec. 65. Trustees who have been guilty of impropriety of conduct may be deprived of costs in the discretion of the Court: *Re Hoskin's Trusts*, 6 Ch. D. 281; *Turner* v. *Hancock*, *supra*; *Re Cabburn, Gage* v. *Rutland*, 46 L. T. N. S. 848; W. N. 1882, 92; *Re Radcliffe, Pearse* v. *Radcliffe*, 44 L. T. N. S. 96; but such an order is appealable as the costs are not in the discretion of the Court if there was no misconduct: *Re Pugh, Lewis* v. *Pritchard*, 57 L. T. N. S. 858. Where *cestuis que trustent* were allowed their costs it was held on appeal that as they were improperly made parties, their costs were not in the discretion of the Court and were disallowed: *Cooper* v. *Vesey*, 45 L. T. N. S. 532; W. N.

Rules 1171, 1172.

1882, 55. A mortgagee in entitled, as by contract, to all costs properly incurred in enforcing his security and such costs are not in the discretion of the Court: *Re Rio Grande, etc., S. S. Co.*, 5 Ch. D. 282. See also notes to sec. 65, and 29 Sol. Jour. 178, 199.

Costs of a hostile action against a trustee seeking to charge him with costs on account of misconduct were not within the old rule of Chancery that the plaintiff in an administration suit is entitled *primâ facie* to costs out of the fund. Such costs are in the discretion of the Court and therefore an order as to them is not appealable: *Williams* v. *Jones*, 34 Ch. D. 120.

The rule that a trustee's costs are payable between solicitor and client is not confined to cases where he is brought into Court against his will: *Blakeley* v. *Ingram*, 9 C. L. T. 143.

Trustees and executors are, in litigating with third persons, in the same position in regard to their liability to costs, as parties litigating in their own right: *Smith* v. *Williamson*, 13 P. R. 126; *G. W. Ry.* v. *Jones*, 15 Gr. 355.

Where one of several plaintiffs fails.

1171. When several plaintiffs have been joined, and some or one of them only have or has been found entitled to relief the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who has or have not been found entitled to relief, unless the Court in disposing of the costs of the action otherwise orders. J. A. Rule 89, *part*.

Same in effect as Eng. R. 1875, O. 16, r. 1, (1883, R. 123), which was taken from s. 19 of the C. L. P. Act of 1852: see Day's C. L. P. Act.

In an action brought by two plaintiffs on separate causes of action, judgment was in favour of the defendants against one plaintiff and for the other against the defendants. Costs were to abide the event of the action. It was held that the defendants were entitled to the costs occasioned by joining the unsuccessful plaintiff and that the successful plaintiff was entitled to the general costs of the action: *Viscount Gort* v. *Rowney*, 17 Q. B. D. 625.

Where the plaintiff succeeds against one defendant and fails against another, the costs of the successful defendant must be borne by the plaintiff and not by the unsuccessful defendant: *Child* v. *Stenning*, 7 Ch. D. 413; 11 Ch. D. 82.

In Inferior Court actions brought in High Court.

1172. In case an action of the proper competence of a County Court is brought in the High Court, or in case an action of the proper competence of a Division Court is brought in the High Court, or in a County Court, and is tried by jury, and the Judge or Court makes no order respecting the costs, the plaintiff shall recover only County Court costs, or Division Court costs, as the case may be, and the defendant shall be entitled to tax his costs of suit as between solicitor and client, and so much thereof as exceeds the taxable costs of defence which would have been incurred in the County Court or Division Court, shall, on entering judgment, be set off and allowed by the Taxing Officer against the plaintiff's County Court or Division Court costs to be taxed, or against the costs to be taxed and the amount of the verdict if it be necessary, and if the

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amount of costs so set off exceeds the amount of the plaintiff's verdict and taxed costs, the defendant shall be entitled to execution for the excess against the plaintiff. See R. S. O. 1877, c. 50, s. 347, and J. A. Rule 512, *first part*. Rule 1172.

(*a*) The event shall in such case be to recover costs according to such scale, subject to such rights of set-off as to costs, as are herein mentioned. J. A. Rule 512, *last part*. The "event" in such case.

No corresponding Eng. R.

This *Rule* applies to cases tried by jury only. It reproduces the practice under R. S. O. 1877, c. 50, s. 347, and was passed to affirm the continued application of the C. L. P. Act, s. 347, about the application of which doubts arose, as original *Rule* 428 (now 1170), did not touch the question of scale, and had been held in *Garnett* v. *Bradley*, 3 App. Cas. 944, to have repealed all Statutes as to costs: *Whitehead* v. *Tait*, 3 C. L. T. 122.

Before this *Rule*, unless the Judge made an order as to costs, the plaintiff if he recovered anything was entitled to costs of the Court in which the action was brought, "the event," which the costs are, under *Rule* 1170, to follow, being in his favour: see *Parsons* v. *Tinling*, 2 C. P. D. 119; *McGarren* v. *Stratton*, 11 P. R. 87; *Wilson* v. *Roberts*, 11 P. R. 412, following *Garnett* v. *Bradley*, 3 App. Cas. 944. The principle of these cases may still apply in all actions where a trifling amount is recovered but the action could not have been brought in an inferior Court; it will also apply to give to the successful party all costs which are "costs in the cause," and so depending upon the event unless the Judge otherwise orders; see *Copeland* v. *Blenheim*, 11 P. R. 54, where the costs of a trial at which the jury disagreed were held to be taxable to the successful party.

Now, however, since this *Rule* 'the event' includes amongst other things the scale on which costs may be taxable: see also *Hyde* v. *Beardsley*, 18 Q. B. D. 24; *Andrews* v. *City of London*, 12 P. R. 44. The scale on which the plaintiff's costs will be taxable, if no order is made by the Judge, will be that of the lowest Court in which the action was capable of being brought, and the defendant will have the right to set-off the extra costs incurred by him as in the *Rule* mentioned: see *Ireland* v. *Pitcher*, 11 P. R. 403.

Clause (*a*) of the *Rule* defines in such case the "event" referred to in *Rule* 1170.

The *Rule* only applies in cases within the proper competence of a County or Division Court. In an action of libel which cannot be brought in those Courts, if the plaintiff recovers anything, costs follow, and he cannot be deprived of them except for good cause: see *Wilson* v. *Roberts*, 11 P. R. 412; *Wellbanks* v. *Conger* (2), 12 P. R. 447; and the Court cannot look behind the finding of the jury and deprive the plaintiff of costs on the ground that he was not really entitled to recover: *Ib.*, and see *Wight* v. *Shaw*, 19 Q. B. D. at p. 398.

For the purposes of the scale on which costs are to be taxed the claim and counter-claim are to be treated as separate actions: see *Amon* v. *Bobbett*, 22 Q. B. D. 543, where a plaintiff recovering on his claim an amount within the jurisdiction of a County Court recovered costs on that footing, but succeeding on the defendant's counter-claim to an amount within the High Court jurisdiction he recovered costs of his defence to the counter-claim on the High Court scale.

In an action tried by a jury where the defendant recovers on a counter-claim, the costs should be on the scale of the Court in which the action is brought by the plaintiff, unless the Judge for good cause makes a different order; the fact that the recovery is for a sum within the jurisdiction of an inferior Court is not

Rule 1172. good cause for such an order; *Foster* v. *Viegel*, 13 P. R. 133. This *Rule* seems to differ from *Rule* 1219, in this respect.

The jurisdiction of the County Courts is defined in R. S. O. 1887, c. 47, ss. 18-22.

Where the title to land is in question, though the amount recovered be within the jurisdiction of a County or Division Court, the plaintiff is entitled to costs on the Higher scale, unless the case is one within *Rule* 1219: *Worman* v. *Brady*, 12 P. R. 618.

Neither an action for use and occupation: see *Re Crawford* v. *Seney*, 17 Ont. 74; nor an action for trespass to land, necessarily brings in question the title to land and so ousts the jurisdiction of the County or Division Court: *Bailey* v. *Bleecker*, 5 C. L. J. 99; *Richardson* v. *Jenkins*, 10 P. R. 292: see *Graham* v. *Spettigue*, 12 Ont. App. 261; *McNeil* v. *Haines*, 13 P. R. 115.

Where the plaintiff's title is denied on the pleadings, and he is required at the trial to prove it, the title to land is brought in question: *Worman* v. *Brady*, *supra*; *Danaher* v. *Little*, Q. B. D. 12 Feb., 1890.

The County Court has jurisdiction to investigate accounts and claims of suitors, however large, provided the amount sought to be recovered does not exceed the sum prescribed by the Act: *Bennett* v. *White*, 13 P. R. 149; where, therefore, a plaintiff claimed $169.72 as a balance on transactions comprehending more than $1000, and defendant counter-claimed for $1325.74, it was held that the plaintiff was entitled to costs on County Court scale: *Ib.* The Judge on an appeal from the taxing officer seems to have dealt with the costs as if sitting at the trial, the case having been tried without a jury.

The plaintiff sued for $228.20, the balance of a claim for $1828.20, and obtained a verdict for $228.20. It was held that the amount was liquidated by the act of the parties within R. S. O. 1877, c. 43, s. 19, (2); and the plaintiff without a Judge's certificate was entitled to County Court costs only: *Durnin* v. *McLean*, 10 P. R. 295. Where the suit was to recover "$272.03 the return of moneys received by defendant belonging to plaintiff, being the proceeds from sales of goods in plaintiff's shop, as follows:—" it was held that the sum was not so ascertained, and the action was not with the jurisdiction of a County Court: *Robb* v. *Murray*, 16 Ont. App. 503.

Where the defendant had signed a writing in these words: "If anything happens to me sudden, this is to insure my son Joseph (*the plaintiff*), to take $100 from his sister Hannah's share, to repay money lent to her; if I live till this time next year I will settle it with him." This was held to be a sufficient ascertaining of the amount due by the signature of the defendant to permit of the claim being recovered in a Division Court: *Moses* v. *Moses*, 13 P. R. 12, 144.

Where an action was brought to recover damages for wrongfully refusing to deliver up a promissory note for $300 to the plaintiff, and the plaintiff recovered $314, the amount of the note and interest, it was held that the action was within the jurisdiction of the County Court: *Johnson* v. *Kenyon*, 13 P. R. 24.

A County Court however has no jurisdiction to give a judgment for an amount within its jurisdiction, when it is arrived at not by any settlement or statement of account between the parties, but as being the balance due upon a disputed account, the total amount of which was beyond the jurisdiction of the Court: *Sherwood* v. *Cline*, 17 Ont. 30.

Where the action is tried by a jury and the verdict is rendered for a sum within the Division Court jurisdiction, the Judge may for good cause order costs to be paid to the plaintiff on the Division Court scale, and may deprive the defendant of any right of set-off: *Livernois* v. *Bailey*, 12 P. R. 525; 13 P. R. 62; the provisions of this *Rule* only apply where the Judge "makes no order"; but unless good cause exists the Judge can make no such order nor any order, the costs must follow the event and be taxable on the scale applicable, with the right of set-off in the cases mentioned in this *Rule*: *Callicott* v. *McKinlay*, 9 C. L. T. 106.

The jurisdiction of the Division Courts is defined in R. S. O. 1887, c. 51, ss. 69-79.

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In an action in the High Court for trespass to lands and removal of fixtures the plaintiff recovered a verdict for $50. It was held that Division Court costs were taxable to the plaintiff and full costs to the defendant: *Richardson* v. *Jenkins*, 10 P. R. 292. **Rules 1173-1175.**

Costs in cases within competence of Division Court but brought in County Court.

1173. The plaintiff in any action which is of the proper competence of a Division Court but is brought in a County Court shall not be entitled to full County Court costs, if judgment is recovered in such action by default for want of an appearance or defence, or on the ground only of a commission for the taking of evidence out of the Province having been issued therein or necessary, whether judgment be recovered by default or otherwise. R. S. O. 1877, c. 50, s. 349.

Costs in actions *prima facie* within the jurisdiction of inferior Courts when judgment entered without trial, how to be taxed.

1174. In every case in which judgment is entered without trial, or the decision of a Court or Judge, or order as to the costs, and where the amount of judgment, *primâ facie*, appears to be within the jurisdiction of an inferior Court, the taxing officer shall not tax full costs of the High Court, without proof on affidavit to his satisfaction that the action was properly instituted therein; and if properly within the jurisdiction of the County, or Division Court, then the taxation shall be on the scale of fees in such Court. J. A. Rule 511. 48 V. c. 13, s. 22.

This *Rule* would appear to apply only where there has been no trial, not to cases where there has been a trial but no order made as to costs: see *Andrews* v. *London*, 12 P. R. 44; in cases tried without a jury no costs are taxable without a decision of a Judge in *Re Great Western Advertising Co.* v. *Rainer*, 9 P. R. 494; and *Rule* 1172 is applicable in cases tried by jury.

No set-off of costs (as under *Rule* 1172) is contemplated by this *Rule* where the plaintiff gets only costs according to the County or Division Court scale: *Andrews* v. *City of London*, 12 P. R. 44.

To determine the proper scale of fees, it is the duty of the Taxing Officer to look at the pleadings, and if necessary to receive affidavits so as to ascertain the facts of the case: *White Sewing Machine Co.* v. *Belfry*, 10 P. R. 64.

Where a verdict by consent for $1 to be altered according to the result of a reference agreed on, costs to abide the event, it was held that it was a judgment without a trial and within this *Rule*: *Andrews* v. *City of London*, 12 P. R. 44.

Non-appearance, subsequent particulars.

1175. When the plaintiff after non-appearance to a writ not specially indorsed delivers particulars of his claim under Rule 707, he shall not be entitled to the costs of the statement of the particulars of his claim, unless the taxing officer is satisfied that there was good reason for not specially indorsing the writ, so as to render unnecessary filing and serving such statement. J. A. Rules 74, 497.

See note to *Rule* 707.

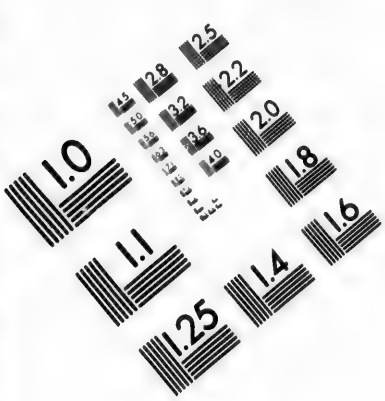
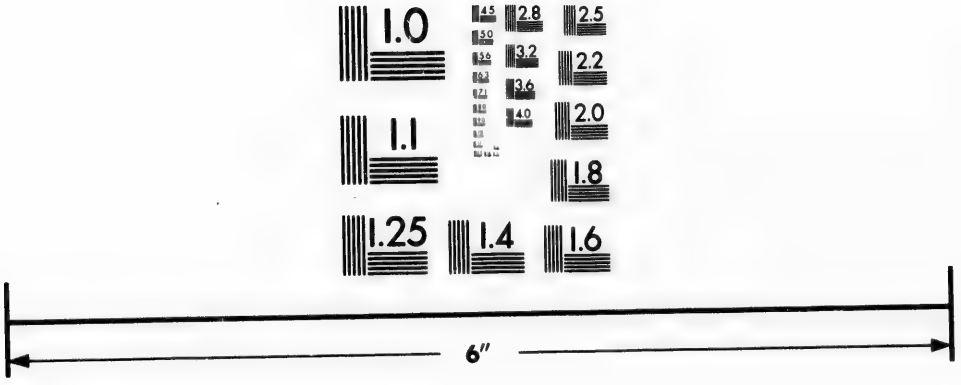
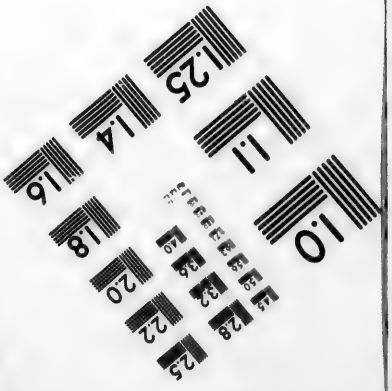




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Rules 1176-1178.

Where several actions on bonds, etc.

1176. Where several actions are brought on one bond, recognizance, promissory note, bill of exchange, or other instrument, or where several actions are brought against the maker and indorser of a note, or against the drawer, acceptor or indorser of a bill of exchange, there shall be collected or recovered from the defendant the costs taxed in one action only at the election of the plaintiff, and the actual disbursements only in the other actions, unless the Court otherwise orders; but this provision shall not extend to any interlocutory costs in the progress of an action. R. S. O. 1877, c. 50, s. 350.

Costs of preliminary examination.

1177. The costs of every examination of parties or of officers of corporations before the trial, or otherwise than at the trial of an action, shall be costs in the cause, but the Court or Judge in adjusting the costs of the action shall at the instance of any party inquire, or cause inquiry to be made, into the propriety of having made such examination; and if it is the opinion of the Court or Judge, or the taxing officer, as the case may be, that such examination has been had unreasonably, vexatiously, or at unnecessary length, the costs occasioned by the examination shall be borne in whole or in part by the party in fault. The taxing officer may make such inquiry without any direction. J. A. Rule 220.

The first part of this *Rule* making the costs, costs in the cause was new and superseded R. S. O. c. 50, s. 167. The remainder of the *Rule* is the same in principle as the Eng. R. 1875, O. 31, r. 2, varying chiefly by referring to the examination, instead of referring to interrogatories, by which the examination is taken under the English practice.

See observations of Ferguson, J., as to examinations for discovery, 21 C. L. J. 66.

Sum in gross may be allowed.

1178. Where the Court, or Judge, or officer exercising jurisdiction in Chambers or the Master deems it proper to award costs to either party, the judgment or order may direct payment of a sum in gross in lieu of taxed costs, to be fixed by himself or the officer who settles the order, and direct by and to whom such sum in gross is to be paid. See Chy. O. 225, 304, 305, 564, 585, 586.

In actions for the administration of the estate of a deceased person, no costs should be allowed to creditors whose claims are rendered pursuant to an advertisement, except when formal proof is also required and given: see *Rule* 976, *et seq.*, claimants attempting to prove claims as creditors, or as heirs at law, or next of kin, who fail to establish their claim, may be ordered to pay the costs occasioned to the opposite party by their claim. In case of a deficiency of assets

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the costs of creditors proving claims are to be added to their debts and paid pro- Rules portionately, and such costs are not entitled to be paid in priority to the debts : 1179-1181. *Re Ætna Insurance Co.*, 17 Gr. 160; *Morshead* v. *Reynolds*, 21 Beav. 638; *Canham* v. *Neale*, 26 Beav. 266, Morgan and Davy, pp. 130-1.

In an action for dower a lump sum for costs was awarded to the plaintiff : *Ryan* v. *Fish*, 4 Ont. 335, 344.

Under this *Rule* the Court may award a lump sum, not only on interlocutory Court may applications, but also for the general costs of the cause, or may award costs award according to the lower scale, even in cases which were beyond the former equit- lower scale able jurisdiction of County Courts : *Palmer* v. *Postle*, (Chy.) before full Court, costs, in a 7th Dec. 1878 ; see Reg. Lib. of that date. case not formerly

The jurisdiction of the County Court was excluded in many cases, where, within C. C. nevertheless, the amount in controversy was very insignificant : see note to jurisdic- *Rule* 1219. Under the powers conferred by this *Rule* the Court may award tion. costs on the lower scale, even in cases not within the provisions of *Rule* 1219.

1179. Where the official guardian or other guardian of an infant, lunatic, or person of unsound mind, is entitled to costs, or against any party to an action or proceeding, the Court or Judge may order the successful adult party, if any, to pay such costs and add them to his own. Costs of guardian.

1180. The costs of any application for an attachment of debts, and of any proceedings arising from, or incidental to, such application, [including examination of the debtor or other person liable to examination,] shall be in the discretion of the Court or a Judge. See J. A. Rule 378. Costs of attaching debts.

This is to the same effect as the Eng. R. 1875, O. 45, r. 10 (1883, R. 612), and is the same in substance as R. S. O. 1877, c. 50, s. 321, except the words in brackets, which are not in the English Rule or the Statute. Without them it was held in *Ginty* v. *Rich*, 7 P. R. 319, that an order for the payment of the costs of the debtor's examination could not be made on an application for that purpose, though it might pershaps be made by way of punishment, on an application to commit.

1181. Where the costs of one defendant ought to be paid by another defendant, the Court may order payment to be made by the one defendant to the other directly ; and it is not to be necessary to order payment through the plaintiff. Chy. O. 319. Costs may be ordered to be paid by one defendant to another.

Under *Rule* 1170 the costs of, and incident to, all proceedings, are in the dis- Costs in cretion of the Court, but a trustee, mortgagee, or other person entitled by the discretion rules of Equity to costs out of a particular estate, or fund, cannot be deprived of Court. thereof.

A defendant is usually liable to pay costs to his co-defendant, when the latter Costs be- is an innocent party, and is necessarily brought into the litigation in order to tween co- enable the plaintiff to obtain complete relief in the action : see *McLean* v. *Grant*, defen- 20 Gr. 76. Formerly at Law there was no practice, authorizing a judgment to dants. be given against a defendant, for the payment of the costs of a co-defendant either directly or indirectly : and even in Equity, prior to Chy. Ord. 319, from which this *Rule* is taken, the Court of Chancery was accustomed only to order such costs to be paid by the circuitous process of directing the plaintiff to pay

Rules 1182-1185.

them, and add them to his own costs. In interpleader proceedings by sheriffs, the costs of the sheriff are to be included in the costs of the successful party under *Rule* 1158.

The Court has ordered a defendant to pay a co-defendant's costs, even though the action was dismissed: *Church* v. *Fuller*, 3 Ont. 417, but a successful defendant cannot be ordered to pay the plaintiff's costs: *Mitchell* v. *Vandusen*, 14 Ont. App. 517; *Wills* v. *Corman*, *Ib.*, 656. Nor can the plaintiff be ordered to pay the costs of a third party brought in by the defendant: *Tomlinson* v. *Northern Ry. Co.*, 11 P. R. 419; *Witham* v. *Vane*, 44 L. T. N. S. 718; but the defendant may be ordered to pay them: *Dawson* v. *Shepherd*, 42 L. T. N. S. 611; and such an order may be refused: *Tomlinson* v. *Northern Ry. Co.*, 11 P. R. 526.

When a plaintiff succeeds against one defendant and fails against another, the costs of the successful defendant must be borne by the plaintiff and not by the unsuccessful defendant: *Child* v. *Stenning*, 7 Ch. D. 413; 11 Ch. D. 82. The Court may order a third party to pay costs to the defendant including those which the defendant has been ordered to pay the plaintiff: *Hornby* v. *Caldwell*, 45 L. T. N S. 781.

Costs of H. C. case in C. C.

1182. The costs on all proceedings where a High Court case is tried in a County Court or a County Court case in the High Court, shall be the usual costs of such cases in the Court in which the action was brought. R. S. O. 1877, c. 49, s. 43.

Costs of shorthand notes, to be costs in the cause.

1183. The disbursements incurred in any cause, matter or proceeding in obtaining copies of the evidence for the purpose of moving against a judgment or for a new trial, shall, unless the Court otherwise orders, be costs in the cause to the party obtaining and paying for the same. C. L. Rules 10th March, 1876, 3.

Taxing officer to allow reasonable sum for shorthand writer in cases not provided for.

1184. In cases not otherwise provided for, the Taxing Officer may in any cause, matter, or other proceeding, allow a reasonable sum for the expense of a short-hand writer, on the certificate of the Judge before whom the examination of any witness or witnesses in any such cause, matter, or other proceeding takes place. C. L. Rules 10th March, 1876, 7.

Official stenographers are now provided for all the ordinary sittings of the Courts. This *Rule* applies when it becomes necessary for the parties specially to engage a stenographer.

Application for interim costs, when it may be made.

1185. No application for costs, in an alimony action, is to be made until the time for delivering the defence has expired, and no costs shall be ordered to be paid *de die in diem* by the defendant beyond the amount of the cash disbursements actually and properly made by the plaintiff's solicitor. R. S. O. 1877, c. 40, s. 47; Chy. O. 489.

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The cash disbursements do not include fees paid to agents for solicitors' services, but they do the fees to counsel, even when the solicitor or his partner is the counsel: *Magurn* v. *Magurn*, 10 P. R. 570; *Bradley* v. *Bradley*, 21 C. L. J. 141; 10 P. R. 571; and see *Ingram* v. *Ingram*, 10 P. R. 569; but in *Lalonde* v. *Lalonde*, 11 P. R. 143, the payment of a prospective fee to counsel who was also the plaintiff's solicitor was refused. Where a cause was entered for trial it was ordered to stand over, until the defendant had paid to the plaintiff a sum sufficient to pay plaintiff's witnesses: *Haffey* v. *Haffey*, 7 P. R. 137.

In *Otway* v. *Otway*, 59 L. T. N. S. 153; 13 P. D. 141, a doubt was expressed as to whether the rules respecting a wife's costs in litigation with her husband were affected by the Married Women's Property Act.

Nor any costs by defendant beyond disbursements where plaintiff fails.

1186. In case the plaintiff in an alimony action fails to obtain a judgment for alimony, no costs beyond the amount of the cash disbursements actually and properly made by the plaintiff's solicitor, shall be ordered to be paid by the defendant. R. S. O. 1877, c. 40, s. 48.

When a plaintiff *pendente lite* returned to her husband, on the petition of her solicitor the defendant was ordered to pay the plaintiff's costs between solicitor and client: *Leonard* v. *Leonard*, 9 P. R. 450; *Moore* v. *Moore*, 10 P. R. 284; 20 C. L. J. 291; but in *Ringrove* v. *Ringrove*, 10 P. R. 299, 596; Proudfoot, J. refused to follow those cases and his decision was subsequently affirmed by the Divisional Court: and see *Thompson* v. *Thompson*, 57 L. T. N. S. 374; but see *Ferris* v. *Ferris*, 7 Ont. 496; *The Friedeburg*, 10 P. D. 112; *Rule* 1170. As to what come within the term 'cash disbursements' see *Rule* 1185, note.

Commission to be allowed in lieu of taxed costs in administration and partition.

1187. In all actions or proceedings instituted for administration, or partition, or administration and partition, unless otherwise ordered by the Court or a Judge, instead of the costs being allowed according to the tariff, each person properly represented by a solicitor, and entitled to costs out of the estate,—other than creditors not parties to the action or proceeding—shall be entitled to his actual disbursements in the action or proceeding, not including counsel fees, and there shall be allowed for the other costs of the suit payable out of the estate, a commission on the amount realized, or on the value of the property partitioned in the action or proceeding, which commission shall be apportioned amongst the persons entitled to costs, as the Judge or Master thinks proper. Such commission shall be as follows:

On sums not exceeding $500	20 per cent.
for every additional $100 up to $1,500	5 " "
for every additional $100 up to $4,000	3 " "
for every additional $1,000 up to $10,000	2½ " "
for every additional $1,000	1 " "

and such remuneration shall be in lieu of all fees, whether between "party and party," "as between solicitor and client," or "between solicitor and client." Chy. O. 643.

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Rule 1187. Commission in lieu of costs, who entitled to share in.

The commission payable under this *Rule* is divisible only between those who are strictly parties to the action, properly represented by a solicitor, and entitled to costs out of the estate. Persons not originally made parties to the action, but served with a copy of the judgment under *Rule* 322, are not thereby made parties to the action, but are merely enabled to attend the proceedings, and are bound thereby as though they were actually parties: *English* v. *English*, 12 Gr. 441. In a suit by a residuary legatees, the plaintiff sufficiently represents the other residuary legatees, and they are not entitled as of course to costs out of the estate occasioned by their appearing by another solicitor in the Master's office: *Gorham* v. *Gorham*, 17 Gr. 386. Creditors who are neither plaintiffs, nor defendants, are also excluded from participation in the commission, their costs are disposed of as formerly. The commission is to cover both the solicitors' fees, and the fees to counsel. It is of course not intended to cover costs ordered to be paid by one party to another. It is intended to cover only costs payable out of the estate. Costs are to be apportioned under this *Rule* in proportion to the work done by, and responsibility imposed on, the solicitors engaged: *Dodge* v. *Clapp*, 8 P. R. 388; *Campbell* v. *Campbell*, 8 P. R. 159; 16 C. L. J. 16. The work done in the Master's office is not alone to be considered in making the apportionment of the commission: *Cameron* v. *Lennox*, 9 P. R. 304. The Master should also consider the circumstances under which the action is brought, when the judgment has been pronounced by himself, and should not award commission to parties who ought to be deprived of, or ordered to pay, costs. In ascertaining the commission, if the estate has been sold subject to a mortgage, the amount of the mortgage is not to be included as part of the "amount realized": *Re McColl*, *McColl* v. *McColl*, 8 P. R. 480; but in *Re Brown*, *Brown* v. *Brown*, 19 C. L. J. 367, it was held that the commission is to be computed on the total amount accounted for, and not merely on the balance found in the accounting parties' hands; and see *Re Batt*, *Wright* v. *White*, 9 P. R. 447.

Mode of apportionment.

On what sum to be estimated.

Ordinarily no costs will be allowed in addition to the commission and disbursements: *Re Fleury*, *Fleury* v. *Fleury*, 9 P. R. 87; and the Court refused to give taxed costs when the estate was large, but insolvent; *Re Stuchig Anthes* v. *Dewar*, 10 P. R. 236; 20 C. L. J. 193. The Master has no power to award taxed costs under this *Rule;* a Judge of the High Court alone has that power: *Hendricks* v. *Hendricks*, 13 P. R. 79.

Where the Master finds, in any administration action commenced before himself, that any of the parties to the action should pay the whole, or any part, of the costs of the action, instead of their being borne by the estate, it would seem that he should so direct: *Rule* 973. But in such a case it would be convenient also to apportion the commission, and ascertain the disbursements payable out of the estate, in case the costs ordered to be paid by any of the parties personally, could not be recovered from them.

Where taxed costs allowed in lieu of commission.

Where the principal part of the costs of an action are ordered to be paid personally by one or more of the parties, and the costs of only a small proportion of the work done, are chargeable against the estate, it does not appear that in such a case the full amount of the commission here provided would be payable, and the power reserved to the Judge to make other order would probably be exercised. Cases might arise where from special circumstances, the commission here provided would be clearly inadequate, and in such cases too it would be possible that the power to make other order as to the costs would be exercised.

An agent employed by a principal solicitor who is paid by commission, is liable to have his bill taxed: *Re Idington*, 8 P. R. 566.

Costs of actions unnecessarily prosecuted may be disallowed.

1188. When two or more actions or proceedings are instituted for administration, or partition, or sale, the Judge may, in his discretion, disallow all or any of the costs of any action or proceeding which in his opinion has been unnecessarily prosecuted; where any one of the parties,

constituting a class formed by a Master for representation in his office by one solicitor, insists on being represented by a different solicitor, such party is personally to pay the costs of his own solicitor of and relating to the proceedings before the Master, with respect to which such nomination has been made, and all such further costs as are occasioned to any of the parties by his being represented by a different solicitor from the solicitor so nominated. Chy. O. 218, and 644.

Rules 1189, 1190.

Party insisting on being represented by a different solicitor to pay costs occasioned thereby.

Under this *Rule* the whole costs of an action may be disallowed if it have been commenced, or prosecuted, unnecessarily, and not only the costs of the plaintiff but those of defendants as well; the latter having power under *Rule* 990 to prevent the prosecution of more than one suit.

Costs, unnecessary, not to be allowed.

A party unnecessarily employing a separate solicitor would not be entitled to participate in the commission referred to in *Rule* 1187.

Under *Rule* 40 the Master has power to classify the parties, and require the parties constituting each or any class to be represented by the same solicitor, and where he appoints a solicitor to act for a class, all the members of that class are bound by the acts of the solicitor so appointed, and cannot repudiate them unless they have refused to be so represented and have appointed a separate solicitor: *Re McConnell*, 3 Ch. Ch. 423. But where a solicitor was appointed *ex parte* to represent creditors, it was held that the solicitor could not recover costs against creditors who had not proved their claims and who had no notice of his appointment: *Re Monteith, Merchants Bank* v. *Monteith*, 12 P. R. 288; 23 C. L. J. 415.

After the appointment of a solicitor to act for a class, the separate costs of any member of that class, subsequently incurred, will not ordinarily be allowed against the estate under administration: *Re Ætna Insurance Co.*, 17 Gr. 160.

The Master should not appoint a separate solicitor for a class already sufficiently represented by the plaintiff; and where the plaintiff *primâ facie* represents (see *Rule* 320) the class, if the Master appoint a separate solicitor he should state his reason for so doing in his report: *Gorham* v. *Gorham*, 17 Gr. 386.

1189. When anything in the course of an action or reference which ought to have been admitted, has not been admitted, the party who neglected or refused to make the admission may be ordered to pay the costs occasioned by his neglect or refusal. See Chy. O. 234. J. A. Rule 163.

Costs of not admitting.

See Eng. R. 1875, O. 22, r. 4 (1883, R. 242).

The Master has jurisdiction to make the order as regards proceedings pending before him: see *Rule* 1170.

Rule 400 requires each party to admit such of the material allegations in the pleading of the opposite party as are true.

1190. No costs of proving a document shall be allowed unless a notice to admit has been given under Rule 617, except when the omission to give notice is a saving of expense.

Notice to admit.

Rules 1191-1193.

Costs of application for extension of time.

1191. The costs of an application to extend the time for taking any proceeding shall, in the absence of an order by the Court or a Judge directing by whom they are to be paid, be in the discretion of the taxing officer. J. A. Rule 463.

Same as Eng. R., April, 1880, R. 65; 1883, O. 65, r. 27 (24).

Certain references or examinations not to be before officer ordering same.

1192. In actions in the High Court of Justice no reference or examination for the purpose of discovery, or examination of a judgment debtor, on which fees may be payable otherwise than in law stamps, shall be taken before the Judge of the County Court, or local Judge of the High Court, or Local Master being also a Judge of the County Court, by whom the order or appointment for such reference or examination has been made.

(*a*) References in administration and partition matters under these Rules, and other like references in mortgage actions are excepted from the operation of this Rule. J. A. Rule 549.

Tender of costs, on service of petition.

1193. Where a petition in any action or matter is served, and notice is given to the party served that in case of his appearance in Court his costs will be objected to, and accompanied by a tender of costs for perusing the same, the amount to be tendered shall be $5. The party making the payment shall be allowed the same in his costs, provided the service was proper, but not otherwise; but this Rule is without prejudice to the rights of either party to costs, or to object to costs where no such tender is made, or where the Court or Judge shall consider the party entitled, notwithstanding such notice or tender, to appear in Court. J. A. Rule 434.

This *Rule* corresponds with the first part of the Eng. R., Aug. 12, 1875, "Costs," R. 17; 1883, O. 65, r. 27 (19), except that the latter is confined to the Chy. Div., and the amount to be tendered is different.

This *Rule* only applies in the case of a petition.

Where the procedure pointed out by this *Rule* has not been followed the party served will be entitled to attend, and may be allowed taxed costs: *Gardner* v. *Burgess*, 13 P. R. 250; and see *Rule* 1194.

In *Re Sutton*, 21 Ch. D. 855, trustees respondents to a petition under *The Trustee Relief Act*, who had been tendered costs under the corresponding English Rule, were refused costs of appearing as their appearance was not necessary to give the Court information. In *Re English's Settlement*, 60 L. T. N. S. 44, a trustee was allowed costs; no tender of a sum for costs was there made. In *Re Vardon's Trusts*, 33 W. R. 297, executors were given costs notwithstanding the acceptance of the tender.

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In *Somes* v. *Martin*, W. N. 1882, 113, mortgagees of interests of persons entitled under a will having been served and not having been tendered costs, were allowed costs of appearing on a petition for construction of a will. **Rules 1194, 1195.**

See also *Campbell* v. *Holyland*, 7 Ch. D. 166.

Where a trustee appeared on an appeal though not notified he was not allowed costs: *Arden* v. *Deacon*, 51 L. T. N. S. 712.

1194. Where any party appears upon any application or proceeding in Court or at Chambers in which he is not interested, or upon which, according to the practice of the Court, he ought not to attend, he is not to be allowed any costs of such appearance, unless the Court or Judge shall expressly direct such costs to be allowed. J. A. Rule 437. Unnecessary appearance in Court or at Chambers.

Identical with Eng. R. 12th Aug., 1875, "Costs," R. 21; 1883, O. 65, r. 27 (23). See Eng. Chy. Ord. 40, r. 28 (Morgan Orders, 4th ed., p. 389), Morgan & Wurtzburg on Costs, 69.

Where the costs of a sheriff in an interpleader matter had been ordered to be paid by the claimant, the claimant appealed, contending that the execution creditor should pay them. Both were able to pay. The sheriff was not allowed costs of appearing on the appeal: *Ex. p. Webster, Re Morris*, 22 Ch. D. 136.

In *O'Brien* v. *Bull*, 19 C. L. J. 211, a sheriff unnecessarily served with notice of motion for final order in an interpleader matter was allowed costs of appearing: see also *Robertson* v. *Grant*, 3 Chy. Ch. 331.

Costs of a person appearing to object that there is no jurisdiction: *Great Northern* v. *Inett*, 2 Q. B. D. 284; or *quia timet* that by mistake an order will be made against him: *Lucas* v. *Fraser* 9 P. R. 319; will be given, but not of a person not interested and appearing merely to ask costs: *Campbell* v. *Holyland*, 7 Ch. D. 175; *Re Arden*, 33 W. R. 460; *Waller* v. *Claris*, 11 P. R. 130.

The Court cannot prevent the appearance of persons entitled to appear, but may sometimes protect an estate by allowing only one set of costs to several parties: *Lees* v. *Stanley*, 28 Sol. Jour. 415. In *Re English's Settlement*, *supra* the costs of a trustee were allowed, he being properly served.

1195. The Court or Judge may, at the hearing of any action or matter, or upon any appeal, application or proceeding in any action or matter in Court or at Chambers, and whether the same is objected to or not, direct the costs of any writ, pleading, petition, affidavit, evidence, notice to cross-examine witnesses, account, statement, or other proceeding, or any part thereof, which is improper, unnecessary, or contains unnecessary matter, or is of unnecessary length, to be disallowed; or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof, as he shall find to be improper, unnecessary, or to contain unnecessary matter, or to be of unnecessary length. In such case the party whose costs are so disallowed shall pay the costs occasioned to the other parties by such unnecessary proceeding, matter, or length; and in any case where such question shall not Disallowance of costs of unnecessary proceedings.

Rule 1196. have been raised before and dealt with by the Court or a Judge, the taxing officer may look into the same (and, as to evidence, although the same may be entered as read in any judgment or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so. *See* Chy. O. 71. J. A. Rule 435 ; App. O. 10.

Same as Eng. R. 12th Aug., 1875, "costs," R. 18; 1883, O. 65, r. 27 (20), and founded on Eng. Chy. Order 40, Rules 9 & 10; see Morgan Orders, 4th ed., 581.

The Court may on its own motion exercise the powers given by this *Rule* in regard to costs "whether the same is objected to or not": see *Brown* v. *Burdett*, 37 Ch. D. 207.

The number of witnesses to prove a point is a matter in the discretion of the Taxing Officer; and so as to witnesses called to establish something on which the party calling them fails: *Latour* v. *Smith*, 13 P. R. 214.

The case stated for the purpose of an appeal should only contain as much of the proceedings as is necessary to raise the questions involved in the appeal: see *Parsons* v. *Standard Insurance Co.*, 4 Ont. App. at p. 330, *per* Burton, J.A., and see *Sickles* v. *Morris*, 1 Charl. Notes of Cases, 174.

Where the notes of the evidence have been lost, the Court of Appeal may allow the evidence to be taken over again: *Ex parte Firth, Re Cowburn*, 19 Ch. D. 419 ; 51 L. J. Chy. 473.

The Master must inquire on taxation into the propriety of proceedings in an action, though not specially directed to do so; and he cannot refuse to do so where an order is made to stay proceedings on payment of costs: *Baines* v. *Wormsley*, 47 L. J. Chy. 844 ; 39 L. T. N. S. 85.

Where an appeal was brought from a Master's report, in order to raise a question which was not the subject of appeal, a substantive motion was also made concurrently for the same relief, though the relief was given no costs were given of either application: *Fouchier* v. *St. Louis*, 13 P. R. 318.

For the practice as to taxation of costs of an abandoned motion, or on discontinuance of action, see *Harrison* v. *Leutner*, 16 Ch. D. 559.

A direction in an order for a commission in the common form: see Form No. 129, in App., that the costs are to be costs in the cause, does not preclude the taxing officer from disallowing the costs on the ground that the evidence has not been used: *Dominion, etc.* v. *Stinson*, 9 P. R. 177.

Costs of inspection of documents.

1196. No allowance is to be made for any order for production or any notice or inspection under any of the Rules relating to production and inspection of documents unless it is shewn to the satisfaction of the taxing officer that there were good and sufficient reasons for taking the order, giving the notice, or making the inspection. J. A. Rule 230.

The same in substance as Eng. R. Aug., 1875, R. 15; 1883, O. 65, r. 27 (17).

Costs of inspection were not allowed between party and party in *Brown* v. *Sewell*, 16 Ch. D. 517 ; *Wicksteed* v. *Biggs*, 52 L. T. N. S. 428.

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2. TAXATION.

Rules 1197-1201.

1197. Where costs are awarded to be paid, it shall be competent to a taxing officer to tax the same, without an express reference to him for that purpose. Chy. O. 316.

Taxing Officers may tax costs without express reference.

The Master or a taxing officer is not justified, without a direction from the Court, in striking a balance between cross claims for costs payable in the action: *Fouchier* v. *St. Louis*, 13 P. R. 318, except where *Rule* 1204 applies.

1198. No bill of costs where the amount claimed exceeds $30 is to be taxed by the Registrars, the Master in Ordinary, the Master in Chambers or Clerk in Chambers, but every bill exceeding that sum is in Toronto to be taxed by one of the Taxing Officers, notwithstanding anything to the contrary contained in the order for taxation. Chy. O. 310.

No bill of costs exceeding $30 to be taxed by Registrars, etc.

This *Rule* merely applies to costs taxable in Toronto, and does not in any way restrict the jurisdiction of local taxing officers.

1199. One day's notice of taxing costs, together with a copy of the bill of costs and affidavit of increase, if any, shall be given by the solicitor of the party whose costs are to be taxed to the other party or his solicitor in all cases where a notice to tax is necessary. Rules T. T. 1856, 48.

One day's notice of taxation sufficient.

1200. Notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his solicitor or guardian. Rules T. T. 1856, 50.

Notice of taxation unnecessary when defendant has not appeared.

As this *Rule* only dispenses with notice of taxation to defendants who have not appeared, it would seem to be intended that wherever a defendant has appeared, he is to be entitled to notice of taxation, and notwithstanding this *Rule* notice is necessary when the defendant has done that which is equivalent to appearing, such as consenting to a Judge's order or the like: *Lloyd* v. *Kent*, 5 Dowl. 125; Arch. Pr., 13th ed., 431.

1201. The taxing officer shall have authority to arrange and direct what parties are to attend before him on the taxation of costs to be borne by a fund or estate, and to disallow the costs of any party whose attendance the officer shall in his discretion consider unnecessary in consequence of the interest of the party in the fund or estate being small or remote, or sufficiently protected by other parties interested. J. A. Rule 440.

Parties to attend taxations.

Identical with Eng. R., Aug. 1875. "costs" R. 24; 1883, O. 65, r. 27 (27).

Rules 1202, 1203.

Defendants improperly severing are to be allowed but one set of costs without special order.

1202. Where two or more defendants defend by different solicitors under circumstances that by the law of the Court, entitle them to but one set of costs, the taxing officer, without any special order from the Court, is to allow but one set of costs; and if two or more defendants defending by the same solicitor separate unnecessarily in their defences, or otherwise, the taxing officer is, without any special order of the Court, to allow but one defence and set of costs. Chy. O. 315.

Where an action is tried against two or more defendants and the judgment is against all defendants, a defendant is not liable to to recoup the plaintiff for costs caused by so much of the separate defence of other defendants as could only be a defence to such other defendants: *Stumm* v. *Dixon*, 22 Q. B. D. 99, 529.

As to the right to contribution amongst co-defendants made jointly liable for plaintiff's costs, see *Fouchier* v. *St. Louis*, 13 P. R. 318.

Rule as to defendants joining in defence, to whom it applies.

The rule which requires defendants in the same interest to join in their defence, appears only to apply to defendants standing in a fiduciary position, either as trustees: *Farr* v. *Sheriff*, 4 Har. 528; or *cestuis que trustent*: *Pellow* v. *Brooking*, 4 L. T. N. S. 731; Sm. Pr. 837-8; but see *Crawford* v. *Lundy*, 23 Gr. 251. Thus in a suit for specific performance by a vendee against the vendor, and a subsequent vendee of the same property, it was held that the defendants might properly sever in their defence, and employ separate solicitors: *Barrett* v. *Campbell*, 7 P. R. 150. But when husband and wife severed in a partition suit, the costs were ordered to be borne by the wife's share: *Mildmay* v. *Quicke*, 46 L. J. Chy. 667.

Where one of several defendants is charged with fraud, the others are justified in severing, even though they stand in a fiduciary position: see *Connolly* v. *Hill*, 7 P. R. 441.

One defendant improperly severing.

Where defendants have severed under circumstances which, if the severance were improper, would disentitle one of them to costs *in toto*, the Master cannot act under this *Rule*, if the judgment award the defendants costs generally. The *Rule* applies only where all the defendants are to blame for the severance, and one set of costs is consequently apportionable between them: *Reid* v. *Stephens*, 3 Chy. Ch. 372.

The Taxing Officer has a discretion to allow to defendants who appear separately separate sets of costs except in the cases referred to in this *Rule*: *Boswell* v. *Coaks*, 36 Ch. D. 444. For the cases in which it is improper for defendants to sever: see Morgan & Wurtzburg on Costs, p. 124.

On appeal from a Taxing Officer as to whether defendants were entitled to separate costs, where it was not shewn that he had not exercised his discretion at all, or that he had not done so on a wrong principle, it was held that an appeal from his decision could not be entertained: *Boswell* v. *Coaks*, 36 Ch. D. 444.

Neglect to bring in or tax costs.

1203. Where any party entitled to costs refuses or neglects to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the taxing officer shall be at liberty to certify the costs of the other parties, and certify such refusal or neglect, or may allow such party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party

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being prejudiced by such refusal or neglect. J. A. Rule 441. Rules 1204, 1205.

Identical with Eng. R., Aug. 1875, R. 25; 1883, O. 65, r. 27 (28).

Set-off of costs.

1204. In any case in which a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set off, or may, if he thinks fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or the officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered. J. A. Rule 436.

Same as Eng. R., Aug. 1875, "costs" R. 19; 1883, R. 27 (21).

Under this *Rule* a discretion is allowed as to whether or not there shall be a set-off of costs in the same action where costs are awarded to and against the parties. Equitable considerations are allowed to enter into the disposal of the contention and there is no strict right in the matter: *McCarthy* v. *Cooper*, 12 P. R. 125; where a set-off was refused.

This *Rule* however does not appear to authorize the Master or taxing officer to adjust the balance due on cross claims for costs, where part of the balance is claimed in the nature of contribution for costs paid by a defendant which the plaintiff was also jointly liable to pay, but of which he has neglected to pay his share: *Fouchier* v. *St. Louis*, 13 P. R. 318.

This *Rule* does not apply to different actions between the same parties but only to costs incurred in the same action or proceeding: *Barker* v. *Hemming*, 5 Q. B. D. 609. It applies to enable costs receivable out of a fund by a party to be set off against costs payable by that party personally in the suit: *Batten* v. *Wedgwood Coal & Iron Co.*, 28 Ch. D. 317.

So where, by an award in an action, the plaintiff was ordered to pay a sum of money to the defendant, and the defendant was ordered to pay the plaintiff a part of his costs when taxed, it was held that the defendant was entitled to have the debt set off against the taxed costs, and that the right to set-off in such a case was not interfered with by the ordinary solicitor's lien for costs: *Pringle* v. *Gloag*, 10 Ch. D. 676.

A change of solicitor is immaterial if the costs are in the same proceeding: *Roberts* v. *Buée*, 8 Ch. D. 198.

As to the solicitor's lien in the same cause, see next *Rule*.

In the case of cross-judgments (not within this *Rule*), in two different proceedings, the lien of the solicitor will prevail and prevent a set-off: see *Rule* 1205: *Ross* v. *McLay*, 7 P. R. 97; *Cuthbert* v. *Commercial Travellers Association*, 7 P. R. 255; *Webb* v. *McArthur*, 4 Chy. Ch. 36; *Re Harrald, Wilde* v. *Walford*, 48 L. T. N. S. 352; 51 L. T. N. S. 441; 31 W. R. 518; *Edwards* v. *Hope*, 14 Q. B. D. 922.

Set-off of damages and costs not to prejudice solicitor's lien.

1205. No set-off of damages or costs between parties shall be allowed to the prejudice of the solicitor's lien for costs in the particular action against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same action awarded to the adverse party may be deducted. Rules T. T. 1856, 52.

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Rule 1205. The practice in England, under Rules of 1883 R. 989, is the reverse of the practice prescribed by this *Rule*, which adopts the Equity rule, as to which, see *Pringle* v. *Gloag*, 10 Ch. D. 76.

The Eng. R. is as follows:—

"989. A set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought."

Whether the Eng. R. extends to a set-off in independent actions or not, the Court has under it a discretion, to order that the set-off shall be subject to the solicitor's lien: see *Edwards* v. *Hope*, 14 Q. B. D. 922, and *Blakey* v. *Latham*, 41 Ch. D. 518.

As to the application of the *Rule*, see *Little* v. *Philpotts*, 8 Jur. N. S. 1175; *Young* v. *Hobson*, 8 P. R. 253; *Re Harrald*, 48 L. T. N. S. 352; *Barker* v. *Hemming*, 5 Q. B. D. 609; *Cuthbert* v. *Commercial Travellers Association*, 7 P. R. 255.

The Common Law *Rule* 52, from which this *Rule* is taken, was in similar terms to the English Rule 63 H. T. 1853. The words "damages and costs" in this *Rule* apply to damages and costs payable in separate actions; and it is only where a set-off of damages and costs in separate actions is sought that the lien of the solicitor is to be protected: *George* v. *Elston*, 1 Sc. 418; *Dunn* v. *West*, 10 C. B. 420; *Scott* v. *Richebourg*, 11 C. B. 447.

A set-off has been allowed of costs due by the plaintiff to one of several defendants as to whom he had failed, against damages and costs due to the plaintiff by other defendants as to whom he had succeeded, without regard to the attorney's lien: *Rawlings* v. *Sewell*, 7 Sc. 231; *George* v. *Elston*, 1 Sc. 518; *Fortune* v. *Hickson*, 1 U. C. Q. B. 408; *Scoville* v. *Noble*, 1 H. Bl. 23; *Bank of Upper Canada* v. *Thomas*, 10 Gr. 356; *Wright* v. *Chard*, 1 L. T. N. S. 182; 4 Drew. 702; but see *Wilson* v. *Switzer*, 1 Chy. Ch. 160; and this, even though the defendants appeared by different attorneys: *Lees* v. *Kendall*, 3 A. & E. 707; 5 N. & M. 340; but see *Wilson* v. *Switzer*, 1 Chy. Ch. 160.

But claims for contribution cannot be allowed by the Master or taxing officer by way of set-off: see *Fouchier* v. *St. Louis*, 13 P. R. 318; the application must be made to a Judge, *Ib.*

The Court, however, has a discretion in allowing a set-off of costs in the same action: *McCarthy* v. *Cooper*, 12 P. R. 125.

The lien of the solicitor only holds as against the opposite party to the extent of the costs between solicitors and client of the cause only, he cannot claim a general lien for all costs due him: *Stephens* v. *Weston*, 3 B. & C. 535; *Watson* v. *Maskell*, 1 Bing. N. C. 727.

In *Jenner* v. *Morris*, 11 W. R. 943, the lien of the solicitor was declared to be always subject to the equities between the parties: and see *Mercer* v. *Graves*, L. R. 7 Q. B. 499; but this view has not always been maintained by the Courts: see *Re Cleland*, 2 Chy. 808.

To the ordinary rule that a set-off of damages and costs in separate actions, will not be allowed to the prejudice of the solicitor's lien; costs payable to a trustee out of the trust estate form an exception; and when costs are ordered to be paid out of a trust fund, the lien of the solicitor of the person entitled to receive the costs will not be allowed to interfere with the set-off against the costs so payable of any moneys payable by the client to the trust estate, though the latter may be payable under a judgment recovered in a separate action: *Re Harrald*, *Wilde* v. *Walford*, 51 L. T. N. S. 441. But the ultimate balance found due by one of the partners in a partnership suit cannot be set off against costs previously ordered to be paid to him in the action, to the prejudice of his solicitor's lien: *Dawson* v. *Moffatt*, 10 P. R. 366; and see *Hieron* v. *Hobson*, 47 L. J. Chy. 574; see, however, *Brigham* v. *Smith*, 17 Gr. 512; but in this case no question of lien appears to have been raised.

Whether for the purpose of this *Rule* a claim and counter-claim are to be treated as separate actions is not very clear. In *Brown* v. *Nelson*, 11 P. R. 121, where the claim and counter-claim arose out of the same transaction, the set-off was allowed without providing for the solicitor's lien, but in *Canadian Pacific*

R. W. Co. v. *Grant*, 11 P. R. 208, the claim and counter-claim, though arising out of the same transaction, were held to be separate actions, and a set-off, to the prejudice of the solicitor's lien, was refused. **Rules 1206-1208.**

In the following cases a set-off of costs payable in separate actions to the prejudice of the solicitor's lien was refused: *Webb* v. *McArthur*, 4 Chy. Ch. 63; *Edwards* v. *Hope*, 14 Q. B. D. 922; 53 L. T. N. S. 69; *Cuthbert* v. *Commercial Travellers Assocn.*, 7 P. R. 255; and see *Ross* v. *McLay*, 7 P. R. 97; *Wardell* v. *Trenouth*, 8 P. R. 142; *Barker* v. *Hemming*, 5 Q. B. D. 609; *Blakey* v. *Latham*, 41 Ch. D. 518. In the following cases a set-off costs in the same action was allowed without regard to the solicitor's lien: *Pringle* v. *Gloag*, 10 Ch. D. 676; 40 L. T. N. S. 512; *Cameron* v. *Campbell*, 12 U. C. Q. B. 159; 1 P. R. 170; *Young* v. *Hobson*, 8 P. R. 253; *Maxwell* v. *Maxwell*, 7 P. R. 63; *Rawlings* v. *Smith*, 7 Sc. 231; costs of special issues, or of interlocutory proceedings in the same action may be set off without regard to the solicitor's lien.

The solicitor's lien attaches to money received by the plaintiff by way of compromise where such money is in substance the fruit of the action, and a solicitor having notice of the lien who procures the money to be paid to the plaintiff, becomes personally liable to satisfy the lien: *Ross* v. *Buxton*, 42 Ch. D. 190.

1206. Costs may be taxed on an award, although the time for appealing from or moving against the award has not elapsed. Rules T. T. 1856, 142. Costs may be taxed on an award, though time for moving not elapsed.

Arbitrators who have power to award costs, cannot, unless expressly authorized so to do, award them "as between solicitor and client." This excess of jurisdiction may be objected to on taxation, when the objection appears in the face of the award; *Re Beaty & Toronto*, 13 P. R. 316.

1207. All bills of costs or disbursements in actions brought for the administration of an estate, or for partition, or for the foreclosure, redemption or sale of mortgaged premises, and all bills in other actions where the amount is to be paid out of an estate or out of a fund in Court, or in which any infant, lunatic, or person of unsound mind is interested, (or which shall be payable out of any estate in which any infant, lunatic, or person of unsound mind, is interested,) are to be revised by one of the taxing officers of the Supreme Court at Toronto, before the amount thereof is inserted in any certificate, report, order, or judgment. J. A. Rules 439 and 593. Revision of certain costs.

Revision of costs payable out of "a fund in Court" is not confined to cases where the Court has judicial control over, or has to exercise some judicial function in regard to the fund. The expression "a fund in Court" has no technical signification which makes it mean anything different from "a sum of money in Court": *Cousineau* v. *London Fire Ins. Co.*, 13 P. R. 42.

The Court will not permit costs occasioned by improper litigation, or negligent conduct of proceedings, to be paid out of an estate under its care; and the amount of costs allowed between solicitor and client is not conclusive as to the amount which will be allowed out of an estate: *Brown* v. *Burdett*, 40 Ch. D. 152.

1208. The Local Master or other local officer is forthwith, after taxing any such bill of costs, to transmit the Revision of taxations by local officers.

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Rule 1209. same by mail to Toronto, addressed to the proper taxing officer, and he is to allow in the bill the postage for the transmission and return of the bill, and shall prepay the same; and is to allow in the bill the sum of one dollar as a fee for the revision of the bill by the taxing officer at Toronto, and a law stamp for that sum, with postage stamps for the postage, is to be paid at the time of taxation by the party procuring the bill to be taxed; and the Local Master or other officer is to transmit with the bill to the taxing officer at Toronto, the law stamp, and the necessary stamps for postage on the return of the bill to the Local Master or other officer. Chy. O. 311.

A revision of taxation is now necessary to be had only in the class of actions mentioned in *Rule* 1207.

Review of taxation.

Appeal from taxation by local officers how brought.

A review of taxation may now be had as provided by *Rules* 1230, 1231; and an appeal therefrom to a Judge, as provided by *Rules* 851-854. Notwithstanding *Rule* 851 it was held by Boyd, C. that an appeal from a taxation by a Local Officer, would not lie direct to a Judge, but that the bill must be revised by one of the Taxing Officers in Toronto, from whom alone an appeal to a Judge will be entertained: *Crowe* v. *Steeper*, 2 C. L. T. 83; but in *Grant* v. *Grant*, 10 P. R. 40; Wilson, C.J., (see p. 44) appears to have been of opinion that an appeal lay direct from a Local Taxing Officer to a Judge. These consolidated *Rules*, at all events, provide only for an appeal to a Judge, and appear to supply no machinery for carrying a taxation from a Local Officer before either of the Taxing Officers in Toronto, except in the cases mentioned in *Rule* 1207, the former *Rule S. C.* 439 *b*, which allowed a revision in any case at the option of any of the parties not having been been re-enacted.

Duty of Taxing Officer on receipt of bill for revision.

1209. The taxing officer at Toronto, upon receiving the bill of costs is to examine the same, and to mark in the margin such sums (if any) as may appear to him to have been improperly allowed, or to be questionable; and he is to revise the taxation either *ex parte*, or upon notice to the Toronto agent (if any) of the solicitor whose bill is in question, as in his discretion he may see fit; but notifying such agent (if any) in all cases where the taxation is not clearly erroneous, or where the amount in question is so large as in the judgment of the taxing officer, to make such notification proper. Such notification may be by appointment mailed to the address of the agent (if any). If upon the revision the sums disallowed shall amount to one-twentieth of the amount allowed upon taxation, the taxing officer is to add to the amount taxed off, the amount of postages, and the sum of one dollar aforesaid, and is thereupon to retransmit the bill so revised to the Local Master or other officer. Chy. O. 312.

Powers of Taxing Officer on revision.

The Taxing Officer, on revision, may restore items improperly disallowed by a Local Master; as well as strike out, or reduce, any which may have been

improperly allowed, even though in the discretion of the local officer: *Keim* v. *Yeagley*, 6 P. R. 60; *Re Robertson*, *Robertson* v. *Robertson*, 24 Gr. 555. **Rules 1210-1213.**

But the Taxing Officer cannot receive evidence to show that costs are payable otherwise than the order awarding them, construed by the ordinary rules of construction, directs: *Keim* v. *Yeagley*, 6 P. R. 60; and see *Edwards* v. *Pearson*, 3 C. L. T. 504.

1210. In any such case no sum is to be inserted in the report of a Local Master or other officer as taxed and allowed for costs, until such revision by a taxing officer; but in a case of urgency a writ of execution may issue to levy debt or costs, or both, upon the order of a Judge, subject to the future revision by the taxing officer. Chy. O. 313. No sum to be inserted for costs in report, until after revision.

1211. Pending a revision, judgment may be entered and execution issued, unless the Court or a Judge otherwise orders; and in case of an execution being so issued, if the amount taxed is reduced on revision, the party entitled to the costs shall forthwith give notice of the reduction and of the amount thereof to the Sheriff or other officer in whose hands the execution had been placed; and the amount struck off on the revision shall be deducted from the amount indorsed on the execution. J. A. Rule 439 (*d*). But execution in cases of urgency may issue.

Not taken from any English Rule.

See *Rule* 1210.

1212. No mileage shall be taxed or allowed for the service of any writ, paper or proceeding, without an affidavit being made and produced to the proper taxing officer, stating the sum actually disbursed and paid for such mileage, and the name of the party to whom such payment has been made; and, except in cases provided for in Rule 254, no fees shall be allowed for the mileage or service of writs of summons unless served, and sworn in the affidavit of service to have been served, by the Sheriff, his Deputy or Bailiff, being a literate person (or by a Coroner when the Sheriff is a party to the action), nor unless a return of the Sheriff or Coroner (as the case may be) is indorsed thereon. R. S. O. 1877, c. 50, s. 335; Rule T. T. 1856, 160. Mileage not allowed on service of *mesne* process unless served by Sheriff.

It would seem that the rules in regard to the allowance of costs of service of writs of summons apply to the costs of serving subpœnas: *Carty* v. *City of London*, 13 P. R. 285.

1213. All affidavits of increase must be made by the solicitor in the cause, or some clerk having the manage- Affidavits of increase, to be made

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Rule 1213. by solicitor, or his clerk having management of cause, or the client.

ment thereof, or by the client. They must set forth the sums paid to counsel, naming them, and for what service, the names of witnesses, their places of abode, the places at which they were subpœnaed, and the distance which each such witness was necessarily obliged to travel in order to attend the trial, that every such witness was necessary and material for the client in the cause, that they did attend, and that they did not attend as witnesses in any other cause (or otherwise, as the case may be). The number of days which each witness was necessarily absent from home in order to attend such trial must also be accurately stated. If a solicitor attends as a witness, it must be stated whether or not he attended at the place of trial as solicitor or witness in any other cause, and whether or not he had any other business there. The day on which the trial occurred should be stated. If maps or plans were used at the trial, the necessity for them must be shown in the affidavit, or no allowance will be made for them; the sum paid for them must also be set forth, and that they were prepared or procured with a view to the trial of the cause. The taxing officer is authorized in such case to make a reasonable allowance for maps and plans. Rules T. T. 1856, 165.

Form of.

Allowance for maps, etc.

In *McGannon* v. *Clarke*, 9 P. R. 555, it was held that surveys and plans made to enable witnesses to give evidence, are not taxable between party and party; and costs of a preliminary examination of accounts by an accountant to qualify himself to give evidence were disallowed between party and party: *Nolan* v. *Coleman*, 8 Q. B. 84. The costs of plans and models, etc., useful to aid the Court and jury in coming to a right conclusion may be allowed: *Pilgrim* v. *Southampton & Dorchester C. W. Co.*, 8 C. B. 25; *Batley* v. *Kynoch*, L. R. 20 Eq. 632.

Where a witness is rejected at *nisi prius*, and the ruling of the Judge is acquiesced in by the parties, and upheld by the Court, the expenses of his attendance are not allowed on taxation as between party and party: *Galloway* v. *Keyworth*, 15 C. B. 228. So, where a witness is rejected by an arbitrator, whether upon a sufficient, or an insufficient ground: *Ib.* And when witnesses were subpœnaed by the plaintiff to attend at a trial which was postponed in consequence of the defendant's default, and the defendant was ordered to pay the costs of the day; and at a subsequent trial the witnesses in question were examined and their evidence proved to be immaterial, the costs of their attendance at the abortive trial were disallowed as against the defendant: *Christopher* v. *Noxon*, 10 P. R. 149. The costs of a commission to take evidence abroad, when the evidence so taken is not actually used at the trial will be disallowed: *Dominion Co.* v. *Stinson*, 9 P. R. 177.

Costs of witness rejected, not allowed.

Witness fees for attendance how allowed.

When a cause at the assizes is over at three o'clock in the afternoon, witnesses may reasonably be allowed the following day for their return home, though their place of residence be distant only about fifty miles, and accessible by trains on the same evening: *Fryer* v. *Sturt*, 16 C. B. 218. It is not a general rule that parties, if witnesses, are to have an allowance for their attendance: *Dowdell* v. *Australian Royal Mail Steam Navigation Company*, 3 El. & Bl. 902.

Witness fees may be paid by setting off, with the consent of the witness, the sum payable against a sum due by the party subpœnaing the witness, and an

affidavit of disbursements describing such a transaction as a payment of the witness fees was held to be true: *Re Solicitor*, 9 C. L. T. 35. **Rule 1214.**

Witnesses are not, in general, allowed for attendance before the day appointed for the opening of the Court: see *Harvey* v. *Divers*, 16 C. B. 497. But when a material witness is going abroad, but is detained on *subpœna*, his subsistence for the whole time he is detained may be allowed: *Potter* v. *Rankin*, L. R. 5 C. P. 518; and the necessary expenses of procuring the attendance of a witness residing out of the jurisdiction may be allowed: *Ball* v. *Crompton Corset Co.*, 11 P. R. 256.

But under the English Rule 1002, s-s. 9, which authorizes the allowance of such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence; the expense of surveys by surveyors to qualify themselves to give evidence was allowed: *Mackley* v. *Chillingworth*, 2 C. P. D. 273; and see *In re Laffitte*, L. R. 20 Eq. 650.

The costs of sending a special commissioner abroad to take evidence in a case of a complicated and important character were allowed: *Yglesias* v. *Royal Exchange Assurance Corporation*, L. R. 5 C. P. 141.

The Taxing Officer may examine into the truth of affidavits of increase: *Boulton* v. *Switzer*, 1 C. L. Ch. 83. The omission of the Christian name of a witness in the affidavit is immaterial: *Ham* v. *Lasher*, 24 U. C. Q. B. 357. All witnesses should be paid before taxation, and only the sums actually paid are taxable: *Ib.* Mileage for serving *subpœnas* is not to be allowed unless the service is effected by the Sheriff or his officer: *Rule* 1212; *McLean* v. *Evans*, 3 P. R. 154. When witnesses are subpœnaed and paid by both parties the successful party is entitled to recover the costs of such witnesses from the other party: *Ib.* The costs of a witness called to prove facts admitted by the defendant in his examination for discovery may be allowed: *Alexander* v. *Gloucester*, 11 P. R. 157.

Taxations between party and party.

1214. As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party. J. A. Rule 442.

Identical with Eng. R., Aug. 1875, "costs," R. 26; 1883, R. 1002 (29).

As to the general rule that the costs taxable between party and party are only those necessary to enable the party to conduct the litigation: see *Smith* v. *Buller*, L. R. 19, Eq. 473.

Where, under an order directing an account of what was due to a party in respect of costs of proceedings taken to enforce a judgment in the Exchequer Division, the Taxing Master disallowed the costs of certain abortive garnishee summonses, it was held that the Master was not precluded by the form of order from disallowing any costs he thought proper, and that, under this *Rule*, he was bound to do so: *Simmons* v. *Storer*, 14 Ch. D. 154.

So a clause in an order for a commission directing that costs of the order, commission and depositions to be taken thereunder, should be costs in the cause, was held not to preclude the Taxing Officer from disallowing the costs when the evidence had not been used: *Dominion, etc.* v. *Stinson*, 9 P. R. 177; see *Delarague* v. *Oxenholme & Co.*, W. N. 1883, 227; *Re McMillan*, 8 C. L. J. 285. Charges not strictly under the tariff of costs, but for work done which saves the greater expense of proceeding in the regular way, may be allowed whether done between the solicitors, or by one party alone: *Torrance* v. *Torrance*, 18 C. L. J. 223; 2 C. L. T. 311; 9 P. R. 271.

Rule 1215. Copies of pleadings where necessary for an interlocutory motion will be allowed: *Warner* v. *Mosses*, W. N. 1881, 135; 45 L. T. N. S. 359; 17 C. L. J. 479; 19 Ch. D. 72.

Where by an order allowing the plaintiff to make an amendment the costs were made costs in the cause, it was held that the Taxing Officer had no discretion under this *Rule* to disallow these costs in taxing the plaintiff's costs of the cause: *Edwards* v. *Pearson*, 20 C. L. J. 93; 3 C. L. T. 504.

In *Christopher* v. *Noxon*, 10 P. R. 149, a trial was postponed owing to defendant not having obeyed an order to produce, defendant to pay the costs rendered nugatory by the postponement. The plaintiff subpœnaed seventeen witnesses, who were examined at the adjourned trial upon matters which the Judge held could not be interfered with by the Court. It was held that the Taxing Officer in refusing the plaintiff the costs of these witnesses did not erroneously exercise the discretion given him by this *Rule*.

See also *Goodfellow* v. *Shuttleworth*, 3 C. L. T. 105; *Trotter* v. *Maclean*, 13 Ch. D. 574.

Costs of unnecessary proceedings not to be taxed.

1215. If upon the taxation of costs it should appear to the officer taxing the same that any proceedings have been taken unnecessarily, and which were not calculated to advance the interests of the party on whose behalf the same were taken, it shall be the duty of the officer to disallow the costs of such proceedings, as well on the taxation of costs between solicitor and client, as on a taxation between party and party, unless the officer shall be of opinion that such proceedings were taken by the solicitor because they were in his judgment, reasonably exercised, conducive to the interest of his client. It shall not be the duty of the officer, on a taxation of costs between a solicitor and his client, to disallow to the solicitor his costs of such proceedings where it is made to appear that such proceedings were taken by the desire of the client, after being informed by his solicitor that the same were unnecessary, and not calculated to advance the interests of the client. Chy. O. 306.

Exception in case of taxation between solicitor and his client, when costs incurred at client's request, after notice that proceeding unnecessary.

The costs of unnecessary affidavits, going into the merits, filed on a motion for leave to appeal from a Master's report: *Nash* v. *Glover*, 6 P. R. 267, and on a motion to vacate a decree: *Redford* v. *Todd*, 6 P. R. 154, were disallowed. Costs rendered unnecessary by the slip of the solicitor cannot be recovered even by the solicitor from his client: *Re Massey*, 76 L. T. Jour. 361.

And see *Rules* 1177, 1195, 1196, which also relate to the disallowance of costs of unnecessary proceedings.

The Court does not allow out of an estate costs of proceedings which were of no benefit to it. See note to *Rule* 972, p. 769, and *Re Ormston*, 58 L. T. N. S. 74; 59 L. T. N. S. 594; 36 W. R. 216.

Where, in an administration suit, the plaintiffs, who were next of kin, had incurred the expense of several journeys to examine the books of the estate and make inquiries, etc.; and also of other proceedings in the Master's office, without the consent of the creditors who were alone beneficially interested, and after they knew that the estate was insolvent; such costs were disallowed: *Re Robertson*, *Robertson* v. *Robertson*, 24 Gr. 555.

Costs taxable between solicitor and

Notwithstanding this *Rule*, charges, and allowances, which might very properly be allowed on a taxation between solicitor and client, when the costs

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come out of the plaintiff's fund, or one in which he is interested, may nevertheless be disallowed out of a fund in which he has no interest: *Ib.* The costs of preparing and tendering a conveyance before suit are not taxable as costs in a cause subsequently brought: *Pringle* v. *McDonald*, 7 P. R. 152; and the amount allowed between solicitor and client is not conclusive as to the amount to be allowed out of the estate: *Brown* v. *Burdett*, 37 Ch. D. 207; 40 Ch. D. 214.

Client not necessarily relieved against estate.

The mere non-communication by a solicitor to his client of an offer of settlement does not prove that proceedings after the offer were unnecessary, so that the costs of them should be disallowed under this *Rule* unless the offer was an advantageous one, the acceptance of which the solicitor ought to have advised, and it can be fairly inferred that he did not do so merely to put further costs into his pocket without regard to the interest of his client: *Re O'Donohoe*, 12 P. R. 612.

See *Latour* v. *Smith* in note to *Rule* 1195.

Certain costs taxable between party and party as would be allowed as between solicitor and client.

1216. Where costs are to be taxed as between party and party, the officer taxing the same may allow to the party entitled to receive such costs, the like costs as are taxable where costs are directed to be taxed as between solicitor and client, in respect to the following matters:

1. Advising with counsel on the pleadings, evidence, and other proceedings in the cause;

2. Procuring counsel to settle such pleadings and petitions as may appear to have been proper to be settled by counsel;

3. Procuring and attending consultations of counsel;

4. The amendment of pleadings;

5. On proceedings in the Master's office;

6. Supplying counsel with copies of, or extracts from, necessary documents. Chy. O. 307.

This *Rule* is not so full as either the Eng. Chy. Order on which it is founded (see Morgan 548-550) or the present Eng. R. (O. 65, r. 27. In consequence of the omission of some such expression as "procuring evidence," which is to be found in the Eng. O. and Rule, no sum can be allowed between party and party for payment to a scientific witness to get up a case: see *McGannon* v. *Clarke*, 9 P. R. 555. A reasonable sum is taxable in England: see *Smith* v. *Buller*, L. R. 19 Eq. 473; *Churton* v. *Frewen*, 15 W. R. 559; *Mackley* v. *Chillingworth*, 2 C. P. D. 273; *Windham* v. *Bainton*, 21 Q. B. D. 199.

Charges for procuring copies of opinions of Judges in another action which were of assistance to counsel were disallowed: *Platt* v. *G. T. Ry. Co.*, 12 P. R. 273.

Tariff of costs.

1217. The table of costs set forth in the Tariff A appended to these Rules shall be that according to which all costs in civil actions in the High Court and in the County Courts shall be allowed and taxed, and no other fees, costs

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or charges than therein set down shall be allowed in respect of the matters thereby provided for. *New.*

Taken from the heading of the former tariff: see J. A. *Rule* of Sept., 1881, Maclennan Jud. Act., 2nd Ed., pp. 573, 592.

The tariff is substantially that previously in force.

Tariff of disbursements.

1218. The fees and disbursements payable in stamps or otherwise upon proceedings in the High Court and the Court of Appeal shall henceforward be those enumerated in the Tariff B, annexed hereto. *New.*

In addition to the fees prescribed by the Tariff, there are also certain fees which are payable under the express provisions of certain *Rules*, *e.g.*, under *Rule* 1035 a fee of $8 is payable to the Inspector of Titles, and under *Rule* 1064 a fee of $1 is payable to a Sheriff for a certificate of render by bail of their principal.

This tariff substantially consolidates those previously in force under J. A. Rule 432.

Lower scale.

1219. The fees and disbursements mentioned in the 2nd or "Lower Scale" column of the tariffs A and B, shall be the amounts taxable in respect of the services or matters there enumerated in all actions where equitable relief is sought in any of the following cases:—

Partnership.

"(1) By a person entitled to, and seeking, an account of the dealings and transactions of a partnership dissolved or expired, the joint stock or capital not having been over $800;

Mortgage suits for foreclosure or sale.

"(2) By a legal, or equitable, mortgagee, whose mortgage has been created by some instrument in writing, or a judgment creditor, or a person entitled to a lien or security for a debt, seeking foreclosure or sale, or otherwise, to enforce his security, where the sum claimed as due does not exceed $200;

Redemption.

"(3) By a person entitled to redeem any legal or equitable mortgage, or any charge or lien, and seeking to redeem the same, when the sum actually remaining due does not exceed $200;

Equitable relief.

"(4) By any person seeking equitable relief for, or by reason of any matter whatsoever, where the subject matter involved does not exceed the sum of $200." *New.* *See* J. A. Rule 515.

This *Rule* is based upon the jurisdiction formerly possessed by County Courts under C. S. U. C. c. 15, ss. 33-35. The question of the scale of costs in actions involving equitable claims formerly depended (under J. A. Rule 515) upon

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whether the action might (before the abolition of the equity jurisdiction of the County Courts by the Law Reform Act of 1868) have been brought in a County Court: *Brough* v. *Brantford*, 25 Gr. 43. The County Courts had no jurisdiction, and costs on the higher scale were therefore taxable where defendants within the Province did not all reside in the County: *McLeod* v. *Millar*, 12 Gr. 194; *Doubledee* v. *Credit Valley Ry. Co.*, 5 P. R. 416; *Re Lyons*, 10 P. R. 150; and where service out of the jurisdiction was necessary: *Lawrason* v. *Fitzgerald*, 9 Gr. 371; *Skelly* v. *Skelly*, 18 Gr. 495; *Scott* v. *Burnham*, 19 Gr. 238. **Rule 1219.**

Under the present *Rule* these cases have no application and the question of the scale of costs is made to depend upon the amount of the plaintiff's claim or the amount involved in the cases specified.

The *Rule* does not apply in the following cases:

Partnership Cases.—Where the partnership had not dissolved or expired: *Blaney* v. *McGrath*, 9 P. R. 417, unless perhaps the case comes within clause (4) of the *Rule*.

Mortgage, etc., Cases.—As was the case under the previous practice, though the amount due plaintiff is less than $200, if there is a subsequent incumbrancer to whom more than that sum is due: *Hyman* v. *Roots*, 11 Gr. 202; *Seath* v. *McIlroy*, 2 Chy. Ch. 93; see also *Mitchell* v. *Martin*, 2 C. L. J. 249; since *The Creditors' Relief Act*, where in an action by a judgment creditor to set aside a fraudulent conveyance, the claims of all execution creditors together exceed $200: *Dominion Bank* v. *Hefferman*, 11 P. R. 504; if there is but one judgment creditor, and to him less than $200 is due, the *Rule* applies, no matter what may be the value of the property fraudulently conveyed: *Forrest* v. *Laycock*, 18 Gr. 611; *McKay* v. *Magee*, 13 P. R. 106, 146.

Equitable Relief Generally.—The mortgagees after exercise of a power of sale claimed that $182.61 was due them, but on accounts being taken $20.07 was found due to the mortgagor. It was held that costs awarded the mortgagor were properly taxable on the higher scale, as $182.61 + $20.07 was involved: *Morton* v. *Hamilton Prov. & L. Socy.* 10 P. R. 636, affirmed by the Divisional Court, 11 P. R. 82.

It is proper practice to obtain a direction of a Judge as to the scale of costs before they are taxed: *Dominion Bank* v. *Hefferman*, 11 P. R. 504; but the Taxing Officer is to tax according to the lower scale wherever it is applicable without any express direction: *Brough* v. *Brantford*, 25 Gr. 43.

"Subject matter involved."

On a bill filed by a mortgagor for an account, where the mortgagee had exercised his power of sale and realised $350, and on taking the account only $130 was found due to the plaintiff, it was held "the subject matter involved" was the $350, and the plaintiff was therefore entitled to costs, on the higher scale: *McGillicuddy* v. *Griffin*, 20 Gr. 81; *Boulton* v. *Rowland*, 4 Ont. 720; *Re Lyons*, 10 P. R. 150; 20 C. L. J. 33; *Morton* v. *Hamilton Provident L. Socy.*, 10 P. R. 636; 11 P. R. 82; but see *Legarie* v. *Canada Loan & Bg. Co.*, 11 P. R. 512; *Beatty* v. *O'Connor*, 5 Ont. 747; and where, besides a money demand within the jurisdiction of the County Court, the plaintiff claimed an injunction, and to have certain fences erected and maintained the costs were allowed on the higher scale: *Brough* v. *Brantford*, 25 Gr. 43; and see *McDonell* v. *Building & Loan Assoc.*, 11 P. R. 413. And in a suit by a purchaser for specific performance of a contract for the sale of land for a sum under $150; but before suit the plaintiff had entered and improved the land and increased its value to more than $200, it was held that "the subject matter involved" was over $200, and higher scale costs were allowed: *Kennedy* v. *Brown*, 6 P. R. 318. Injunction. Specific performance.

In a suit to enforce payment of an annuity of which only $160 was found in arrear, higher scale costs were allowed: *Looney* v. *Cairns*, before Boyd, C., 14 January, 1885.

A mechanics lien action, where the plaintiffs claim $142, but the aggregate amount of liens against the property is over $200, was held properly brought in the High Court, and costs on the higher scale were given, although the plaintiff alone substantiated his claim: *Hall* v. *Pilz*, 11 P. R. 449; but see *Truax* v. *Dixon*, 13 P. R. 279.

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In an action for illegal distress under the distress clause in a mortgage for $2,300, by which goods to the value of $112.55 had been distrained, it was held not to be a case under this *Rule*: *McDonell* v. *Building & Loan Assn.*, 11 P. R. 413.

To actions for a partnership account the lower scale applies only where the partnership has dissolved, or expired. An action, therefore, for dissolution of a partnership would not be one to which the lower scale would apply unless it could be brought within sub-sec. 4 of this *Rule*: and see *Blaney* v. *McGrath*, 9 P. R. 417.

Partnership. Application of former practice.

1220. The practice of any Court, whose jurisdiction is vested in the High Court of Justice or Court of Appeal, relating to costs, and to the allowance of the fees of solicitors, and to the taxation of costs, existing prior to *The Ontario Judicature Act, 1881*, shall, in so far as they are not inconsistent with the Act and the Rules of Court remain, in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal. J. A. Rule 445.

This corresponds in substance with Eng. R. Aug. 12th, 1875, R. 28; 1883, O. 65, r. 27 (37).

See *Pringle* v. *Gloag*, 10 Ch. D. 676.

Rules 154 and 168 of T. T. 1856, and the practice under them not inconsistent with the J. A., are in effect preserved in force by this *Rule*, and under such practice the Taxing Officer may allow what is reasonable for procuring the attendance of foreign witnesses: *Ball* v. *Crompton Corset Co.*, 11 P. R. 256.

Certificate to be filed on instituting action where lower scale tariff is applicable.

1221. The solicitor or party instituting any action or proceeding, in respect of which he claims to pay the fees of Court, according to the tariff referred to in Rule 1219, is to file with the officer in whose office appearance is required to be entered, a certificate in the form No. 211 in the Appendix, of which certificate the said officer is, at the request of any solicitor or party acting in person in the suit or matter, to mark a copy. Chy. O. 554.

Rule is directory.

This *Rule* is directory, and the omission to file a certificate does not entitle a defendant on dismissal of the action, to higher scale fees, except for fees of Court actually paid by him: *Ferguson* v. *Rutledge*, 18 Gr. 511. It applies only where the plaintiff admits that the lower scale is applicable. *Prima facie* in every action commenced in the High Court of Justice, the fees of Court are payable according to the higher scale.

The certificate should be filed on the issue of the writ, with the officer in whose office the appearance is to be entered.

On production of copy of certificate lower scale fees to be charged.

1222. On production of a copy of the certificate, the officers of the Court are to receive and file all papers and take all necessary proceedings upon payment by stamps, or otherwise, as the case may be, of the proper fees, according to the said tariff. Chy. O. 555.

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Rules 1223-1226.

1223. In every case certified for the said tariff in which it may happen that the solicitor becomes entitled to charge and be allowed according to the ordinary tariff, the deficiency of the fees of Court is to be made good. Chy. O. 556. Where costs on higher scale afterwards given.

By the words "ordinary tariff" it is presumed the higher scale of costs is intended.

It appears by this *Rule* that the Court is not bound by the plaintiff's claim to bring the action under the lower scale, but may award costs according to the scale properly applicable.

It would seem that the deficiency to be made good under this *Rule*, is the difference in the fees of Court which have been previously paid under the lower scale, and the amount which should have been paid, according to the higher scale, by the party to whom the higher scale costs are awarded. It would not seem to include the deficiency in fees paid by the opposite party, and even if it did, there seems to be no means of enforcing the payment of the deficiency.

1224. In any case in which the fees of Court have been paid, according to the ordinary tariff, and in which it may happen that the solicitor becomes entitled to charge and be allowed his own fees, only according to the lower tariff, the excess of fees of Court so paid may be allowed upon the taxation of costs, if the circumstances of the case, in the judgment of the taxing officer, justify such allowance. Chy. O. 557. Where fees have been paid according to higher scale, excess may be allowed.

In this *Rule*, as in the last, by the words "ordinary tariff" it is presumed the higher scale of costs is intended.

This *Rule* provides for the converse of the case covered by the preceding *Rule*—viz: where the party awarded costs has paid fees of Court according to the higher scale, and is only awarded lower scale costs. In such cases the extra disbursements may be allowed in the discretion of the taxing officer.

1225. Where a seal is under the 126th section of the Judicature Act, impressed on any document which before the passing of *The Ontario Judicature Act, 1881*, did not require to be sealed, the fee of fifty cents mentioned in the 155th section of "*The Judicature Act*," shall not be payable on such document. J. A. Rule 503. No fee for seal when impressed on documents not formerly requiring to be sealed.

This *Rule* was passed to prevent the fee of 50 cents payable under sec. 155 of the Act for the seal of the Court, from being payable on ordinary filings on which under sec. 126 the seal is to be impressed.

1226. When a client or other person is entitled to the delivery of a solicitor's bill of fees, charges and disbursements, or a copy thereof, the bill or a copy thereof, as the case may be, is to be delivered within fourteen days from the service of the order. Solicitor and client taxation.

See R. S. O. 1887, c. 147, sec. 39 printed *infra*.

Rule 1226. (*a*) The bill delivered shall be referred to the proper Master for taxation, and on the reference the solicitor is to give credit for all sums of money by him received from or on account of the client, and is to refund what, if anything, he may on such taxation appear to have been overpaid;

These directions refer only to moneys received in respect of the business for which the bill was rendered, unless there was special agreement: see *Jones* v. *James*, 1 Beav. 307; *Re Smith*, 4 Beav. 309; 9 Beav. 182; *Cooper* v. *Ewart*, 2 Ph. 362.

(*b*) The Master is to tax the costs of the reference and certify what shall be found due to or from either party in respect of the bill and demand and of the costs of the reference, to be paid according to the event of the taxation pursuant to the statute;

The R. S. O. c. 147, s. 35, printed *infra* in note p. 933, is the Statute referred to. It makes the costs of the reference depend upon whether a sixth part is taxed off the bill.

(*c*) The solicitor is not to commence or prosecute any action touching the demand pending the reference without leave of the Court or a Judge;

(*d*) The amount certified to be due shall be paid forthwith after confirmation of the certificate by filing, as in the case of a Master's report, by the party liable to pay such amount;

(*e*) Upon payment by the said client or other person of what (if anything) may appear to be due to the solicitor, the solicitor (if required) is to deliver to the said client or other person, or as he may direct, all deeds, books, papers, and writings in the said solicitor's possession, custody, or power, belonging to the said client;

(*f*) The order shall be read as if it contained the above particulars, and shall not set forth the same, but may contain any variations therefrom, and any other directions which the Court or Judge shall see fit to make. *See* J. A. Rule 443.

There is no corresponding Rule in England. This *Rule* contains the provisions which previously thereto it was usual to insert in an order for the taxation of a solicitor's bill. It will not now be proper to insert them and the order will be read as if it contained them: see clause *f* and *Rule* 1227; but it may contain any variations or additional directions. Form No. 44 in the Appendix, is the form of order to be used in such cases, and should be adhered to; *Re Solicitors*, 9 P. R. 90, is not to be followed. A direction for payment in 21 days was formerly inserted in orders issued in Chancery, but should not now be inserted: *Re Clarke*, 9 P. R. 197; *Macdonald* v. *Piper*, 10 P. R. 586;

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see *Re A. B. & C. D.* 8 P. R. 126. The order may, however, in a proper case reserve questions of retainer and negligence: *Millar* v. *Cline*, 12 P. R. 155. **Rule 1226.**

Where an order for taxation has been obtained, it is now, under *Rule* 1227 and clause (*f*) of the above *Rule*, to be read as if it contained an order for payment of the amount to be found due upon the reference, (see clause (*d*) of the *Rule*), whether the order be made on the application of solicitor, client or third party liable to pay; it is not necessary to bring an action: *Re Peace & Waller*, 19 L. T. N. S. 637. Formerly when the order had been obtained by the solicitor, he was not entitled to such summary order for payment: *Re Washington*, 12 P. R. 386.

Where an order had been made for taxation and directing the solicitor to refund what if anything had been overpaid, a subsequent express order for payment of the balance found due to the client by the Master's report was held to be proper: *Re Elliot*, 18 C. L. J. 75, 143; 2 C. L. T. 104.

R. S. O. c. 147, ss. 31 and 32 are as follows:— R. S. O. c. 147, s. 31.

"31. No action shall be brought for the recovery of fees, charges or disbursements, for business done by a solicitor as such, until one month after a bill thereof, subscribed with the proper hand of such solicitor, his executor, administrator or assignee (or, in the case of a partnership, by one of the partners, either with his own name, or with the name or style of such partnership), has been delivered to the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, or has been enclosed in or accompanied by a letter subscribed in like manner, referring to such bill." R. S. O. 1877, c. 140, s. 32. Solicitors to deliver their bill one month before bringing action for costs.

The assignee of a solicitor may deliver a bill signed by himself, and at the expiration of a month may sue for its recovery: *Ingle* v. *McCutchan*, 12 Q. B. D. 518; but see *Re Ward*, 28 Ch. D. 719.

No action can usually be brought on a solicitor's bill of costs until a month after it has been delivered, but the want of an allegation of a delivery of the bill in a statement of claim, is not a ground of demurrer: *Scane* v. *Duckett*, 3 Ont. 370; and a solicitor may sue in respect of the bill of costs to set aside a fraudulent conveyance by his client, even before the lapse of the month: *Ib.*

Where the bill delivered does not set out the items, an action on it cannot be maintained: *Wilkinson* v. *Smart* 33 L. T. N. S. 573; but where some items are properly set out, and others are not, the former may be recovered: *Black* v. *Hammell*, 51 L. T. N. S. 430.

For the form of judgment in an action on an untaxed bill: see *Re Park*, *Cole* v. *Park*, 41 Ch. D. 326.

"32. Upon the application of the party chargeable by such bill within the month the High Court or a Judge thereof, or a Judge of a County Court shall, without money being brought into Court, refer the bill and the demand thereon to be taxed by the proper officer of any of the Courts in the County in which any of the business charged for in the bill was done, and the Court or Judge making such reference shall restrain the bringing any action for such demand pending the reference. R. S. O. 1877, c. 140, s. 33." R. S. O. c. 147, s. 32. Taxation of costs.

Pursuant to this section a solicitor's bill must be taxed in the County in which the work was done: *Re Solicitor*, 2 C. L. T. 106; *Re Idington & Mickle*, 8 P. R. 566; by the proper officer of any of the Courts in the County in which any of the business charged for was done. The word "Courts" in the section does not mean Divisions of the High Court, and a *præcipe* order issued under this *Rule* may be issued by, and reference directed to, either the Deputy Clerk or Local Master for the County in which any of the business charged for was done: *Re Clute & Williams*, 13 P. R. 110. Where taxation to be had.

But where the principal part of the work had been done in the country and there had also been agency work done in Toronto, although the Court has in such a case a discretion to refer the bill to Toronto, yet on a special application, it was held that the discretion should not be exercised in favour of Toronto except under special circumstances: *Re Skinner*, 13 P. R. 267;

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Rule 1226. affirmed, 26 C. L. J. 188; 10 C. L. T. 98. Where, however, the order for taxation is taken on *præcipe*, the right to name the place of taxation seems to belong to the applicant, subject to the provisions of sec. 32. If the place named in a *præcipe* order has been unreasonably chosen, the opposite party may possibly have a right to apply to change it: *Re Solicitor*, 7 P. R. 263.

Where a taxation is ordered after action brought, the right to dispute the retainer has been reserved: *Re Green*, 7 P. R. 89.

Where an action has been brought and the defendant does not dispute the retainer, but asks for a taxation of the bill, the solicitor is entitled to judgment for the amount allowed on taxation. As to the form of judgment see *Re Park, Cole* v. *Park*, 41 Ch. D. 326.

Delivery of bill.

A bill must be delivered before it can be referred for taxation, *Re Eccles*, 6 U. C. L. J. 59. If none has been delivered, and the client desires to have the solicitor's charges taxed, he may obtain delivery of a bill under R. S. O. 1887, c. 147, s. 39, which is as follows:

Where no bill delivered, Court or Judge may order delivery of bill and of papers.

"39. Where no bill has been delivered, sent or left as aforesaid, and where such bill if delivered, sent or left, might have been referred as aforesaid, any such Court or Judge may order the delivery of a bill, and may also order the delivery up of deeds or papers in the possession, custody or power of the solicitor, his assignee or representatives, in the same manner as has heretofore been done in cases where any such business had been transacted in the Court in which such order was made. R. S. O. 1877, c. 140, s. 40."

What bills may be taxed.

The Court has power under its general jurisdiction to order the taxation of any bill relating to Court business, whether the bill be of the solicitor or his agent, or any part of such bill: *Re Johnson & Weatherall*, 37 Ch. D. 433; though the principal received payment by a commission: *Re Idington* v. *Mickle*, 8 P. R. 566; and upon such taxation a Master should, without specific directions, regard any settlement with the solicitors: *Ib.*

A bill for counsel fees exclusively may be referred: *Re C. K. & C.*, 6 P. R. 226; and see also *Re Ashbaugh*, 10 C. L. T. 30, where the services were respecting the defence of a prisoner.

A bill for conveyancing only cannot be referred: *Re Lemon & Peterson*, 8 U. C. L. J. 185. But see *Re Pollard*, 20 Q. B. D. 160; *Re O'Donohoe & Wermoll*, 4 P. R. 266, where solicitors were ordered to deliver a bill of costs respecting business not done in Court: and see *Re Richardson*, 3 Chy. Ch. 144.

Where a solicitor has funds or papers of a client in his possession, and claims a lien, an order for taxation will be made, though the services for which the solicitor claims have been wholly in County Court proceedings: *Re Prince*, 3 Chy. Ch. 282; and see *Re M. C. Cameron*, 1 Chy. Ch. 356.

A client who is merely a nominal plaintiff, his name being used for convenience, and who is not responsible to the solicitor, is not entitled to an order for taxation: *Re Attorneys*, 6 P. R. 319.

R. S. O. c. 147, s. 33.

R. S. O. 1887, c. 147, s. 33, is as follows:

Court or Judge may order bill to be referred on application of either party.

"33. In case no application is made within the month, then the Court or Judge upon the application of either party may order a reference with such directions and conditions as he may deem proper; and may upon such terms as may be thought just restrain any action for such demand pending the reference. R. S. O. 1877, c. 140, s. 34."

The month is a calendar month: see R. S. O. c. 1, s. 8 (15), and is to be computed exclusively of the day on which the bill is delivered, and the day on which the order was applied for: see *Re Morphy & Kerr*, 2 Chy. Ch. 56.

Order when obtained on *præcipe*.

Where a bill has been delivered more than a month, the client cannot obtain a *præcipe* order, but must apply in Chambers: *Re Boultbee*, 2 Chy. Ch. 58.

After the lapse of the month the solicitor is entitled on an *ex parte* motion in Chambers to an order for taxation: *Re Solicitor*, 7 P. R. 263. An order is not granted *ex parte* to a solicitor where any of the facts lie in dispute between him and the client, and it is his duty to disclose any such dispute: *Re Fitch*, 2 Chy. Ch. 288, and *Re C. & L.*, 15 C. L. J. 139.

The common order only is obtained on *præcipe*, or on such *ex parte* motion, notice must be given if a special order is required: *Re Atkinson* v. *Pegley*, 1, Chy. Ch. 187; as for instance to tax part of a bill: *Re Byrch*, 8 Beav. 124; *Re Johnson & Weatherall*, 37 Ch. D. 433; or where there is a special agreement as to retainer: *Re Thurgood*, 19 Beav. 541; or where application is made by some only of several jointly liable: *Re Ilderton*, 33 Beav. 201; *secus*, where they are severally liable: *Re Hair*, 10 Beav. 187. **Rule 1226.** Common order.

Under the common order the Taxing Officer has power to investigate and dispose of questions of carelessness, impropriety and negligence in the conduct of the business to which the bill relates; and the officer's certificate, unless appealed against in proper time, is conclusive as to all matters within his jurisdiction: *Re Miller, Millar* v. *Cline*, 12 P. R. 155; *Re Kerr*, 29 Gr. 188, and R. S. O. c. 147, s. 48.

Whether under the common order by the client the Taxing Officer should disallow all items which appear to be Statute barred, *query:* see *Curwen* v. *Milburn*, 42 Ch. D. 424.

The order to tax may reserve questions of retainer and negligence in a proper case: *Re Millar, Millar* v. *Cline*, 12 P. R. 155; in such case a special application would be necessary: but see *Re Totten*, 27 U. C. Q. B. 449, where it was held that without consent the right to dispute the retainer cannot be reserved. The practice is different in England under 6 & 7 Vict. c. 73; but see also *Re Bacon*, 3 Chy. Ch. 79; *Re Toms, Ib.* 204; *Re Lewis*, 9 U. C. L. J. 81.

Where there is no retainer in writing, and it is disputed, weight is given to the denial of the client: *Re Eccles & Carroll*, 1 Chy. Ch. 263.

It is held in England that under the common order obtained by the solicitor, the client may object to every item on the ground of want of retainer: *Re Jones*, 35 Ch. D. 105; *Re Herbert*, 34 Ch. D. 504; but under an order obtained by the client himself, he cannot object to the whole bill on that ground: *Ib.*; but see *Re A. B.*, 8 C. L. J. 21.

R. S. O. 1887, c. 147, s. 34, is as follows: R. S. O. c. 147, s. 34.

"34. No such reference shall be directed upon application made by the party chargeable with such bill after a verdict has been obtained or a writ of inquiry executed, or after twelve months from the time such bill was delivered, sent or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the Court or Judge to whom the application for the reference is made: R. S. O. 1877, c. 140, s. 35." No reference to be made on application of party chargeable after verdict or after 12 months from delivery of bill.

Orders for taxation are not made, except on special circumstances being shewn, after the expiration of twelve months from delivery of a bill: *Re Cameron*, 2 Chy. Ch. 311; *Re Thompson*, 2 Chy. Ch. 100; *Re Gildersleeve* v. *Walkem*, 6 P. R. 117; *Read* v. *Cotton*, 3 P. R. 118; *Pattulo* v. *Church*, 8 P. R. 363; *Re Norman*, 16 Q. B. D. 673; *Re Nelson*, 30 Ch. D. 1; *Re Park*, 61 L. T. N. S. 173; see *Fletcher* v. *Field*, 10 P. R. 608; *Snider* v. *Snider*, 11 P. R. 130 or after payment: *Re Walker*, 10 P. R. 400; *Schragg* v. *Schragg*, 11 P. R. 218; *Re Boycott*, 29 Ch. D. 571; *Re Jackson*, 40 Ch. D. 495; *Re Fairbanks*, 1 Chy. Ch. 222.

Where the special circumstances were that the solicitor was paid on the understanding that the bill might be taxed at any time, an order was made for taxation after his death, against his representatives: *Re Baker*, 13 P. R. 227.

Special circumstances signify generally "pressure accompanied by some overcharge" or "gross overcharges or errors so great as to amount to fraud": *Re Strother*, 3 K. & J. 518; *Re Cameron*, 2 Chy. Ch. 311; *Re Walker*, 10 P. R. 400; *Re Griffith*, 50 L. T. N. S. 434. "Special circumstances."

Where alleged overcharges constitute the special circumstances, they must be specified on the application to tax: *Re Gildersleeve & Walkem, supra;* a general allegation of overcharge is not enough: *Re Boycott*, 29 Ch. D. 571; and they must be on their face excessive: *Re Bethune & Co.*, 4 C. L. T. 251. Trifling items will not be sufficient: *Re Drake*, 8 Beav. 123; overcharge by mutual mistake was held not to be a special circumstance: *Re Glascodine*, 52 L. T. N. S. 781.

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Rule 1226.

A lump sum retained for costs out of the proceeds of a sale, and no bill delivered, were held to constitute "special circumstances": *Re Malcolmson & Wade*, 9 P. R. 242.

The fact that an action was brought on a number of bills delivered during several years, while defendant was plaintiff's client, is not a special circumstance: *Read* v. *Cotton*, 6 U. C. L. J. 114; nor the existence of a controversy as to the terms on which the business was done, nor the continuance of employment after the delivery of the first bill: *Arnoldi* v. *O'Donohoe*, 2 Ont. 322; see *Gillespie* v. *Shaw*, 10 U. C. L. J. 100. Where judgment had been signed against the client in an action, during the pendency of negotiations for a settlement, this was held a special circumstance: *Puttullo* v. *Church*, 8 P. R. 363. So conjunction of the following (1) that the relationship of solicitor and client continued after the delivery of the bill, (2) that the solicitor had offered to make a substantial deduction, and (3) that there were items of apparent overcharge of which no explanation was offered: *Re Walker*, 12 P. R. 400.

R. S. O. 1887, c. 147, s. 42, is as follows:

Where a party not being the principal pays a bill of costs, a taxation may be allowed afterwards.

"42. Where any person not being chargeable as the principal party is liable to pay or has paid any bill either to the solicitor, his assignee, or representative, or to the principal party entitled thereto, the person so paying, his assignee or representative, may make the like application for a reference thereof to taxation as the party chargeable therewith might himself have made, and in like manner, and the same proceedings shall be had thereupon, as if the application had been made by the party so chargeable. R. S. O. 1877, c. 140, s. 43."

A creditor of an estate has no right under sec. 42 as between himself and the personal representative to a taxation of the costs incurred by the latter in collateral proceedings affecting the estate, all he is entitled to is to have the bill "moderated": *Re Hague, Traders' Bank* v. *Murray*, 12 P. R. 119; and see *Beatty* v. *Halden*, 4 Ont. App. 239; *Re Jackson*, 40 Ch. D. 495; 60 L. T. N. S. 589.

The bill of a mortgagee's solicitor in regard to the mortgaged estate may be taxed by the mortgagor: *Re Lees*, 3 Beav. 410; *Ex parte Glass, Re Macdonald*, 3 P. R. 138; see also *Re Massey*, 34 Beav. 463; also the bill of the solicitor of executors of an estate may be taxed by residuary devisees: *Re Solicitor*, 10 C. L. T. 21; 25 C. L. J. 623.

So on a sale by mortgagees under a power of sale, the mortgagor or a subsequent incumbrancer is entitled to taxation of the solicitor's bill: *Re Crerar & Muir*, 8 P. R. 56; and under R. S. O. c. 102, s. 28, the taxation may be had without an order and that clause is retrospective: *Ferguson* v. *E. & S. Invest. Co.*, 8 P. R. 404.

But after payment by the mortgagee of the solicitor's bill, the mortgagor's only remedy is for an account: *Re Macdonald, Macdonald & Marsh*, 8 P. R. 88; *Re Cronyn, etc., Ib.* 372.

An account may be had in a summary way under *Rule* 1229.

Where on the application of a mortgagor the mortgagee's solicitor was ordered under R. S. O. 1887, c. 147, s. 44, to deliver to a third party a copy of the bill of costs of the sale, it was held that, though the delivery was under R. S. O. 147, s. 44, to be regarded as for the purposes of a reference to taxation, yet the person so obtaining the copy had not necessarily the right to tax the bill: *Re Moffatt*, 12 P. R. 240.

Delivery and constructive delivery to the third parties liable to pay were discussed in *Re Robertson*, 42 Ch. D. 553.

Adding to bill rendered.

A bill once rendered cannot be added to or deducted from by the solicitor without leave: *Re Davy*, 1 C. L. J. 213. A substituted bill was allowed to be delivered in *Re B. & S.*, 6 P. R. 18.

Where a bill was delivered indorsed as follows—"In the event of taxation, we reserve to ourselves the right to deliver another and more complete bill," this was held to be an absolute delivery: *Re Spencer & McDonald*, 19 Grant, 467; *Re Thompson*, 30 Ch. D. 441.

Where a solicitor obtains leave to amend his bill after taxation commenced, it is improper to strike out items; the charges omitted should be added, and if

one sixth be taxed off the amended bill, the solicitor pays the cost of taxation : *Re Martin*, 7 P. R. 90. **Rule 1226.**

Leave has been given to amend by inserting omitted items and increasing under charges : *Re Crawford & Crombie*, 2 Chy. Ch. 13 ; but not to decrease overcharges : *Re Whalley*, 20 Beav. 576 ; nor to withdraw items improperly inserted : *Re Carven*, 8 Beav. 436 ; *Re Jones*, *Ib.*, 479 ; *Re Blakesly*, 32 Beav. 379; *Re B. & S.*, 6 P. R. 18.

R. S. O. 1887, c. 147, ss. 35-38, are as follows :—

"35. In case either party to any such reference, having due notice, refuses or neglects to attend the taxation, the officer to whom the reference is made may tax the bill *ex parte ;* and in case the reference is made upon the application of either party and the party chargeable with the bill attends the taxation, the costs of the reference shall be paid according to the event of the taxation, except that if a sixth part is taxed off, the costs shall be paid by the party by whom or on whose behalf such bill was delivered ; and if less than a sixth part is taxed off, then by the party chargeable with such bill, if he applied for or attended the taxation. R. S. O. 1877, c. 140, s. 36." If parties refuse to attend officer may tax bill *ex parte.* Costs of taxation ; how payable.

"36. Every order for such reference shall direct the officer to whom the reference is made, to tax the costs of the reference, and to certify what, upon the reference, he finds to be due to or from either party in respect of such bill and of the costs of the reference, if payable. R. S. O. 1877, c. 140, s. 37." Order.

"37. Such officer may certify specially any circumstances relating to the bill or taxation, and the Court or Judge may thereupon make such order as may be deemed right respecting the payment of the costs of the taxation. R. S. O. 1877, c. 140, s. 38." Officer may make special certificate.

"38. In case such reference is made when the same is not authorized except under special circumstances, as hereinbefore provided, the Court or Judge, in making the same, may give any special directions relative to the costs of the reference. R. S. O. 1877, c. 140, s. 39." Special directions relative to costs of reference may be given.

Interest is payable on a bill delivered to a client after demand, and notice, under R. S. O. c. 44, s. 86, that interest will be claimed : *Re McClive & Gilleland*, 2 C. L. T. 103, but the taxing officer has no power to allow interest unless that matter has been expressly referred to him : S. C. 18 C. L. J. 98 ; see in England under the Solicitors Remuneration Act : *Blair* v. *Cordner*, 19 Q. B. D. 516 : *Re Marsden*, 40 Ch. D. 475.

The Taxing Officer has no authority to charge the solicitor with interest upon money in his hands belonging to his client ; *Re O'Donohoe*, 12 P. R. 612.

Only those payments are allowed which are made by the solicitor in his professional capacity : *Re Remnant*, 11 Beav. 603, and not payments in proceedings where he was not professionally concerned : *Hemming* v. *Wilton*, 4 Car. & P. 318 ; *Re Lees*, 5 Beav. 410.

After taxation under an order obtained after action brought, the litigation is ended except to enforce payment. If the order does not reserve questions of retainer and negligence, it is not open to the client to take a double chance of defeating the solicitor's claim by proceeding to defend the action after the conclusion of the taxation : *Re Millar, Millar* v. *Cline*, 12 P. R. 155 ; where *Re Clarke*, 9 P. R. 337, and *Macdonald* v. *Piper*, 10 P. R. 586, were distinguished. But see *Re Washington*, 12 P. R. 386.

Costs of Taxation.—The solicitor will be entitled to add the costs of the reference to his claim only in the event of the client appearing upon the reference : *Re Washington*, 12 P. R. 386 ; see sec. 35 *supra*.

Where the solicitor has offered to take in full settlement less than the amount of a bill of costs as rendered, and has made the offer in a manner unequivocal and binding on him, then, and not otherwise, he is to be allowed the benefit of the offer in determining whether or not a sixth has been struck off. If the offer to take a less sum is unequivocal and binding on the solicitor, then upon taxation the question whether one-sixth has been taxed off is to be determined by reference to the smaller amount so offered to be accepted : *Re Allison*, 12 P. R. 6 ; *Re Cameron & Co.*, 13 P. R. 173 ; see also *Re Carthew*, and *Re Paul*, 27

Rules 1227-1229.

Ch. D. 485; *In re Elwes*, 58 L. T. N. S. 580; solicitors paid themselves £20 as their costs out of money in their hands, but the client demanded a bill, and as it amounted to over £26 required it to be taxed; it was taxed to a sum exceeding £20, but one-sixth was taxed off; no costs were given to either party.

Security for Costs.—The fact of a client applying for taxation being out of the jurisdiction is not sufficient ground for an order for security for costs, without special circumstances being shewn: *Re A. B.*, 6 P. R. 210. But see *Re Cornwall* in note to *Rule* 1245.

What order presumed to contain.

1227. When a solicitor's bill has been delivered, the order of reference shall be presumed to contain clauses (*a*) to (*e*) inclusive of Rule 1226, whether obtained by the solicitor, client or other person liable to pay the same.

Order of course to issue on præcipe.

1228. The order, when grantable of course, shall be issued on *præcipe*. J. A. Rule 444.

There is no corresponding Rule in England.

An order was formerly in Chancery, and is now under this *Rule*, grantable on *præcipe* on the application of the client within a month from the delivery of the bill, unless the retainer is disputed: *Re Thurgood*, 19 Beav. 541, or there is some special agreement as to costs; *Ib.*, *Re C. & L.*, 15 C. L. J. 139, or as to the solicitor's lien: *Re Moss*, 17 Beav 59, or taxation of only part of the bill is desired: *Re Byrch*, 8 Beav. 124; *Re Yetts*, 33 Beav. 412; *Re Johnson & Weatherall*, 37 Ch. D. 433; or only some of several parties jointly liable, are applying: *Re Ilderton*, 33 Beav. 201; see *Re Lewin*, 16 Beav. 608; *Re Becher, etc.*, 2 Chy. Ch. 215. But an order on *præcipe* will not be discharged where the party obtaning it had no previous intimation of special contentions of the other party: *Re Bacon*, 3 Chy. Ch. 79; *Re Cameron*, *Ib.*, 204.

Before the consolidation of the *Rules* it was held that an order for delivery of a bill, as well as for taxation of a bill already delivered, might be obtained on *præcipe* in all the Divisions according to the former Chancery Practice: *Re Fitzgerald*, 10 P. R. 279. *Query* whether R. S. O. c. 147, s. 39 (*supra* p. 930), now regulates the practice.

Taxation of third party.

1229. When a party not principally liable to pay a bill applies for delivery of a copy thereof for the purpose of a reference, or for taxation of a bill delivered, and it appears that by reason of the conduct of the party principally liable, he is precluded from taxing the same, but is nevertheless entitled to an account by the party principally liable, it shall not be necessary for the party so applying to bring an action for an account, but the Court or Judge may, in a summary manner, refer a bill already delivered for taxation, or may order delivery of a copy of the bill, and refer the same for taxation, and may add such parties not already notified as may be necessary to do complete justice to all parties.

(*a*) The rights of the parties are to be adjusted by reference to the provisions of Rule 1226 as far as they are applicable,

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having regard to the relations of the parties to the application and reference. Rule 1230.

See note to *Rule* 1226, *supra* p. 932.

1230. Any party who may be dissatisfied with the allowance or disallowance by the Taxing Officer, in any bill of costs taxed by him, of the whole or any part of any item or items, may, at any time before the certificate is signed, deliver to the other party interested therein, and carry in before the Taxing Officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the item or items, or parts or part thereof, objected to (*a*), and may thereupon apply to the Taxing Officer to review the taxation in respect of the same. J. A. Rule 447. Objection to taxation.

Identical with the Eng. R. Aug. 12th, 1875, R. 30.

When a party carries in an objection in writing to an allowance or disallowance under this *Rule*, he is only bound to state the items to which he objects, not the reasons of his objection: *Simmons* v. *Storer*, 14 Ch. D. 154. The present Eng. O. 65, r. 39, provides differently as it inserts at (*a*) the words "and the grounds or reasons for such objections."

A Sheriff, as an officer of the Court claiming fees by virtue of its process, is so far within its jurisdiction that his bill may be taxed, and this *Rule* will therefore apply to prevent an appeal as to items not brought before the Taxing Officer for review: *Morrison* v. *Taylor*, 9 P. R. 390.

Where the question is one of the principle of the whole taxation, and not as to particular items, it is not necessary to specify objections under this *Rule*: *Sparrow* v. *Hill*, 7 Q. B. D. 362; 8 Q. B. D. 479.

So where the ground of objection is to the whole of the finding generally and the bill was not taxed at all, the Taxing Officer finding that a settlement had been made, which under the terms of the order for taxation was not to be disturbed: *Re Geo. Castle*, 36 Ch. D. 794.

This *Rule* originally only applied in the case of taxations by the Taxing Officers at Toronto, not to taxations by Local Officers: *Grant* v. *Grant*, 10 P. R. 40. This is, however, not now the case as appeals are now taken under *Rule* 851, from Local Taxing Officers direct, and not after a revision at Toronto as formerly: see formerly *Exchange Bank* v. *Newell*, 9 P. R. 528.

An appeal therefore does not lie, unless objections were carried before the officer, as required by this *Rule*: see *Rule* 851, and *Snowdon* v. *Huntingdon*, 12 P. R. 248; nor will an appeal be allowed as to any item not included in such objections: *Platt* v. *G. T. Ry. Co.*, 12 P. R. 273. Any objections to the taxation must be carried in in writing before the signature of the officer is affixed to his certificate: *Cuerrier* v. *White*, 12 P. R. 571. It is a sufficient certificate if the officer ascertains the correct amount payable at the foot of the bill, and notes the bill of costs as taxed at such sum, with the date, and verifies the whole by his signature: *Ib.* After having so acted, the officers have no power to alter what they have allowed or disallowed, except as to clerical errors: *Ib.*; *Langtry* v. *Dumoulin*, 10 P. R. 444.

A person who is not a party to the making of an order for the taxation of costs, and who desires to have the taxation reviewed, ought to apply to set aside the order for taxation, and not apply to review the taxation: *Charlton* v. *Charlton*, W. N. 1882, 183; 31 W. R. 237.

Rule 1231. The following form of stating objections is given in Summerhays & Toogood's Precedents, 2nd ed., p. 45, and is a convenient form to be followed, though it states the reasons of objections, which is unnecessary under *Simmons* v. *Storer*, *supra* :—

In the H. C. J.

———Division

[TITLE OF CAUSE].

Objections taken by the plaintiff [*or* defendant] to the taxation by Esq., one of the Taxing Officers of this Court, of the bill of costs of the plaintiff [*or* defendant] under the judgment [*or* order], dated the day of 18 .

The plaintiff [*or* defendant] objects to the disallowance of the items in his bill of costs mentioned in the second and third columns, hereunder written, for the following reasons :

No. of Objection.	Page of Bill	No. of Items.	REASONS FOR ALLOWANCE.
1	1	1 to 6	These items are properly chargeable under the order which gives the plaintiff his costs, charges and expenses.
2	2	10	The attendance was taken for the purpose of saving expense, and further expense was thereby avoided.
3	4	50	This item is in accordance with the tariff.
4	6	90	The inspection of documents was necessary to enable the plaintiff to prepare his case, and he obtained information as to [*set this out*], which was of material assistance to him on the trial.
5	7	110	The affidavit was necessary and was used on the hearing of the motion and entered in the order.
6	8	120	This item is in the discretion of the Master and under the special circumstances of the case [*set out what these circumstances are*] should be allowed.

Dated this day of 18

To Mr. C. D.,
Deft's Sol'r.

Yours, etc.,
A. B.,
Plaintiff's Sol'r.

See also *Turnbull* v. *Janson*, 3 C. P. D. 264, for examples of objections.

Review of taxation by Taxing Officer.

1231. Upon such application the Taxing Officer shall reconsider and review his taxation upon such objections, and he may, if he thinks fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or by reference to such objections, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto. J. A. Rule 448.

Identical with Eng. R. 1875, 12th Aug., R. 31, 1883, O. 65, r. 27 (40).

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A notice served at 4.30 p.m. to consider objections at 1 p.m. on the following day was considered sufficient in *re Hill*, 33 Ch. D. 266. **Rules 1232, 1233.**

The officer should include in his certificate of the result the points of objection to his taxation. After giving a certificate of the result he is *functus officio*: *Langtry* v. *Dumoulin*, 10 P. R. 444. Certificates of ruling on any points pending the taxation may be given from which an appeal may be had: *Ib.*

Appeals from taxations are governed by analogy to appeals from Chamber orders, and should therefore, under *Rule* 846, be brought on within nine days from the date of the certificate on a notice served within four days: *Stark* v. *Fisher*, 11 P. R. 235.

3. Sheriffs' Fees.

Sheriffs' fees.

1232. The fees and allowances set forth in the Tariff C, appended to these Rules shall be taken and received by Sheriffs and coroners in civil proceedings in lieu of all fees to which they have been heretofore entitled under the Tariffs heretofore in force. See Tariff, 2 Feb. 1874.

See *Rules* 1064, 1236, under which Sheriffs are entitled to fees not mentioned the tariff.

In what cases Sheriff entitled to poundage.

1233. In case a part only is made by the Sheriff on, or by force of any execution against goods and chattels, the Sheriff shall be entitled, besides his fees and expenses of execution, to poundage only upon the amount so made by him, whatever be the sum indorsed upon the writ, and in case the personal estate, except chattels real, of the defendant is seized or advertised on or under an execution, but not sold by reason of satisfaction having been otherwise obtained, or from some other cause, and no money is actually made by the Sheriff on or by force of such execution, the Sheriff shall be entitled to the fees and expenses of execution and poundage only on the value of the property seized not exceeding the amount indorsed on the writ, or such less sum as the Court or Judge may deem reasonable. R. S. O. 1877, c. 66, s. 45.

A Sheriff was formerly only entitled to poundage for money actually passing through his hands, and he was not entitled to charge poundage on moneys paid by the execution debtor direct to the execution creditor or his solicitor: *Hamilton & P. D. Ry. Co.* v. *Gore Bank*, 20 Gr. 190; but now where the payment is made or the claim is settled after seizure of the debtor's goods, the Sheriff though not entitled to poundage on the whole amount recovered, is under this *Rule* entitled to poundage on the value of the goods seized not exceeding the amount indorsed on the writ: and see *McRoberts* v. *Hamilton*, 7 P. R. 95. Where the money is paid direct to the Sheriff without any seizure he is entitled to his poundage and fees: *Consolidated Bank* v. *Bickford*, 7 P. R. 172.

This *Rule*, however, does not authorize a Sheriff to collect poundage under an execution against lands where the lands have been advertised but not sold: see *Merchants Bank* v. *Campbell*, 32 C. P. 170.

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Rules 1234-1237.

When Sheriff entitled to mileage and fees only.

1234. In cases of writs of execution upon the same judgment to several counties, wherein the personal estate of the judgment debtor or debtors has been seized or advertised, but not sold, by reason of satisfaction having been obtained under and by virtue of a writ in some other county, and no money has been actually made on the execution, the Sheriff shall not be entitled to poundage, but to mileage and fees only for the services, actually rendered and performed by him, and the Court or a Judge may allow him a reasonable charge for such services, in case no special fee therefor is assigned in any table of costs. R. S. O. 1877, c. 66, s. 46.

If party dissatisfied he may apply to the Court, who may reduce the amount.

1235. In case any person liable on an execution is dissatisfied as to the amount of poundage, fees, and expenses of execution claimed by a Sheriff, he may, before or after payment thereof, and upon notice to the Sheriff, apply to the Court or a Judge, and if, upon a statement of the facts, the Court or Judge is of opinion that the amount is unreasonable, notwithstanding that it is according to the tariff, the same shall be reduced or ordered to be refunded upon such terms as to costs or otherwise, as the Court or Judge may think fit to impose. R. S. O. 1877, c. 66, s. 47.

See *McRoberts* v. *Hamilton*, 7 P. R. 95.

Taxing Sheriff's costs.

1236. Upon the settlement of an execution, either in whole or in part, by payment, levy or otherwise, the Sheriff or officer claiming any fees, poundage, incidental expenses or remuneration, which have not been taxed, shall, upon being required by either plaintiff or defendant, or the solicitor of either party, and on payment or tender of the expenses of such taxation, and the further sum of 25 cents for the copy of his bill in detail (which he shall be bound to render) have his fees, poundage, incidental expenses or remuneration, as the case may be, taxed by one of the Taxing Officers of the Supreme Court, in the County of York, and in other counties by the proper Taxing Officer of the county wherein such Sheriff keeps his office. R. S. O. 1877, c. 66, s. 48; 49 V. c. 16, s. 17.

Costs not to be collected till taxed.

1237. No Sheriff shall without taxation collect any fees, costs, poundage or incidental expenses, after having been required to have the same taxed; and upon tender of the

amount taxed, no fees, costs, poundage or incidental expenses in respect of proceedings subsequently taken shall be allowed to any Sheriff. R. S. O. 1877, c. 66, s. 49. Rules 1238-1242.

1238. It shall be the duty of the Taxing Officer to tax the bills of costs presented to him for taxation, as herein required, upon payment or tender of his fees, and to give, when requested, a certificate of such taxation and the amount thereof. R. S. O. 1877, c. 66, s. 50. How to be taxed and taxation certified.

1239. It shall be the duty of the Taxing Officer, upon proof of notice of the time and place of the taxation having been duly served upon the Sheriff, Deputy-Sheriff, or other officer charged with the execution of the writ, to examine the bills presented to him for taxation, as herein required, whether such taxation is opposed or not, and to be satisfied that the items charged in such bill are correct and legal, and to strike out all charges for services which, in his opinion, were not necessary to be performed. R. S. O. 1877, c. 66, s. 51. Duty of Taxing Officer.

1240. Either party dissatisfied with the taxation may appeal therefrom as in ordinary cases. R. S. O. 1877, c. 66, s. 52. Revision of taxation.

See *supra* p. 696 for practice on appeals from taxation in ordinary cases.

1241. The Court or a Judge may, in or for the purposes of any interpleader proceedings, make all such orders as to costs and all other matters as may be just and reasonable. Costs, etc.

4. Security for Costs.

1242. Where it appears, by the writ of summons, notice, or other proceeding by which an action or matter is instituted, or by an indorsement thereon, that the plaintiff resides out of Ontario, the defendant shall be entitled on *præcipe* to an order requiring the plaintiff within 4 weeks from the service of the order to give security in $400 for the defendant's costs of the action staying all further proceedings in the meantime, and directing that in default of such security being given the action be dismissed with costs against such defendant, unless the Court or Judge upon special application for that purpose shall otherwise order. J. A. Rule 431. Security for costs, order for.

Not in the Eng. Orders. See *Paxton* v. *Bell*, W. N. 1876, 221, 249.

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Rule 1243.

The Ontario *Rules* do not expressly require as the English Rules do (see *Rules* of 1883, r. 19) that the address of the plaintiff suing by solicitor shall be indorsed upon the writ: see *Rule* 240. The form of writ, however, (Form 1 in the App.) contemplates such an indorsement and this should therefore be followed. Where the plaintiff is without the jurisdiction and liable to give security, if the writ does not disclose the residence, a special application for security is proper: *Lawless* v. *Radford*, 17 C. L. J. 388; 1 C. L. T. 661; and the costs of it will be to the defendant as the plaintiff ought in such case to indorse his address on the writ so as to enable defendant to obtain an order on *præcipe* under this *Rule*: *McCready* v. *Hennessy*, 9 P. R. 489.

As to what is a sufficiently positive statement that the plaintiff's residence is out of the jurisdiction, in an affidavit to obtain an order for security, see *Hollingsworth* v. *Hollingsworth*, 10 P. R. 58.

A *præcipe* order has as much force, upon being served, to effect a stay of proceedings, as if made on application to a Judge: *Bank of N. S.* v. *La Roche*, 9 P. R. 503; *Doer* v. *Rand*, 10 P. R. 165. An order under this *Rule* limits in the first instance the time for giving security. Formerly a *præcipe* order merely stayed proceedings till security was given, and by the Chancery practice or under 42 Vict. c. 15, s. 2, (now *Rule* 1246) a subsequent application might be made to limit a time. In default of compliance with an order where no time has been limited, a motion may still be made under *Rule* 1246, to limit the time, or in default to dismiss the action for want of prosecution: *La Grange* v. *McAndrew*, 4 Q. B. D. 210; *White* v. *Bromige*, W. N. 1878, 28. If the plaintiff then wishes to give security he must pay the defendant's costs of the application: *Ex parte Isaacs*, 10 Ch. D. 1.

Where an order has limited a time and provided for dismissal in case of default, a subsequent *ex parte* motion shewing default has been customary in Ontario to obtain the dismissal of the action: see *Burns* v. *Chisholm*, 2 Chy. Ch. 88.

It was doubted under the original *Rules* whether there was any power to fix the amount at less than $400 where a *præcipe* order had been taken out: *North* v. *Fisher*, 10 P. R. 582. *Rules* 1248 and 1250 were passed to settle this question.

An order obtained by the defendant for security, with a stay of proceedings, does not prevent the defendant from moving to dismiss for want of prosecution: *London Road Car Co.* v. *Kelly*, 18 L. R. Ir. 43; but see *Duffus* v. *Scullin*, 26 L. R. Ir. 8.

Additional cases in which the defendant may obtain security for costs.

1243. In addition to any cases in which a defendant in any action, may by any law or by the practice of the Courts, be entitled to obtain security for costs from a plaintiff, security for costs may be granted to the defendant or applicant in any action or proceeding in which it is made to appear satisfactorily to the Court or a Judge, that the plaintiff has brought a former action or proceeding for the same cause, which is pending either in Ontario or in any other country, or that he has judgment or order passed against him in such action or proceeding, with costs, and that such costs have not been paid; and such Court or Judge may thereupon make such rule or order staying proceedings until such security is given as to the Court or Judge seems meet. R. S. O. c. 40, s. 97; c. 50, s. 70.

Another judgment or suit pending.

To bring a case within this *Rule* it must be clearly shewn that the causes of action are identically the same and not merely growing out of the same transaction: *Dean* v. *Lamprey*, 2 Chy. Ch. 202. See also *Caswell* v. *Murray*, 18

C. L. J. 76; *Grand Junction Ry.* v. *Peterborough*, 10 P. R. 107; *Lucas* v. *Cruickshank*, 13 P. R. 31; *Cobbett* v. *Warner*, L. R. 2 Q. B. 108; and *Martin* v. *Beauchamp*, 25 Ch. D. 12; approved in *McCabe* v. *Bank of Ireland*, 14 App. Cas. 413. Where some of the causes of action in a second action were the same as in a former action, the plaintiff having discontinued as to those, the Court refused to stay the second action in respect of the new causes of action: *Bywater* v. *Dunne*, 10 L. R. Ir. 380. **Rule 1244.**

Where an action by a married woman by her next friend was dismissed with costs, for want of prosecution, a second action on her behalf for the same object but by a new next friend was stayed till the costs of the first action were paid: *Re Payne, Randle* v. *Payne*, 23 Ch. D. 288.

In *Brunsden* v. *Humphrey*, 14 Q. B. D. 141, it was held that where a judgment had been obtained, in an action to recover damages for injury to the plaintiff's cab, in a collision caused by the defendant's servant, another action might be brought for damages for a personal injury suffered in the same collision, as it was held to constitute a distinct cause of action.

See *Russell* v. *Waterford & Limerick Ry.*, 16 L. R. Ir. 314, for an instance of splitting a cause of action.

In *Serrao* v. *Noel*, 15 Q. B. D. 549, an action was instituted in the Chancery Division for an injunction to restrain the defendants and a company from parting with shares or registering the defendants as transferees, and for "further and other relief." The action was settled by an order for delivery up of shares to the plaintiff and staying the action. Owing to delay in delivering the shares they were sold at a loss and this action was brought for damages for the detention. It was held that it was the same cause of action as in the Chancery Division and the plaintiff was estopped by a consent order from recovering damages, the action in the Chancery Division being for all kinds of relief to do complete justice between the parties.

Persons suing for penalties may be ordered to give security for costs; in what cases and on what application.

1244. In any action in which the plaintiff sues as an informer, or seeks to recover any penalty given to any informer or person who sues for the same as aforesaid, under any statute or law in which any penalty is given to any person who sues for the same, either for his sole benefit, for the benefit of the Crown, or partly for his benefit and partly for the benefit of the Crown,—the person so sued, or his agent, or solicitor, may apply to the Court in which the action was instituted or is pending, or a Judge thereof, for security for costs, upon an affidavit made by the defendant applying, showing that the action is brought to recover a penalty, and that in the belief of the deponent the plaintiff or informer is not possessed of property sufficient to answer the costs of the action in case a verdict is given or judgment rendered in favour of the defendant, and that he (the said defendant) has a good defence to the action upon the merits, as he is advised and believes; and the Court or Judge may make an order that the plaintiff or informer in the action shall give security for the costs to be incurred in the action, in the same manner and in accordance with the practice in cases where a plaintiff resides out of the Province, and the order shall be a stay of the pro-

Rule 1245.

ceedings in the case, until the proper security is given as aforesaid. R. S. O. c. 50, s. 71.

Amount of security for costs.

1245. In any action or matter (*a*) in which security for costs is required, the security shall be of such amount and be given at such time or times and in such manner and form, as the Court or a Judge shall direct. J. A. Rule 429.

Identical with the Eng. R. February 1876, R. 7.

(*a*) See *Re Cornwall*, 15 L. R. Ir. 144, where security was ordered to be given by a client out of the jurisdiction, seeking to tax his solicitor's bill.

The words "at such time or times" have been held to be inconsistent with the former rule that application for security must be made before taking a step, otherwise the right was waived: see *Knowlton* v. *Knowlton*, 8 P. R. 400; *Pendry* v. *O'Neil*, 7 P. R. 52; *Hathway* v. *Doig*, 9 P. R. 91; and it is therefore held in England that now in a proper case security may be ordered or increased at any stage of the cause however late, *e.g.*, after reply, and notice of trial given: *Lydney, etc.* v. *Bird*, 23 Ch. D. 358; and see *Budworth* v. *Bell*, 10 P. R. 544, where security under the C. L. P. Act. sec. 71 (now *Rule* 1244), was ordered after defence on examination of parties; see also *Tellett* v. *Lalor*, 8 L. R. Ir. 8; *Heil* v. *Lazenby*, 12 L. R. Ir. 75, and *Arkwright* v. *Newbold*, W. N. 1880, 59; each case depending upon its own circumstances: see *Pooley's Trustee* v. *Whetham*, 33 Ch. D. 76. In this Province though the right is not waived by taking a step, the application must be made at a reasonable time, which has been considered to be in general before issue joined: *Caswell* v. *Murray*, 18 C. L. J. 76; 9 P. R. 192.

One surety may be sufficient. The number is in the discretion of the officer before whom the question of the allowance of the security comes: *Fletcher* v. *Noble*, 9 P. R. 534; see note to *Rule* 1247.

A defendant is *primâ facie* but not necessarily entitled to security because the plaintiff's residence is out of the jurisdiction. If it be made apparent from evidence which the Court can look at, such as defendant's admissions on examination, or other admission though not in any technical form: *Anglo-American* v. *Rowlin*, 10 P. R. 391, that there is no defence, security will not be ordered, or a *præcipe* order will be set aside: *Doer* v. *Rand*, 10 P. R. 165; *De St. Martin* v. *Davis*, W. N. 1884, 86; 28 Sol. Jour. 392.

The following are some of the principal cases relating to security for costs:

Residence out of jurisdiction.

Residence out of Jurisdiction.—A plaintiff wilfully giving a fictitious address within the jurisdiction, though really living without, will be ordered to give security: *Waldron* v. *McWalter*, 6 P. R. 145; *Sutherland* v. *McDonald*, 9 P. R. 178; *Redondo* v. *Chaytor*, 4 Q. B. D. 458; *Manby* v. *Bewicke*, 8 De. G. M. & G. 468, and see *Re Sturgis, etc.*, 34 W. R. 163; *Andrews* v. *Read*, 3 Times 573; *Fraser* v. *Palmer*, 3 Y. & C. 280; and where this is done the order will not be discharged merely because the plaintiff comes to reside within the jurisdiction: *Ib.* A sole plaintiff residing out of the jurisdiction, will *primâ facie* be obliged to give security: Dan. Pr. 5 Ed. 28; *Republic of Costa Rica* v. *Erlanger*, 3 Ch. D. 62; but not if the residence abroad is of a temporary character: *Cole* v. *Beale*, 7 Moo. 613; *Wilson* v. *Wilson*, 6 P. R. 152; see *Sturla* v. *Freccia*, W. N. 1877, 166, 188; or if any one of several plaintiffs resides within the jurisdiction where they sue in respect of a joint claim, even though a several claim be set up in the alternative: *D'Hormusgee* v. *Grey*, 10 Q. B. D. 13. But since *Rules* 300 and 1171, all the plaintiffs are not jointly liable for the whole costs. Hence, the rule that security for costs should not be ordered where the objection taken to a plaintiff (*e.g.*, residence abroad, insolvency), is not applicable to other co-plaintiffs, does not now universally govern: *Irving* v. *Clark*, 12 P. R. 29, in which security was ordered for the costs of the defendants against one plaintiff, where the claims of the several plaintiffs were distinct.

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Security will not be required if the plaintiff is serving abroad in the army or navy: *Evelyn* v. *Chippendale*, 9 Sim. 497; *Evering* v. *Chiffenden*, 7 Dowl. 536; *Dickenson* v. *Duffill*, 1 Chy. Ch. 108; or if a subject and at the time resident within the jurisdiction, though his movements be uncertain: *Allen* v. *Globe*, Globe, 1 Dec. 1881; *Gardiner* v. *Harris*, 8 L. R. Ir. 352; or if the plaintiff before suit comes to reside within the jurisdiction, even though it be only to avoid giving security, and intends to return after judgment: *Wilder* v. *Hopkins*, 4 P. R. 350; *Redondo* v. *Chaytor*, 4 Q. B. D. 453; *Reynolds* v. *Barker*, 21 C. L. J. 80; *Ebrard* v. *Gassier*, 28 Ch. D. 232, (where one of the plaintiffs came to reside within the jurisdiction, after dismissal of a motion for security, but before an appeal from that order, and the state of facts at the time of the appeal was looked at, though on other grounds the order for security would have been made). In England these cases are superseded by *Rule* 42 of R. S. C. 1885, changing the law: see *Wilson*, 7th ed., 481. **Rule 1245.**

A petitioner for winding up a company who had given an address at which he cannot be found and whose solicitor was unable to state his private address was ordered to give security: *Re Sturgis Motor Power Syndicate (Ltd.)*, 53 L. T. N. S. 715; 34 W. R. 163.

If the plaintiff's permanent residence is foreign, the defendant is entitled to security if the plaintiff is out of the jurisdiction at the time of the motion: *Robertson* v. *Cowan*, 10 P. R. 568.

If a plaintiff goes out of the jurisdiction permanently pending action, he may be required to give security for both past and future costs: *Massey* v. *Allen*, 12 Ch. D. 807; *Hateley* v. *Merchants Despatch Transportation Co.*, 10 P. R. 253.

In *Martin* v. *Russell*, 21 L. R. Ir., 196, security was ordered to be given by a sailor following his calling out of the jurisdiction though his family resided within it.

Defendants were held not entitled to security from plaintiffs who sued as executors, and who, under a power of attorney from English executors, took out probate in Ontario, of the will of a testator, who resided and died in England: *Sykes* v. *Canada Pacific Ry.*, 3 C. L. T. 505.

Semble, that an affidavit of information and belief as to residence abroad is not sufficient ground for an order for security for costs: *Hollingsworth* v. *Hollingsworth*, 10 P. R. 5.

An infant out of the jurisdiction, petitioning the Court for relief, may be required to give security for costs: *Stinson* v. *Martin*, 2 Chy. Ch. 86.

A foreigner in prison within the jurisdiction was not ordered to give security: *Dupont* v. *Crook*, 80 L. T. Jour. 31.

As to what constitutes "residence" abroad see *Re Trench, ex. p. Brandon*, 25 Ch. D. 500.

If the plaintiff has substantial property within the jurisdiction, of the value of $400, available in execution, this may be shewn in answer to a motion for security, to displace the *primâ facie* case made by proof of residence out of the jurisdiction: *Gault* v. *Spencer*, 2 Chy. Ch. 92, or it may be made the ground for a special motion to discharge any order which has been made on *præcipe* for security: *Ganson* v. *Finch*, 3 Chy. Ch. 296. It would not seem, according to the latest cases, to make any difference whether the property be real or personal: *Hamburger* v. *Poetting*, 30 W. R. 769; 47 L. T. N. S. 249; *Redondo* v. *Chaytor*, 4 Q. B. D. 453; *Republic of Costa Rica* v. *Erlanger*, 3 Ch. D. 62; but see *Kilkenny Ry. Co.* v. *Fielden*, L. R. 6 Ex. 81; *Re Carrol*, 2 Chy. Ch. 305; *Higgins* v. *Manning*, 6 P. R. 147; *McKenzie* v. *Sinton*, 6 P. R. 282; *Wilson* v. *Wilson*, 6 P. R. 152; *Swinbourne* v. *Carter*, 23 L. J. Q. B. 16: *Re Howe S. M. Co.*, 61 L. T. N. S. 179. But the acquisition of property subsequently to an order for security is no reason for discharging it: *Reaume* v. *Leavitt*, 6 P. R. 70. If the possession of sufficient property at the time of applying for a *præcipe* order was known to the defendant's solicitor this may be a reason for discharging the order with costs: *Ganson* v. *Finch*, *supra*. But not if he has property within the jurisdiction.

If a plaintiff returns to reside permanently within the jurisdiction an order for security may be discharged: *Harvey* v. *Smith*, 1 Chy. Ch. 392; *Sed quære*: Order where discharged.

Rule 1245. see *Badnall* v. *Hayley*, 4 M. & W. 535; 7 Dowl. 19, referred to in *Hateley* v. *Merchants Despatch Co.*, 12 Ont. App. 643, 646, unless obtained because the plaintiff had wilfully misstated his residence: see *Waldron* v. *McWatter*, 6 P. R. 145. But if the Court thinks the return is merely to get rid of the order, and the plaintiff has no ties, business or otherwise, to guarantee that he will remain within the jurisdiction, the order will not be rescinded: *Marsh* v. *Bear'*, 1 Chy. Ch. 390.

Nominal plaintiff.

Nominal Plaintiff.—Security may also be ordered if the plaintiff is insolvent and the suit is in reality for the benefit of some other person: *Mason* v. *Jeffrey*, 2 Chy. Ch. 15; *Little* v. *Wright*, 16 Gr. 576; *Pendry* v. *O'Neill*, 7 P. R. 52; *Boice* v. *O'Loane*, 7 P. R. 359; *Delaney* v. *MacLellan*, 13 P. R. 63. Especially if such other person is out of the jurisdiction, though the plaintiff had a nominal interest: *Re Rainy Lake Lumber Co.*, 11 P. R. 314; see also *Swain* v. *Fellows*, 18 Q. B. D. 585; and see *Port Rowan & L. S. Ry. Co.* v. *South Norfolk Ry. Co.*, 13 P. R. 327, where an application for security for costs was made, on the ground that the plaintiff company was alleged to have no corporate existence, and was alleged to be suing on behalf of a third person who was insolvent. So where the plaintiff is only one of a large number interested and the Court is satisfied that he has been put forward by the others to institute the suit, and he is a man of no means: *Hathway* v. *Doig*, 9 P. R. 91; *Clark* v. *St. Catharines*, 10 P. R. 205; *Re Seventh E. C. Bdg. Soc.*, 51 L. T. N. S. 109. But this principle does not apply where the plaintiff asserts a cause of action in which no one but himself is interested: *Clarke* v. *Rama Timber Transport Co.*, 10 P. R. 384; nor where the plaintiff himself has an interest in the suit which is brought partly for the benefit of another: *Wallbridge* v. *Trust & Loan Co.*, 13 P. R. 67; but the interest must be substantial and not merely nominal: *Delaney* v. *MacLellan*, *supra*. But an assignee in insolvency *bonâ fide* suing in the discharge of his duty will not be ordered to give security, though without means and not beneficially interested: *Vars* v. *Gould*, 8 P. R. 31; nor will a receiver of an insolvent company continuing, by order of the Court, an action brought by the company: *Provincial Ins. Co.* v. *Gooderham*, 7 P. R. 283; nor an official liquidator: *Cowell* v. *Taylor*, 31 Chy. D. 34. The doubts expressed as to such cases in *Pooley's trustee* v. *Whetham*, 28 Ch. D. 38, were dispelled in *Cowell* v. *Taylor*, *supra* 34.

Quære, whether the rule that security is not ordered against one only of several plaintiffs was ever applicable to the case of an insolvent plaintiff suing for the benefit of another: *Irving* v. *Clark*, 12 P. R. 29.

Where the plaintiff parts with his interest *pendente lite*, further proceedings may be stayed until security is given or the suit revived in the name of the assignee: *Swan* v. *Adams*, 7 P. R. 147; see also *Seear* v. *Lawson*, 16 Ch. D. 121, and *Goatley* v. *Emmott*, 15 C. B. 291.

Poverty of the plaintiff is no ground alone for asking security: *Ross* v. *Jacques*, 8 M. & W. 135; *Sweetman* v. *Morrison*, 10 P. R. 446; *Cowell* v. *Taylor*, 31 Ch D. at p. 38; nor his insolvency where he is suing for his own benefit: *Rhodes* v. *Dawson*, 16 Q. B. D. 548; not even though the plaintiff be also a married woman: *McKay* v. *Baker*, 12 P. R. 341; but insolvency was under the Insolvent Act of 1875: see s. 39, and *Brocklebank* v. *King's Lynn Steamship Co.*, 3 C. P. D. 365.

Where the Insolvent Act of 1875 applied, and an undischarged insolvent sues, sec. 39 of that Act was imperative and entitled the defendant to security as of right: *Humphries* v. *Ramsay*, 7 P. R. 189; and will be granted since the repeal of the Insolvent Act, in any case where the insolvent's estate had vested in the Assignee prior to the repeal: *Cooper* v. *Kirkpatrick*, 8 P. R. 248; and though the defendant had dealt with the plaintiff knowing him to be an insolvent: *Carroll* v. *Williams*, 2 C. L. T. 151. The right may, however, be waived by not applying at a proper stage of the cause: *Robertson* v. *McMaster*, 8 P. R. 14. The rule as to when it is too late to apply is not the same, however, as formerly: see note p. 942; see *United Telephone Co.* v. *Bassano*, 31 Ch. D. 630.

A motion for security was refused where the plaintiffs, resident out of the jurisdiction, had recovered judgment, and the defendant was appealing and

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alleged that since recovery of the judgment, the plaintiffs had removed their assets out of the Province: *Exchange Bank* v. *Barnes*, 11 P. R. 11. Rule 1245.

Where the plaintiff is a corporation the fact that it is insolvent and a receiver of profits appointed is no ground for security: *Dartmouth Harbour Commission* v. *Mayor of Dartmouth*, 34 W. R. 774; 55 L. J. Q. B. 483.

Other Grounds for Granting Security for Costs.—Security may also be applied for under some special provisions, *e.g.*, (1) where another suit is pending in respect of the same matter within or without the Province: see *Rule* 1243; (2) where costs of a former suit in respect of the same matter are unpaid: *Ib.*, not, however, where the costs of the former suit were not payable by the plaintiff but out of an estate: *Curtis* v. *McNabb*, 7 P. R. 246: *Peters* v. *Tilly*, 11 P. D. 145; (3) formerly where successive actions of ejectment were brought: R. S. O. c. 51, s. 73; see *Armstrong* v. *Montgomery*, 5 P. R. 461, and *Chambers* v. *Unger*, 6 P. R. 101; but this is not now provided for otherwise than under *Rule* 1243, as the rule is now that a judgment for the recovery of land is conclusive where it would be so in any other kind of action; (4) in actions for penalties, on an affidavit of merits and showing that the informer is not possessed of sufficient means to answer for costs: see *Rule* 1244, and *Ker* v. *Williams*, 79 L. T. Jour. 229; W. N. 1886, 16; and (5) in actions for libel under R. S. O. 1887, c. 57, s. 9. Another action pending abroad. Costs of former suit unpaid. Successive actions of ejectment. Suits for penalties. Libel.

Quære whether security will be ordered in a vexatious or frivolous action: *Potter* v. *Cotton*, W. N. 1879, 204.

It will not be ordered in an alimony suit: *Bennett* v. *Bennett*, 7 P. R. 54.

Security if applied for promptly, is generally for past as well as future costs: *Brocklebank* v. *King's Lynn, etc.*, 3 C. P. D. 365; *Massey* v. *Allen*, 12 Ch. D. 807; *Hateley* v. *Merchants Despatch*, 10 P. R. 253.

Amount of Security.—See *Rule* 1250 and notes.

Master's Office.—Parties residing out of the jurisdiction, coming into the Master's office to prove claims as creditors or otherwise, may be required to give security for costs: *Re Rees, Urquhart* v. *Toronto General Trusts Co.*, 10 P. R. 425.

Garnishee Proceedings.—Security has also been ordered to be given by one of the parties to an issue arising out of garnishee proceedings, where he was resident out of the jurisdiction: *Canadian Bank of Commerce* v. *Middleton*, 12 P. R. 121; *Edwards* v. *Edwards*, 12 P. R. 538.

Interpleader Proceedings.—In an interpleader matter either party: *Swain* v. *Stoddart*, 12 P. R. 490; *Walker* v. *Niles*, 3 Chy. Ch. 108; *Deller* v. *Prickett*, 20 L. J. Q. B. 151; *Tomlinson* v. *Land & Finance Co.*, 14 Q. B. D. 539, may be ordered to give security under the same circumstances as a plaintiff in an ordinary action; and so formerly in replevin the defendant: *Selby* v. *Crutchley*, 2 B. & B. 505; 4 Moo. 280. The substantial and not the nominal interest of the parties must be looked at, and therefore where one of the defendants in an interpleader issue was really interested in the result thereof as a plaintiff, he was held not entitled to call upon the plaintiff in the issue to give security for costs upon the ground that the latter was a foreigner residing abroad: *Belmonte* v. *Aynard*, 4 C. P. D. 352. Interpleader and replevin.

A sheriff in interpleader proceedings is only entitled to security for costs under the same circumstances as would entitle an ordinary litigant thereto: *Sweetman* v. *Morrison*, 10 P. R. 446.

A defendant residing out of the jurisdiction has a right to take any proceeding to defend himself: *Re Percy & Kelly Nickel, etc., Co.*, 2 Ch. D. 531; either against the plaintiff or by claiming relief against a co-defendant: *Walmsley* v. *Griffith*, 11 P. R. 139; or may present a petition: *Cochrane* v. *Fearon*, 18 Jur. 568, without being called on to give security for costs.

Defendant, where Ordered to Give Security for Costs.—In an action for breach of contract against defendant, a foreigner residing abroad, where the defendant denied the breaches and also made a counter-claim for breaches of the same contract by the plaintiff, claiming damages to an amount less Counter-claims.

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Rules 1246, 1247.

than the plaintiff's claim, it was held that the defendant could not be ordered to give security for the plaintiff's costs occasioned by the counter-claim: *Mapleson* v. *Masini*, 5 Q. B. D. 144. So in prosecuting a claim to to land before the Referee of Titles, a contestant served with notice will not be prevented from asserting his rights until payment of costs of proceedings instituted by him against the claimant, in respect of the property in question, ordered to be paid by the contestant: *Shepherd* v. *Hayball*, 13 Gr. 681; see also *Re Percy & Kelly Nickel, etc., Co.*, 2 Ch. D. 531. Where a defendant admitted the cause of action sued upon and set up a counter-claim founded upon a distinct transaction, he was held not entitled to security for costs from the plaintiff, a foreigner, residing without the jurisdiction: *Winterfield* v. *Bradnum*, 3 Q. B. D. 324. In the Admiralty Division, in an action of collision, a defendant claiming damages by counter-claim was ordered to give security for the plaintiff's costs of the action: *The Julia Fisher*, 2 P. D. 115.

Where a claim and counter-claim arise out of different matters, so that the counter-claim is really in the nature of an independent or cross-action, the defendant, if residing out of the jurisdiction, may be required to give security and should be so required, if the only dispute in the action is on his counter-claim: *Sykes* v. *Sacerdoti*, 15 Q. B. D. 423; *Lake* v. *Haseltine*, 55. L. J. Q. B. 205; see also *The Newbattle*, 54 L. J. (P. D. & Ad.) 16.

Security will be ordered to be given by a person out of the jurisdiction applying to be added as a party and for leave to apply for substantial relief, as he must be considered as in the position of a plaintiff: *Apollinaris Co.* v. *Wilson*, 31 Ch. D. 632.

Time for giving security for costs may be limited.

1246. Where a defendant in any action is entitled to obtain security for costs from a plaintiff, the Court or Judge may require the plaintiff to furnish the security within a time to be limited in any order for such security, or by any subsequent order.

(*a*) If the plaintiff fails without sufficient excuse to comply with such order, he shall be liable to have his action dismissed as for want of prosecution, with costs, and the Court or a Judge may make an order accordingly. 42 V. c. 15, s. 2.

See note to *Rule* 1242, p. 940.

Security for costs where given by bond.

1247. Where a bond is to be given as security for costs, it shall unless the Court or a Judge otherwise directs, be given to the party or persons requiring the security, and not to an officer of the Court. J. A. Rule 430.

Identical with the Eng. R. April, 1880, R. 41, and in accordance with the practice at Common Law. The Chancery Rule required the bond to be given to the Registrar or Deputy Registrar. See *Monro* v. *McLeod*, 7 P. R. 53.

For form of bond see Chitty's Forms, 11th ed. 220; Leggo's Forms, 2nd ed., Nos. 396, 397.

One surety only may be sufficient: *Beaton* v. *Boomer*, 1 C. L. J. 108; *Fletcher* v. *Noble*, 9 P. R. 534. The former Chy. Practice was that one was sufficient, unless the defendant before the bond is prepared, gives notice that he requires more: *Donnelly* v. *Jones*, 4 Chy. Ch. 48.

The sureties must be solvent: *Cliffe* v. *Wilkinson*, 4 Sim. 122; and if the security becomes altered by the death or insolvency of a surety, fresh security

may be required: *Lautour* v. *Holcombe*, 1 Ph. 262; *Veitch* v. *Irvine*, 11 Sim. 122; *Gage* v. *Canada Publishing Co.*, 10 P. R. 169; Morgan & Wurtzburg, p. 22.

The former Chancery practice was for the opposite party within two days after being served with notice of filing to give notice of motion to disallow the bond, otherwise it was considered sufficient. The Common Law practice was for the party filing the bond to take an appointment from the Clerk or Deputy Clerk of the Court for the allowance of the bond which was served with notice of filing; and the latter practice seems to be the one generally followed now.

The plaintiff's solicitor should not be a surety: *Beckett* v. *Wragg*, 1 Chy. Ch. 5; *G. T. Ry. Co.* v. *O. & Q. Ry. Co.*, 3 C. L. T. 173.

The plaintiff, instead of giving a bond might formerly *ex parte* obtain an order giving leave to pay $400 into Court: *Cliffe* v. *Wilkinson*, 4 Sim. 123; *Ganson* v. *Finch*, 3 Chy. Ch. 296; see also *Re Howland*, 4 Chy. Ch. 6; *Luther* v. *Ward*, 2 Chy. Ch. 175; and may now under *Rule* 1240 pay in not less than $200 without an order. The Accountant is the proper person to receive the money. Payment to a Local Registrar is not regular or sufficient: *Leroux* v. *Lauthier*, 2 C. L. T. 48.

Money may be paid into Court.

1248. Whenever a party is under an obligation to give a bond as security for costs, he may, without special order, pay into Court a sum of money not less than half the penalty of the bond required, and the same when so paid in shall stand as security in lieu of the bond required. *New.*

See note to *Rule* 1247.

It is presumed that the ordinary *præcipe* order for security being sufficiently and in practice ordinarily complied with by the giving of a bond for $400, the party is "under an obligation" to give a bond within the meaning of this *Rule* though the *præcipe* order does not in terms direct a bond to be given.

If the money paid in is not sufficient the opposite party may apply under *Rule* 1250 to have "further" security given.

The money must be paid into Court to the credit of the cause, in the same way as other moneys are paid into Court: see *Rules* 163-171 p. 246, *et seq.* Deposit of the money with a Local Registrar is invalid: *Leroux* v. *Lauthier*, *supra*.

Notice to be served.

1249. The party so paying in money shall when paying the same in state the purpose for which it is so paid in, and shall forthwith serve a notice upon the opposite party specifying the fact and purpose of such payment. *New.*

To comply with this *Rule* the *præcipe* for the direction of the bank, necessary under *Rules* 166, 167, should contain a statement of the purpose for which the money is paid in.

Amount may be varied.

1250. The amount of security may be increased or diminished from time to time by the Court or a Judge. *New.*

The security given under a *præcipe* order under *Rule* 1242, could not formerly be reduced without reason being shewn, and it was held that such reduction was not authorized by *Rule* 1245: *Riddell* v. *McKay*, 11 P. R. 459. See now *Rule* 1248.

Security given under a *præcipe* or special order might even before this *Rule* have been in a proper case increased. This was refused where the usual amount, $400, was likely to be insufficient only by reason of an adjournment of

Rules 1251, 1252.

the hearing, owing to the Judge having to close the Sittings to take another Circuit, and it was not shewn that defendant might not at the outset have applied for a larger sum than $400: *Bell* v. *Landon*, 9 P. R. 100. Also where the trial was postponed on terms, and the giving of security was not imposed as one of the terms: *Simon* v. *La Banque Nationale*, 7 P. R. 422.

In a suit by a foreign government £120 security for costs had been given before *The Judicature Act* came into operation. A large amount of costs would be incurred before the suit was heard, and further security to the amount of £500 to cover future costs was, under the Rule corresponding to *Rule* 1245, ordered to be given; further security, it was said, could not be given for *past* costs: *Republic of Costa Rica* v. *Erlanger*, 3 Ch. D. 62. In *Paxton* v. *Bell*, W. N. 1876, pp. 221, 249, it was held that the old Chancery rule as to the amount of security for costs must prevail in the Chancery Division, unless some special reason could be shewn for increasing the amount.

In a matter in the Surrogate Court security was directed to be given to the amount of $200. Subsequently the matter was removed to the Chancery Division, nothing at the time being said as to further security. On motion further security was ordered: *Johnston* v. *Wilson*, 4 C. L. T. 291.

Security on motion for judgment.

1251. Where an action is brought by a foreign plaintiff liable to give security for costs, who indorses his writ of summons with particulars of his claim in such a manner that, upon motion under Rule 739, an order allowing him to sign judgment might be made, he may, on being served with an order for security for costs, pay into Court the sum of $50, as a partial compliance with such order, and thereupon he shall be at liberty to proceed with a motion for judgment under Rule 739, but the order for security shall, nevertheless, in all other respects, have its full operation and effect. *New.*

This *Rule* is intended apparently to remove the obstacle which formerly existed to the plaintiff taking any proceedings until he had complied with an order for security for costs or obtained its discharge: see *Doer* v. *Rand*, 10 P. R. 165.

Judgment for part.

1252. If upon such a motion the plaintiff is allowed to sign judgment for any portion of his claim, he may sign judgment and issue execution therefor, but shall not take any other proceedings until the order for security shall have been fully complied with. *New.*

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CHAPTER XIV.

COUNTY COURTS.

All writs to be under the seal of the Courts, and tested, etc.

1253. All writs issued in the County Courts shall be issued by the Clerk and shall be under the seal thereof, and shall be tested in the name of the Judge thereof; or in the case of the death of such Judge, then in the name of the Junior or acting Judge in the County Court for the time being. R. S. O. 1877, c. 50, ss. 6, 8.

Subpœnas

1254. The several County Courts may issue writs of *subpœna ad testificandum*, to enforce the attendance of any witnesses resident within Ontario, and also writs of *subpœna duces tecum*, to enforce the attendance of and the production of deeds and papers by any such witnesses and may proceed against persons who, having been duly served with a *subpœna*, disregard or disobey the same, with the same powers, in like manner and by the same mode of proceeding as belongs to and is practised in the High Court. R. S. O. 1877, c. 62, s. 16.

Judges may sit at any time.

1255. Subject to Rules of Court, the Judges of the County Court shall have power to sit and act at any time for the transaction of any part of the business of such Courts, or for the discharge of any duty which by any statute or otherwise was formerly required to be discharged out of or during Term. J. A. Rule 488.

This corresponds with the powers given to the Judges of the High Court of Justice and the Court of Appeal by sec. 19 of the J. A. Act, 1881, (see now sec. 57).

Costs where action fails for want of jurisdiction.

1256. In all actions or other proceedings brought in any County or Division Court in Ontario, in which the plaintiff fails to recover judgment by reason of such Court having no jurisdiction over the subject matter thereof, the said County Court, or the Judge presiding in the said

Rules 1257-1259.

Division Court, as the case may be, shall have jurisdiction over the costs of such action, suit or other proceeding, and may order by and to whom the same shall be paid, and the recovery of the costs so ordered to be paid may be enforced by the same remedies as the costs in actions, suits or proceedings within the proper competence of the said Courts respectively are recoverable. J. A. Rule 489.

Not in the English Rules.

Where an appeal from a County Court was struck out on the ground that the order giving leave to appeal had been granted by a Judge at Chambers without jurisdiction, and there was, therefore, no jurisdiction to entertain the appeal, the Court of Appeal from Inferior Courts held that they had no power to grant costs to the party who appeared to shew cause against it. *Brown* v. *Shaw*, 1 Ex. D. 425; see also *Abbott* v. *Feary*, 29 L. J. Ex. 476; and *Peacock* v. *Reg.*, 4 C. B. N. S. 268.

Where a case was stated by Justices under 20 & 21 Vict. c. 43, but in consequence of the appellant not having complied with the conditions required by that Act, there was no jurisdiction to hear the case, and the respondent moved to strike the case out of the paper, the application was granted with costs: *Great Northern, etc., Committee* v. *Inett*, 2 Q. B. D. 284; *Crowther* v. *Boult*, 33 W. R. 150; not following *Peacock* v. *Reg.*, *supra*; see also *Royal Canadian Bank* v. *Stevenson*, 22 U. C. C. P. 562.

But for this *Rule* the Court would have no power to make any order for costs in a case in which it had no jurisdiction: *Powley* v. *Whitehead*, 16 U. C. Q. B. 589; *Dempster* v. *Purnell*, 3 M. & Gr. 375; but see *Re Isaacs*, 4 My. & Cr.

Procedure in County Courts.

1257. The pleadings, practice and procedure in actions in the High Court of Justice shall apply and extend to actions in the County Courts. J. A. Rule 490. *Altered.*

No corresponding English Rule. The original *Rule* 490 limited the application of the procedure of the High Court to cases where "the present pleadings, practice and procedure of the County Courts correspond with those of the Superior Courts of Law." The present *Rule* makes the procedure the same in all cases within the limits of the jurisdiction of the County Courts, and subject to any special *Rules*, such as *Rules* 1259-1264. Doubts were formerly entertained as to the application of many of the *Rules*, *e.g.*, *Rule* 755: see *McConnell* v. *Williams*, 13 Ont. App. 438; *Rule* 526: see *Williams* v. *Crow*, 10 Ont. App. 301; and *Rule* 510: see *Ferguson* v. *McMartin*, 11 Ont. App. 731, and now R. S. O. c. 47, s. 41. See also notes to sec. 158 of the Act, p. 126.

Motions against judgments.

1258. In actions in the County Courts motions against judgments and for new trials shall be disposed of upon the like grounds and principles as in the High Court. *See* R. S. O. 1877, c. 50, s. 292.

Notice of motion.

1259. Every motion against a judgment or for a new trial shall be a two clear days' notice, and the motion shall be set down at least one clear day before the first day of the sittings for which the notice is given unless otherwise ordered. *See* R. S. O. 1877, c. 50, s. 293.

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1260. In all actions brought in a County Court the Judge of the County Court where the proceedings are commenced, [or the Master in Chambers,] or one of the Judges of the High Court sitting at Chambers may change the place of trial according to the practice now in force in the High Court; and in the event of an order being obtained for that purpose, the Clerk of the County Court where the action was commenced shall forthwith transmit all papers in the action to the Clerk of the County Court to which the place of trial is changed, and all subsequent proceedings shall be entitled in such last mentioned Court, and carried on in such last mentioned County as if the proceedings had originally been commenced in such last mentioned Court. R. S. O. 1877, c. 50, s. 155. Rules 1260-1262. Change of place of trial in County Court.

The jurisdiction of the Master in Chambers doubted in *Brigham* v. *McKenzie*, 10 P. R. 406, has been made clear in the consolidation of the *Rules* by the insertion in this *Rule* of the words in brackets.

1261. Every County Court Clerk shall keep his office open for the transaction of business on every day except on holidays, and except as hereinafter provided from the hour of 10 in the forenoon, to the hour of 3 in the afternoon. On and between the 1st day of July and the 31st day of August, and on and between the 24th day of December and the 6th day of January, every such Clerk shall keep his office open for the transaction of business, from 10 in the forenoon until noon; and during the Statutory Sittings of the Court, such Clerk shall keep his office open as aforesaid, on and between the said dates until 4 in the afternoon. J. A. Rule 534. Office hours of Clerks of County Courts.

1262. Money to be paid into the County Court, or Surrogate Court of ~~the~~ County ~~of York~~ by any person, shall be paid into some incorporated bank designated for this purpose, from time to time, by order of the Lieutenant-Governor in Council; or where there is no such bank, then into some incorporated bank in which public money of the Province is then being deposited, and which has been appointed for this purpose by any General Rule or Order made in the same manner as other General Rules or Orders of the said Courts respectively are by law directed to be made; or if no bank has been so appointed, then into any bank in which public money of the Province is then being deposited. Payment of money into Court.

Rules 1263, 1264. Procedure.

(2) The money shall be so paid in to the credit of the cause or matter in which the payment is made, with the privity of the Clerk or Registrar (as the case may be) of the Court, and in no other manner; and such money shall only be withdrawn on the order of the Court or a Judge thereof, with the privity of the Clerk or Registrar of the Court.

Withdrawal.

Plea of payment into Court.

(3) Where money is so paid in under a plea of payment into Court, the Clerk, on the production of the receipt of the bank for the money or other satisfactory proof of such payment, shall sign a receipt for the amount in the margin of the pleading.

Clerk or Registrar to keep books and render statements.

1263. The Clerk and Registrar of said Courts shall each keep a book or books containing an account of all moneys so paid into their respective Courts, and of the withdrawal thereof; and shall prepare in the month of January in every year a statement of all moneys so paid in and withdrawn respectively, and a statement of the condition of the various accounts upon the thirty-first day of the preceding December, and shall transmit to the Provincial Secretary and to the Judge or each of the Judges of such Courts, a copy of such statement, with a declaration thereto annexed made before a Justice of the Peace or Commissioner for taking affidavits, in the Form No. 217 in the Appendix.

Books to be open for inspection.

1264. The book or books so to be kept shall be open for inspection within office hours; and the Clerk or Registrar shall give a certificate of the state of any account or an extract therefrom at the desire of any party interested, or his attorney or solicitor on payment to the Clerk or Registrar of the sum of twenty cents for such inspection or certificate and the sum of ten cents per folio for such extract. R. S. O. 1877, c. 42, s. 25.

Fees for extracts, etc.

1265 Orders in chambers may be signed

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SCHEDULE

Of Rules and Orders not Repealed.

Description of Title or Order.	Extent to which Unrepealed.
Rules of the Court of Queen's Bench and Common Pleas of 7th Feb., 1876. (Crown cases reserved.)	The whole.
Orders of the Court of Chancery. (Election Court Rule.)	Order 618.
Rules of the Supreme Court of Judicature.	Rules 493 and 494 referring to proceedings pending at the time of passing the *Judicature Act*; 538 referring to selection of *rota* Judges for trial of election petitions; and 695 referring to Fees in Surrogate Courts and fees of Clerks of the Peace.
Rules relating to controverted elections of members of the House of Commons, passed 12th Feb., 1875.	The whole.
Rules of the Court of Appeal relating to controverted elections of members of the Legislative Assembly of Ontario.	The whole.

The following *Rule* passed on Nov. 17, 1886, under the authority of 49 V. c. 49, s. 6 (D.), now R. S. C. c. 178, s. 90, is not mentioned in the above schedule, but, as it does not relate to civil matters, it is probably unaffected by the general repeal of the former *Rules* by *Rule* 3.

"No motion shall be entertained by this Court, or by any Division of the same, or by any Judge of a Division sitting for the Court, or in Chambers, to quash a conviction, order, or other proceeding which has been made by or before a Justice of the Peace (as defined by the said Act) and brought before the Court by *certiorari*, unless the defendant is shown to have entered into a recognizance, with one or more sufficient sureties, in the sum of $100, before a Justice or Justices of the county or place within which such conviction or order has been made, or before a Judge of the County Court of the said county, or before a Judge of the Superior Court, and which recognizance, with an affidavit of the due execution thereof, shall be filed with the Registrar of the Court in which such motion is made or is pending, or unless the defendant is shown to have made a deposit of the like sum of $100 with the Registrar of the Court in which such motion is made, with or upon the condition that he will prosecute such *certiorari* at his own costs and charges, and without any wilful or affected delay, and that he will pay the person in whose favour the conviction, order, or other proceeding is affirmed his full costs and charges, to be taxed according to the course of the Court, in case conviction, order, or proceeding is affirmed."

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APPENDIX

TO THE FOREGOING RULES.

FORMS. (a)

PART I.

FORMS OF WRITS OF SUMMONS AND NOTICE IN LIEU OF SUMMONS.

No. 1.

General Form of Writ of Summons.

In the High Court of Justice.
———Division.

Between A. B., Plaintiff,
and
C. D. & E. F., Defendants.

VICTORIA, by the Grace of God, etc.

To C. D., of in the county of , and E. F., of

We command you, That within ten days after the service of this writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of A. B.; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, the Honourable President of our High Court of Justice at in the year of Our Lord 18 .

Memorandum to be subscribed on the writ.

N.B.—This writ is to be served within 12 calendar months from the date thereof, or if renewed, within 12 calendar months from the date of such renewal, including the day of such date, and not afterwards.

The defendant [or defendants] may appear hereto by entering an appearance [*or* appearances] either personally or by solicitor at the [ ] office at

Indorsements to be made on the writ.

The plaintiff's claim is for, etc.

Where the writ is to be specially indorsed add:—The following are the particulars: —(*Giving them. See Part II. post.*)

This writ was issued by E. F., of solicitor for the said plaintiff, who resides at *or*, this writ was issued by the plaintiff in per-

(a) As to the extent to whichanything contained in the Forms affects the construction of the *Rules* see *Rule* 458 and note also *Boswell* v. *Coaks*, 36 Ch. D. 441; 36 W. R. 65: *McCready* v. *Hennessy*, 9 P. R, 489.

son who resides at [*mention the city, town, or township, and also the name of the street and number of the house of the plaintiff's residence, if any, or in case of a township, the number of the lot and concession*].

Also the Indorsement No. 5.

Indorsement to be made on the writ after service thereof.

This writ was served by X. Y. on C. D. [the defendant *or* one of the defendants], on *Monday*, the day of , 18 .

(Signed) X. Y.

No. **2.**

Writ for service out of Ontario.

In the High Court of Justice. Between A Plaintiff,
——Division.
C. D. and , Defendants.

VICTORIA, by the Grace of God, etc.

To C. D., of

We command you, C. D., that within [*here insert the number of days directed by Rule 273, or as the case may be*], after the service on you, of this writ [*or* notice of this writ *as the case may be*], and of the plaintiff's statement of claim delivered herewith, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of A. B., and your defence thereto, if any, to be delivered; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, the Honourable President, etc

Memorandum and indorsement as in Form No. 1.

Indorsement to be made on the writ.

N.B.—This writ is to be used where the defendant or all the defendants or one or more defendant or defendants is or are out of Ontario. When the defendant to be served is not a British subject, and is not in British dominions, notice of the writ, and not the writ itself, is to be served upon him.

Indorsement to be made on the writ after service thereof:

This notice was served by X. Y., on G. H., (the defendant or one of the defendants) on the day of 18 .

Indorsed the day of 18 .

(Signed)
(Address)

No. **3.**

Notice of writ, in lieu of writ, to be given out of Ontario.

In the High Court of Justice.
——Division. Between A. B., Plaintiff,
and
C. D., E. F., and G. H., Defendants.

To G. H., of

Take notice that A. B., of has commenced an action against you, G. H., in the Division of Her Majesty's High Court of

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Justice in Ontario, by writ of that Court, dated the day of , A.D., 18 ; which writ is indorsed as follows [*copy in full the indorsements*], and you are required within [ ] days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said Court to the said action, and your defence thereto, if any, to be delivered; and in default of your so doing, the said A. B., may proceed therein, and judgment may be given in your absence.

You may appear to the said writ by entering an appearance personally, or by your solicitor at the [ ] office at

Dated, etc.

(Signed) A. B., of etc.
or
Y. Y., of etc.
Solicitor for A. B.

N.B.—This notice is to be used when the person to be served is not a British subject, and is not in British dominions.

Indorsement to be made on the notice of the writ after service thereof:

This notice was served by X. Y., on G. H., (the defendant *or* one of the defendants) on the day of 18 .

Indorsed the day of 18 .

(Signed)
(Address)

PART II.

Indorsements on Writs of Summons.

SECTION I.

No. 4.

Money Claims where no special Indorsement under Rule 242.

The plaintiff's claim is $	for the price of goods sold.	Goods sold.
This Form shall suffice whether the claim be in respect of goods sold and delivered, or of goods bargained and sold.		
The plaintiff's claim is $	for money lent [and interest].	Money lent
The plaintiff's claim is $	whereof $ is for the price of goods sold, and $ for money lent, and $ for interest.	Several demands.
The plaintiff's claim is $	for arrears of rent.	Rent.
The plaintiff's claim is $	for arrears of salary as a clerk [*or as the case may be*].	Salary, etc.
The plaintiff's claim is $	for interest upon money lent.	Interest.
The plaintiff's claim is $	for a general average contribution.	General average.
The plaintiff's claim is $	for freight and demurrage.	Freight, etc.

	The plainitff's claim is $ for lighterage.
Tolls.	The plaintiff's claim is $ for market tolls and stallage.
Penalties.	The plaintiff's claim is $ for penalties under the Statute Victoria, chap. [. . .]
Banker's balance.	The plaintiff's claim is $ for money deposited with the defendant as a banker.
Fees, etc., as solicitors.	The plaintiff's claim is $ for fees for work done [and $ money expended] as a solicitor.
Commission.	The plaintiff's claim is $ for commission as [*state character as auctioneer, broker, etc.*]
Medical attendance.	The plaintiff's claim is $ for medical attendance.
Return of premium.	The plaintiff's claim is $ for a return of premiums paid upon policies of insurance.
Warehouse rent.	The plaintiff's claim is $ for the warehousing of goods.
Carriage of goods.	The plaintiff's claim is $ for the carriage of goods by railway.
Use and occupation of house.	The plaintiff's claim is $ for the use and occupation of a house.
Hire of goods.	The plaintiff's claim is $ for the hire of [*furniture*].
Work done.	The plaintiff's claim is $ for work done as surveyor.
Board and lodging.	The plaintiff's claim is $ for board and lodging.
Schooling.	The plaintiff's claim is $ for the board, lodging and tuition of X. Y.
Money received.	The plaintiff's claim is $ for money received by the defendant as solicitor [*or* factor, *or* collector, *or etc.*] of the plaintiff.
Fees of office.	The plaintiff's claim is $ for fees received by the defendant under colour of the office of
Money over paid.	The plaintiff's claim is $ for the return of money overcharged for the carriage of goods by railway.
Return of money by stakeholder.	The plaintiff's claim is $ for a return of fees overcharged by the defendant as
	The plaintiff's claim is $ for a return of money deposited with the defendant as stakeholder.
Money won from stakeholder.	The plaintiff's claim is $ for money entrusted to the defendant as stakeholder, and become payable to plaintiff.
Money entrusted to agent.	The plaintiff's claim is $ for a return of money entrusted to the defendant as agent to the plaintiff.
Money obtained by fraud.	The plaintiff's claim is $ for a return of money obtained from the plaintiff by fraud.
Money paid by mistake.	The plaintiff's claim is $ for a return of money paid to the defendant by mistake.
Money paid for consideration which has failed.	The plaintiff's claim is $ for a return of money paid to the defendant for [*work to be done, left undone; or a bill to be taken up, not taken up, etc.*]
	The plaintiff's claim is $ for a return of money paid as a deposit upon shares to be allotted.
Money paid by surety for defendant.	The plaintiff's claim is $ for money paid for the defendant as his surety.
Rent paid.	The plaintiff's claim is $ for money paid for rent due by the defendant.

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The plaintiff's claim is $ upon a bill of exchange accepted [*or* indorsed] for the defendant's accommodation. — Money paid on accommodation bill

The plaintiff's claim is $ for a contribution in respect of money paid by the plaintiff as surety. — Contribution by surety.

The plaintiff's claim is $ for a contribution in respect of a joint debt of the plaintiff and the defendant, paid by the plaintiff. — By co-debtor.

The plaintiff's claim is $ for money paid for calls upon shares, against which the defendant was bound to indemnify the plaintiff. — Money paid for calls.

The plaintiff's claim is $ for money payable under an award. — Money payable under award.

The plaintiff's claim is $ upon a policy of insurance upon the life of X. Y., deceased. — Life policy.

The plaintiff's claim is $ upon a bond to secure payment of $1,000 and interest — Money bond.

The plaintiff's claim is $ upon a judgment of the Court, in the Province of Quebec. — Foreign judgment.

The plaintiff's claim is $ upon a cheque drawn by the defendant.

The plaintiff's claim is $ upon a bill of exchange accepted [*or* drawn *or* indorsed] by the defendant. — Bill of exchange, etc.

The plaintiff's claim is $ upon a promissory note made [*or* indorsed] by the defendant.

The plaintiff's claim is $ against the defendant A. B. as acceptor, and against the defendant C. D. as drawer [*or* indorser], of a bill of exchange.

The plaintiff's claim is $ against the defendant as surety for the price of goods sold. — Surety.

The plaintiff's claim is $ against the defendant A. B. as principal, and against the defendant C. D. as surety for the price of goods sold [*or* arrears of rent, *or* for money lent, *or* for money received by the defendant A. B., as traveller for the plaintiffs, *or*, *etc.*]

The plaintiff's claim is $ against the defendant as a *del credere* agent for the price of goods sold [*or* as losses under a policy]. — *Del credere* agent.

The plaintiff's claim is $ for calls upon shares.

SECTION II.

No. **5.**

Indorsement for Costs, etc.

[*Add to the above forms*] and $ for costs; and if the amount claimed be paid to the plaintiff or his solicitor within 8 days [*or if the writ is to be served out of Ontario, or notice in lieu of service allowed, insert the time limited for appearance and defence*] from the service hereof, further proceedings will be stayed.

SECTION III.

No. **6.**

Indorsements on writs for Damages and other Claims.

The plaintiff's claim is for damages for breach of a contract to employ the plaintiff as traveller. — Agent, etc.

The plaintiff's claim is for damages for wrongful dismissal from the defendant's employment as traveller [and $ for arrears of wages].

The plaintiff's claim is for damages for the defendant's wrongfully quitting the plaintiff's employment as manager.

The plaintiff's claim is for damages for breach of duty as factor [*or, etc.*] of the plaintiff [and $ for money received as factor, etc.]

The plaintiff's claim is for damages for breach of the terms of a deed of apprenticeship of X. Y. to the defendant [*or* plaintiff].

Arbitration. The plaintiff's claim is for damages for non-compliance with the award of X. Y.

Assault, etc. The plaintiff's claim is for damages for assault [and false imprisonment, and for malicious prosecution].

By husband and wife. The plaintiff's claim is for damages for assault and false imprisonment of the plaintiff C. D.

The plaintiff's claim is for damages for assault by the defendant C. D.

Solicitor. The plaintiff's claim is for damages for injury by the defendant's negligence as solicitor of the plaintiff.

Bailment. The plaintiff's claim is for damages for negligence in the custody of goods [and for wrongfully detaining the same].

Pledge. The plaintiff's claim is for damages for negligence in the keeping of goods pawned] and for wrongfully detaining the same].

Hire. The plaintiff's claim is for damages for negligence in the custody of furniture let on hire [*or* a carriage lent], [and for wrongfully, etc.]

Banker. The plaintiff's claim is for damages for wrongfully neglecting [*or* refusing] to pay the plaintiff's cheque.

Bill. The plaintiff's claim is for damages for breach of a contract to accept the plaintiff's drafts.

Bond. The plaintiff's claim is upon a bond conditioned not to carry on the trade of a

Carrier. The plaintiff's claim is for damages for refusing to carry the plaintiff's goods by railway.

The plaintiff's claim is for damages for refusing to carry the plaintiff by railway.

The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of coals by railway.

The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of machinery by sea.

Charter party. The plaintiff's claim is for damages for breach of charter-party of ship [*Mary*].

Damages for depriving of goods. The plaintiff's claim is for wrongfully depriving plaintiff of goods, household furniture, etc.

Defamation. The plaintiff's claim is for damages for libel.

The plaintiff's claim is for damages for slander.

Distress. Replevin. The plaintiff's claim is in replevin for goods wrongfully distrained.

Wrongful distress. The plaintiff's claim is for damages for improperly distraining.

[*This form shall be sufficient whether the distress complained of be wrongful or excessive, or irregular, and whether the claim be for damages only, or for double value*].

Fishery. The plaintiff's claim is for damages for infringement of the plaintiff's right of fishing.

Fraud. The plaintiff's claim is for damages for fraudulent misrepresentation on the sale of a horse [*or* a business, *or* shares, *or* etc.]

The plaintiff's claim is for damages for fraudulent misrepresentation of the credit of A. B.

Guarantee. The plaintiff's claim is for damages for breach of a contract of guarantee for A. B.

The plaintiff's claim is for damages for breach of a contract to indemnify the plaintiff as the defendant's agent to distrain.

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The plaintiff's claim is for a loss under a policy upon the ship "Royal Charter," and freight or cargo [*or* for return of premiums]. Insurance.

[*This form shall be sufficient whether the loss claimed be total or partial*].

The plaintiff's claim is for a loss under a policy of fire insurance upon house and furniture. Fire insurance.

The plaintiff's claim is for damages for breach of a contract to insure a house. Landlord and tenant.

The plaintiff's claim is for damages for breach of a contract to keep a house in repair.

The plaintiff's claim is for damages for breaches of covenants contained in the lease of a farm.

The plaintiff's claim is for damages for injury to the plaintiff from the defendant's negligence as a medical man. Medical man.

The plaintiff's claim is for damages for injury by the defendant's dog. Mischievous animal.

The plaintiff's claim is for damages for injury to the plaintiff [*or, if by husband and wife*, to the plaintiff C. D.] by the negligent driving of the defendant or his servants. Negligence.

The plaintiff's claim is for damages for injury to the plaintiff while a passenger on the defendant's railway by the negligence of the defendant's servants.

The plaintiff's claim is for damages for injury to the plaintiff at the defendant's railway station, from the defective condition of the station.

The plaintiff's claim is as executor of A. B. deceased, for damages for the death of said A. B., from injuries received while a passenger on the defendant's railway, by the negligence of the defendant's servants. Lord Campbell's Act.

The plaintiff's claim is for damages for breach of promise of marriage. Promise of marriage.

The plaintiff's claim is for damages for the seduction of the plaintiff's daughter. Seduction.

The plaintiff's claim is for damages for breach of contract to accept and pay for goods. Sale of goods.

The plaintiff's claim is for damages for non-delivery [*or* short delivery, *or* defective quality, *or* other breach of contract of sale], of cotton [*or*, etc.]

The plaintiff's claim is for damages for breach of warranty of a horse.

The plaintiff's claim is for damages for breach of a contract to sell [*or* purchase] land. Sale of land.

The plaintiff's claim is for damages for breach of contract to let [*or* take] a house.

The plaintiff's claim is for damages for breach of a contract to sell [*or* purchase] the lease, with goodwill, fixtures, and stock-in-trade of a public-house.

The plaintiff's claim is for damages for breach of covenant for title [*or* for quiet enjoyment, *or* etc.] in a conveyance of land.

The plaintiff's claim is for damages for wrongfully entering the plaintiff's land and drawing water from his well [*or* cutting his grass, *or* pulling down his timber, *or* pulling down his fences, *or* removing his gate, *or* using his road or path, *or* crossing his field, *or* depositing sand there, *or* carrying away gravel from thence, *or* carrying away stones from his river]. Trespass to land.

The plaintiff's claim is for damages for wrongfully taking away the support of plaintiff's land [*or house or mine*]. Support.

The plaintiff's claim is for damages for wrongfully obstructing a way [public highway *or* private way]. Way.

The plaintiff's claim is for damages for wrongfully diverting [*or* obstructing, *or* polluting, *or* diverting water from] a watercourse. Watercourse, etc.

The plaintiff's claim is for damages for wrongfully discharging water upon the plaintiff's land [*or* into the plaintiff's mine].

The plaintiff's claim is for damages for wrongfully obstructing the plaintiff's use of a well.

Pasture. The plaintiff's claim is for damages for the infringement of the plaintiff's right of pasture.

[*This form shall be sufficient whatever the nature of the right to pasture be*].

Light. The plaintiff's claim is for damages for obstructing the access of light to plaintiff's house.

Patent. The plaintiff's claim is for damages for the infringement of the plaintiff's patent.

Copyright. The plaintiff's claim is for damages for the infringement of the plaintiff's copyright.

Trade mark. The plaintiff's claim is for damages for wrongfully using [*or* imitating] the plaintiff's trade mark.

Work. The plaintiff's claim is for damages for breach of a contract to build a ship [*or* to repair a house, *etc.*]

The plaintiff's claim is for damages for breach of a contract to employ the plaintiff to build a ship, etc.

Nuisance. The plaintiff's claim is for damages to his house, trees, crops, etc., caused by noxious vapours from the defendant's factory [*or, etc.*]

The plaintiff's claim is for damages from nuisance by noise from the defendant's works [*or, etc.*]

Innkeeper. The plaintiff's claim is for damages for loss of the plaintiff's goods in the defendant's inn.

Claim for return of goods damages. The plaintiff's claim is for return of household furniture, or, etc., or their value, and for damages for detaining the same.

Ejectment. The plaintiff's claim is to recover possession of a house, No. in street, in the City of Ottawa; *or* of the N. E ¼ of lot 2, in the 3rd concession of the Township of in the County of

To establish title and recover rents The plaintiff's claim is to establish his title to [*here describe property*], and to recover the rents thereof.

[*The two previous forms may be combined*].

Dower. The plaintiff's claim is for dower out of lot number (*or* describing the property otherwise with reasonable certainty). And take notice that the plaintiff claims damages for the detention of her dower from the day of

Add to indorsement if a mandamus is claimed.

Mandamus. And for a mandamus commanding the defendant to

Add to indorsement if an injunction is claimed.

Injunction. And for an injunction to restrain the defendant from

Add to Indorsement where Claim is to land, or to establish title, or both:

Mesne profits. And for mesne profits.

Arrears of rent. And for an account of rents or arrears of rent.

Breach of covenant. And for breach of covenant for [*repairs*].

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SECTION IV.

No. 7.

Money Claims—Special Indorsements under Rule 243.

1. The plaintiff's claim is for the price of goods sold. The following are the particulars:—

1879—31st December.—
Balance of account for butcher's meat to this date . . . $142
1880—1st January to 31st March.—
Butcher's meat supplied 297

$439
1880—1st February.—Paid 180

Balance due $259

2. The plaintiff's claim is against the defendant A. B. as principal, and against the defendant C. D. as surety, for the price of goods sold to A. B. The following are the particulars:—

1881—2nd February. Guarantee by C. D. of the price of woollen goods to be supplied to A. B.

2nd February—To goods $225
3rd March—To goods 151
17th March—To goods 27
5th April—To goods 65

$468

3. The plaintiff's claim is against the defendant, as maker of a promissory note. The following are the particulars:—

Promissory note for $1,000 dated 1st January, 1879, made by defendant, payable four months after date.

Principal $1,000
Interest . . . . . .

4. The plaintiff's claim is against the defendant A. B. as acceptor, and against the defendant C. D. as drawer, of a bill of exchange. The following are the particulars:—

Bill of exchange for $2,000, dated 1st January, 1880, drawn by defendant C. D. upon and accepted by defendant A. B., payable three months after date.

Principal. $2,000
Interest . . . . . .

5. The plaintiff's claim is for principal and interest due upon a bond. The following are the particulars:—

Bond dated 1st January, 1879. Condition for payment of $500 on the 26th December, 1879.

Principal due $500
Interest . . . . . .

6. The plaintiff's claim is for principal and interest due under a covenant. The following are the particulars:—

Deed dated covenant to pay $3,000 and interest.
Principal due $800
Interest.....

SECTION V.

No. 8.

Indorsements of Character of Parties.

Executor. The plaintiff's claim is as executor [*or* administrator] of C. D., deceased, for, etc.

The plaintiff's claim is against the defendant A. B., as executor [*or*, etc.] of C. D., deceased. for, etc.

The plaintiff's claim is against the defendant A. B., as executor for X. Y., deceased, and against the defendant C. D., in his personal capacity, for, etc.

Against executrix. The claim of the plaintiff is against the defendant as executrix of C. D., deceased, for

Assignee in insolvency. The plaintiff's claim is as assignee in insolvency of A. B., for

The plaintiff's claim is against the defendant as assignee in insolvency of A. B., for

Trustees. The plaintiff's claim is as [*or* the plaintiff's claim is against the defendant as] trustee under the will of A. B. [*or* under the settlement upon the marriage of A. B. and X. Y., his wife].

Heir and devisee. The plaintiff's claim is against the defendant as heir-at-law of A. B. deceased.

The plaintiff's claim is against the defendant C. D., as heir-at-law, and against the defendant E. F., as devisee of the lands under the will of A. B.

Qui tam action. The plaintiff's claim is as well for the Queen as for himself, for

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SECTION VI.

No. 9.

Indorsements in Matters which formerly belonged to the exclusive jurisdiction of Equity.

(*a*) *Creditor to administer Estate.*

The plaintiff's claim is as a creditor of X. Y., of deceased, to have the [real and] personal estate of the said X. Y. administered. The defendant C. D. is sued as the administrator of the said X. Y. [and the defendants E. F. and G. H. as his co-heirs-at-law].

(*b*) *Legatee to administer Estate.*

The plaintiff's claim is as a legatee under the will dated the day of 18 , of X. Y., deceased, to have the [real and] personal estate of the said X. Y. administered. The defendant C. D. is sued as the executor of the said X. Y. [and the defendants E. F. and G. H. as his devisees]

(*c*) *Partnership account.*

The plaintiff's claim is to have an account taken of the partnership dealings between the plaintiff [and defendant [under articles of partnership dated the day of], and to have the affairs of the partnership wound up.

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(*d*) *By Mortgagee for sale and for immediate payment and possession.*

The plaintiff's claim is on a mortgage dated the day of made between [*or* by deposit of title deeds], and that the mortgage may be enforced by sale, and payment to the plaintiff by the defendant personally of any balance. (*If order for immediate payment is wanted add*), And take notice further that the plaintiff claims to be entitled forthwith to execution against the goods and lands of you (*naming the defendant against whom this order is claimed*) to recover payment of the amount due by you.

(*If order is wanted for immediate possession add*), And take notice further, that the plaintiff claims to be entitled to an order for the immediate delivery of the mortgaged premises to him.

(*e*) *By Mortgagee for foreclosure and for immediate payment and possession.*

The plaintiff's claim is on a mortgage dated the day of made between (*or* by deposit of title deeds), and that the mortgage may be enforced by foreclosure.

(*If order for immediate payment is wanted add*), And take notice further that the plaintiff claims to be entitled forthwith to execution against the goods and lands of you (*naming the defendant against whom this order is claimed*) to recover payment of the amount due by you.

(*If order for immediate possession is wanted add*), And take notice further that the plaintiff claims to be entitled to the immediate possession of the mortgaged premises.

(*At the end of the indorsement add*), If you desire a sale of the mortgaged premises instead of a foreclosure, and do not intend to defend the action, you must within the time allowed for appearance, file in the office within named, a notice in writing, signed by yourself or your solicitor, to the following effect:—"I desire a sale of the mortgaged premises in the plaintiff's writ of summons mentioned, or a competent part thereof, instead of a foreclosure," and you must deposit the sum of $80 to meet the expenses of such sale.

(*f*) *By Mortgagor for Redemption.*

The plaintiff's claim is to have an account taken of what, if anything, is due on a mortgage dated and made between [*parties*], and to redeem the property comprised therein.

(*g*) *Raising portions.*

The plaintiff's claim is that the sum of $, which by an indenture of settlement dated , was provided for the portions of the younger children of may be raised.

(*h*) *Execution of Trusts.*

The plaintiff's claim is to have the trusts of an indenture dated and made between , carried into execution.

(*i*) *Cancellation or Rectification.*

The plaintiff's claim is to have a deed dated and made between [*parties*], set aside or rectified.

(*j*) *Specific Performance.*

The plaintiff's claim is for specific performance of an agreement dated the day of for the sale by the plaintiff to the defendant of certain [*freehold*] hereditaments at

(*k*) *Alimony.*

The plaintiff's claim is for alimony; and the plaintiff demands as interim alimony until the trial of the action the monthly (*or* weekly) sum of $ to be paid to her on the day of each month (*or* week) at and the interim costs to which she is entitled by the practice in that behalf.

NOTE.—*Where the plaintiff desires to register a certificate of* lis pendens *the indorsement on the writ of summons may contain such short description of the property as may be necessary or proper for that purpose.*

PART III.

NOTICES, ETC.

No. **10.**

Notice of Motion to Court.

In the High Court of Justice.
———Division.
Between

Plaintiff.

and

Defendant.

Take notice, that the Court will be moved on behalf of on day the day of 18 . at o'clock in the forenoon, or so soon thereafter as counsel can be heard, that (*state the object of the intended application*).

Dated the day of 18 .

(Signed)
Solicitor for the

To

No. **11.**

Notice of Motion in Chambers.

[Title, etc.]

Take notice, that a motion will be made on behalf of before the Master in Chambers (*or as the case may be*), at Osgoode Hall, in the City of Toronto, on day the day of 18 , at o'clock in the noon, or so soon thereafter as the motion can be heard, for an order for time to, etc.

For time.

For final judgment under Rule 739.

or, that be at liberty to sign final judgment in this action for the amount indorsed on the writ with interest, if any, and costs;

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or, that the plaintiff be at liberty to amend the writ of summons in this action by — To amend writ.

or, that the do furnish the said with a statement in writing, verified by affidavit, setting forth the names of the persons constituting the members or co-partners of their firm, pursuant to the Rules of the Supreme Court, Rule 317. — For particulars (partnership).

or, for an account in writing of the particulars of the plaintiff's claim in this action (with dates and items, *or as the case may be*), and that unless such particulars be delivered in four days, all further proceedings be stayed until the delivery thereof; — For particulars (generally).

or, for an account in writing of the particulars of the injuries and expenses mentioned in the Statement of Claim, together with the time and place of the accident, and the particular acts of negligence complained of, and that unless such particulars be delivered within days all further proceedings be stayed until the delivery thereof; — For particulars (accident).

or, that the order of in this action, dated the day, of , 18 , be (discharged, *or* varied by, etc.), on the grounds disclosed in the affidavit of , filed in support of this application; — To discharge or vary order.

or, that this action be dismissed with costs to be taxed and paid to the Defendant by the Plaintiff for want of prosecution, the Plaintiff not having, etc; — To dismiss action.

or, that the answer within days, stating what documents are or have been in possession or power relating to the matters in question in this action; — For discovery of documents.

or, that the be at liberty to inspect, and take copies of, or extracts from , and that in the meantime all further proceedings be stayed; — To inspect documents.

or, that a witness on behalf of the be examined forthwith before upon the usual terms; — To examine witness before trial.

or, that the be at liberty to issue a commission for the examination of witnesses on behalf at , and that the trial of this action be stayed until the return of such commission upon the usual terms; — For Commission to examine witnesses.

or, that the following question arising in this action, namely:— be referred for inquiry and report to under section 101 of the Judicature Act; — To refer under section 101 of the Act.

or, that the in this action be tried by under section 102 of the Judicature Act; — To refer under section 102 of the Act.

or, that the above-named judgment debtor be orally examined as to whether any and what debts are owing to him, and do attend for that purpose before the Master in Chambers (*or as the case may be*) at such time and place as he may appoint, and that the said judgment debtor produce his books, etc., before the said Master at the time of the examination; — For examination of judgment debtor as to means

or, that this action be tried before the County Court of holden on — For trial of action in County Court.

For interpleader order (by sheriff).

or, that the plaintiff and claimant appear and state the nature of their respective claims to the goods and chattels seized by the above-named sheriff under the writ of *fieri facias* issued in this action and maintain or relinquish the same and abide by such order as may be made herein, and that in the meantime all further proceedings be stayed.

No. 12.

Notice of application for Administration Order or respecting the guardianship of an infant.

In the High Court of Justice,
———Division.

Between A. B., plaintiff,
and
C. D., defendant.

Take notice that an application will be made to , in Toronto, (*or* to at his office in the city (*or town*) of, etc., *as the case may be*), on the day of at the hour of o'clock in the forenoon, (or if opposed, then to a Judge in Chambers so soon thereafter as a Judge shall be sitting in Chambers, for an order for the administration of the estate, real and personal, of by the Court, *or* for any order appointing guardian of an infant); and upon such application will be read the affidavits of this day filed.

Dated, etc.,

X. Y., Solicitor for

To Mr. C. D.

No. 13.

Notice of Entry of Appearance.

In the High Court of Justice.
———Division.
Between

Plaintiff,

and

Defendant.

Take notice that have this day entered an appearance at for the defendant to the writ of summons in this action.

The said defendant require [*or* do not require] delivery of a statement of claim.

Dated the day of 18 .

(Signed)
Solicitor for the defendant

To

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No. **14.**

Notice limiting defence.

In the High Court of Justice.
——Division.

Between A. B., plaintiff,
and
C. D., and E. F., defendants.

The defendant, C. D., limits the defence to part only of the property mentioned in the writ in this action, that is to say, to the north-west quarter of the lot.

Yours, etc.,
G. H.,
Solicitor for the said defendant, C. D.

To

No. **15.**

Notice disputing amount.

In the High Court of Justice.
——Division.

Between A. B., plaintiff,
and
C. D., defendant.

Take notice, that the defendant disputes the amount claimed by the plaintiff (*or* the defendant insists that the amount due to the plaintiff is $ only; *or* the defendant insists that the amount due to the plaintiff is $ for principal and $ for interest, since the day of , etc., and no more, *as the case may be*).

(Signed)
Solicitor for the defendant.

To

No. **16.**

Notice in Lieu of Statement of Claim.

In the High Court of Justice.
——Division.

Between A. B., plaintiff,
and
C. D., defendant.

The particulars of the plaintiff's claim herein, and of the relief and remedy to which he claims to be entitled, appear by the indorsement upon the writ of summons.

The plaintiff proposes that this action shall be tried at

Dated, etc.

X. Y.,
Solicitor for Plaintiff.

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No. 17.

Confession of Defence.

In the High Court of Justice.
——Division.

Between A. B., plaintiff,
and
C. D., defendant.

The plaintiff confesses the defence stated in the paragraph of the defendant's statement of defence [*or*, of the defendant's further statement of defence].

Dated, etc.

X. Y.,
Solicitor for Plaintiff.

No. 18.

Notice by Defendant to Third Party.

Notice filed day of

In the High Court of Justice.
——Division.

Between A. B., plaintiff,
and
C. D., defendant.

To Mr. X. Y.

Take notice that this action has been brought by the plaintiff against the defendant [as surety for M. N.], upon a bond conditioned for payment of $10,000 and interest to the plaintiff.

The defendant claims to be entitled to contribution from you to the extent of one-half of any sum which the plaintiff may recover against him, on the ground that you are (his co-surety under the said bond, *or*, also surety for the said M. N., in respect of the said matter, under another bond made by you in favour of the said plaintiff, dated the day of , A.D.)].

Or, [as acceptor of a bill of exchange for $ 50 dated the day of , A.D. , drawn upon and accepted by the defendant and payable 3 months after d

The defendant claims to be indemnifi by you against liability under the said bill, on the ground that it was accepted for your accommodation.]

Or [to recover damages for a breach of a contract for the sale and delivery to the plaintiff of 1,000 tons of coal.

The defendant claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by him on your behalf and as your agent].

And take notice that, if you wish to dispute the plaintiff's claim in this action as against the defendant C. D., you must cause an appearance to be entered for you within 8 days after service of this notice.

In default of your so appearing, you will not be entitled in any future proceeding between the defendant C. D. and yourself to dispute the validity of the judgment in this action whether obtained by consent or otherwise.

Dated, etc.

(Signed) E. T.

Or
X. Y.,
Solicitor for the defendant,
E. T.

Appearance to be entered at

No. **19.**

Indorsement on copy Defence and Counter-claim to be served on Third Party.

"To the within named X. Y.

Take notice that if you do not appear to the within counter-claim of the within-named C. D., within 8 days from the service of this defence and counter-claim upon you, you will be liable to have judgment given against you in your absence.

Appearances are to be entered at

No. **20.**

Indorsement on Order adding or changing parties under Rule 625.

Take notice, that if you desire to discharge this order you must apply to the Court for that purpose within 14 days after the service hereof upon you. The original statement of claim in this cause is filed in the office of the at

(*and if the service is after a judgment directing a reference to a Master or other officer, add*) and the reference under the judgment in this matter is being prosecuted in the office of the at

---

No **21.**

Notice of payment into Court.

In the High Court of Justice.
——Division.

Between A. B., plaintiff,
and
C. D., defendant.

Take notice that the defendant has paid into Court $ in satisfaction of the plaintiff's claim [*or* the plaintiff's claim, for, etc.]

Dated, etc.

To Mr. X. Y.,
the Plaintiff's Solicitor.

Z.,
Defendant's Solicitor.

No. **22.**

Acceptance of sum paid into Court.

In the High Court of Justice.
——Division.

Between A. B., plaintiff,
and
C. D., defendant.

Take notice that the plaintiff accepts the sum of $ paid by you into Court in satisfaction of his claim herein (*or* of his claim for, etc.)

Dated, etc.

X. Y.,
Plaintiff's Solicitor.

To Z.,
Defendant's Solicitor.

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No. **23.**

Notice to produce Documents.

In the High Court of Justice
————Division

Between A. B., plaintiff,
and
C. D., defendant.

Take notice that the [plaintiff *or* defendant], requires you to produce for his inspection the following documents referred to in your [statement of claim *or* defence, *or* affidavit dated the day of A.D.].

Dated, etc.

[*Describe documents required*].

X. Y.,
Solicitor for the

To Z.,
Solicitor for

No. **24.**

Notice to producee (General Form).

In the High Court of Justice.
——————Division.

Between

Plaintiff,

and

Defendant.

Take notice that you are hereby required to produce and shew to the Court on the trial of this action all books, papers, letters, copies of letters, and other writings and documents in your custody, possession or power, containing any entry, memorandum, or minute relating to the matters in question in this action, and particularly

Dated, etc.

To the above named)
. Solicitor for the above named
h Solicitor or agent)

No. **25.**

Notice to Inspect Documents.

In the High Court of Justice.
————Division.

A. B. *v.* C. D.

Take notice that you can inspect the documents mentioned in your notice of the day of A.D. [*except the deed numbered in that notice*] at my office on day next the instant, between the hours of 12 and 4 o'clock.

Or, that the [plaintiff *or* defendant] objects to giving you inspection of the documents mentioned in your notice of the day of A.D. on the ground that [*state the ground*] :—

Dated, etc.

X. Y.,
Solicitor for

No. 245.

Notice to admit Documents.

In the High Court of Justice.
——Division.

A. B. *v.* C. D.

Take notice that the plaintiff [*or* defendant] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or* plaintiff] his solicitor or agent at , on , between the hours of ; and the defendant [*or* plaintiff] is hereby required, within 4 days from the said day, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies, and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

X. Y.,
Solicitor for

Dated, etc.

To E. F., solicitor [*or* agent] for defendant [*or* plaintiff].
G. H., solicitor [*or* agent] for plaintiff [*or* defendant].

Here describe the documents, the manner of doing which may be as follows:]

ORIGINALS.

Description of Documents.	Dates.
Deed of covenant between A. B. and C. D. first part, and E. F. second part	January 1, 1878.
Indenture of lease from A. B. to C. D.	February 1, 1878.
Indenture of release between A. B., C. D., first part, etc.	February 2, 1878.
Letter—defendant to plaintiff	March 1, 1878.
Policy of Insurance on goods by ship "Isabella," on voyage from Toronto to Kingston	July 3, 1877.
Memorandum of agreement between C. D., captain of said ship, and E. F.	August 1, 1878.
Bill of exchange for $500 at 3 months, drawn by A. B. on and accepted by C. D., indorsed by E. F. and G. H.	May 1, 1879.

COPIES.

Description of Documents	Dates.	Original or duplicate served, sent, or delivered, when, how and by whom.
Registrar of baptism of A. B. in the parish of X.....	January 1, 1848.	Sent by General Post February 2, 1848.
Letters—Plaintiff to defendant	February 1, 1848.	
Notice to produce papers	March 1, 1878.	Served March 2, 1878, on defendant's attorney by E. F., of——
Record of a Judgment of the Court of Queen's Bench in an action, J. S. and J. N..	Trinity Term, 10th Vict.	

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No. **27.**

Notice of Trial.

In the High Court of Justice.
——Division.

A. B. *v.* C. D.

Take notice of trial of this action [*or* the issue in this action ordered to be tried] at for the day of next.

X. Y., plaintiff's solicitor [*or as the case may be*].

Dated, etc.

To Z., defendant's solicitor [*or as the case may be*].

No. **28.**

Notice of Entry of Demurrer for Argument.

In the High Court of Justice.
——Division.

Between

Plaintiff.

and

Defendant.

Take notice, that have this day entered for argument the demurrer of the to the in this action.

Dated the day of 18 .

(Signed)
of
Solicitor for the

To

No. **29.**

Notice of Discontinuance.

In the High Court of Justice.
——Division.

Between

Plaintiff.

and

Defendant.

Take notice, that the plaintiff hereby wholly discontinues this action, (*or* withdraws so much of h claim in this action as relates to, etc.
(*If not against all the defendants add*), "As against the defendant," etc.

Dated the day of 18 .

(Signed)
of
Solicitor for the plaintiff.

No. **30.**

Notice of Cross-examination of Deponents at Trial on Affidavits.

In the High Court of Justice.
——Division.

Between

Plaintiff.

and

Defendant.

Take notice, that the intend at the trial of this action to cross-examine the several deponents named and described in the schedule hereto on their affidavits therein specified.

And also take notice that you are hereby required to produce the said deponents for such cross-examination before the Court aforesaid.

Dated the day of 18 .

Solicitor for the

To

THE SCHEDULE above referred to.

Name of Deponent.	Address and Description.	Date when affidavit filed.

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No. 31.

Notice of Renewal of Writ of Execution.

In the High Court of Justice.
———Division.

Between . Plaintiff.

and

Defendant.

Take notice, that the writ of ' issued in this action directed to the sheriff of and bearing date the day of 18 , has been renewed for one year from the day of 18 .

Dated the day of 18 .

(Signed)
Solicitor for the

To the sheriff of

———

No. 32.

Notice of Election that Defendant conduct Sale.

In the High Court of Justice.
———Division.

(Short Title.)

To , Defendant.

Take notice that the plaintiff elects that the sale of the mortgaged premises be conducted by you instead of by the plaintiff, and you are at liberty to withdraw the deposit made by you in this cause for the purpose of such sale.

———

No. 33.

Indorsement of notice of time to move to discharge order adding a party.

Rules 47, 322, etc.

To A. B., (*the person upon whom service has been directed, set out the order*).

If you wish to apply to discharge the foregoing order, or to add to, vary, or set aside, the judgment, you must do so within fourteen days from the service hereof. (*When the order fixes a time for the further proceedings, add,*) And if you fail to attend at the time and place appointed, either in person or by your solicitor, such order will be made and proceedings taken, in your absence, as may seem just and expedient; and you will be bound by the judgment, and the further proceedings in the cause, in the same manner as if you had been originally made a party to the action, without notice.

No. **34**.

Notice to Incumbrancers served under Rule 126.

In the High Court of Justice.
——Division.

Between A. B. Plaintiff.

and

C. D. Defendant.

Whereas an action has been instituted by the above named plaintiff for the foreclosure (*or* sale) of (*or* enforcement of a lien on) certain lands, (*insert description of lands,*) and I have been directed by the judgment made in this cause, and dated the day of , to inquire whether any person, other than the plaintiff, has any charge, lien, or incumbrance upon the said estate. And whereas it has been made to appear before me that you have each some lien, charge or incumbrance upon the said estate, and I have therefore appointed the day of , at o'clock in the noon, for you to appear before me, at my Chambers at , either in person or by your solicitor, to prove your claims.

Now you are hereby required to take notice: 1st. That if you wish to apply to discharge my order making you a party, or to add to, vary, or set aside the judgment, you must do so within fourteen days after the service hereof; and if you fail to do so, you will be bound by the judgment, and the further proceedings in this cause as if you were originally made a party to the action. 2nd. That if you fail to attend at the time and place appointed, you will be treated as disclaiming all interest in the land in question, and it will be dealt with as if you had no claim thereon, and your claim will be in fact foreclosed.

W. L., *Master.*

To

———

No. **35**.

Appointment, served under Rule 128.

In the High Court of Justice.
——Division.

Between A. B., Plaintiff,

and

C. D., Defendant.

Having been directed by the judgment in this cause, dated the day of , to inquire whether any person other than the plaintiff has any lien, charge or incumbrance upon the lands in the pleadings mentioned being (*insert description of lands*), I hereby appoint the day of next, at o'clock, in the noon, at my Chambers at , to proceed with the said inquiries.

And you are hereby required to take notice: That if you fail to attend at the time and place appointed, you will be treated as disclaiming all interest in the land in question, and it will be dealt with as if you had no claim thereon, and your claim will be in fact foreclosed.

W. L., *Master.*

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No. 36.

Advertisement for Creditors, under Rule 976.

Pursuant to a judgment [*or* an order] of the High Court of Justice, ——Division, made in [the matter of the estate of A. B., and in a cause S. against P. [*short title*], the creditors of A. B., late of in the County of , who died in or about the month of 18 , are, on or before the day of 18 , to send, by post, prepaid to E. F., of , the solicitor of the defendant C. D., the executor [*or* administrator] of the deceased [*or as may be directed*], their Christian and surnames, addresses and description, the full particulars of their claims, a statement of their accounts, and the nature of their security [if any] held by them; or in default thereof, they will be peremptorily excluded from the benefit of the said judgment [*or* order]. Every creditor holding any security is to produce the same before me at my Chambers, at, etc., on the day of , 18 , at o'clock in the noon, being the time appointed for adjudication on the claims.

Dated this day of , 18 .

G. H., *Master.*

No. 37.

Notice to Creditors to produce Documents, under Rule 978.

(*Short Title.*)

You are hereby required to produce, in support of the claim sent in by you, against the estate of A. B. deceased [*describe any document required*], before me at my Chambers, at, etc., on the day of , 18 , at o'clock in the noon,

Dated this day of , 18 .

G. R., of, etc., Solicitor for the plaintiff,
[*or* defendant, *or as may be*].

To Mr. S. T.

No. 38.

Notice to Creditor that claim allowed, under Rule 984.

(*Short Title.*)

The claim sent in by you against the estate of A. B., deceased, has been allowed at the sum of $, [with interest thereon at $ per cent., per annum, from the day of , 18 , *and* $ for costs, *or as the case may be*].

If part only allowed, add.—If you claim to have a larger sum allowed, you are hereby required to prove such further claim, and you are to file [etc., *as in Form No. 39*].

Dated this day of , 18 .

G. R., of, etc., Solicitor for the plaintiff,
[*or* defendant, *or as may be*].

To Mr. P. P.

No. **39.**

Notice to Creditor to prove his claim under Rule 984.

(*Short Title.*)

You are hereby required to prove the claim sent in by you against the estate of A. B., deceased. You are to file such affidavit as you may be advised in support of your claim, to give notice thereof to , Master [*or as the case may be*], on or before the day of 18 ; and to attend personally, or by your solicitor, at his Chambers, on the day of , 18 , at o'clock in the noon, being the time appointed for adjudicating on the claim.

Dated this day of , 18 .

G. R., of etc., Solicitor for the plaintiff,
[*or* defendant, *or as may be*].

To Mr. S. T.

No. **40.**

Notice that Cheques may be received, under Rule 987.

(*Short Title.*)

The cheques for the amounts directed to be paid to the creditors of A. B., deceased, by an order made in this action [*or* matter] dated the day of , 18 , may be received at the Accountant's Office, in Osgoode Hall, Toronto, on and after the day of , 18 .

G. R., of, etc., Solicitor for the plaintiff,
[*or* defendant, *or as may be*].

To Mr. W. S.
Etc.

No. **41.**

Notice of Appeal. (J. A. Sec. 71.)

In the High Court of Justice.
——Division.

Between A. B. (Respondent) plaintiff,
and
C. D. (Appellant) defendant.

Take notice that C. D., the above-named defendant, hereby appeals from the (judgment, order *or* decision) pronounced in this action (*or* matter) by the Divisional Court (*or* by the Hon. Mr. Justice on the day of , 18 , whereby a judgment given at the trial for the defendant was set aside and a judgment directed to be entered for the plaintiff (*or as the case may require*).

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PART IV.

REPORTS, ETC., BY MASTERS.

No. 42.

Form of Report in Administration Suit.

In the High Court of Justice.
——Division.

Between A. B. and Plaintiffs.

and

C. D. and Defendants.

Pursuant to the Order [*or* Judgment] herein made, dated the day of , 18 , having caused an office copy thereof to be served upon [*give the names of persons served under Rule 322, and also the names of those upon whom service has been dispensed with, and the reason for dispensing with service*], I proceed to dispose of the matters referred to me, and thereupon was attended by the solicitors for all parties interested [*or as the case may be*].

[*If a Guardian ad litem has been appointed for any of the parties, this should be so stated, and the reason why such appointment was made*].

and I find, as follows:

1. The personal estate not specifically bequeathed of the testator come to the hands of the executors, and wherewith they are chargeable, amounts to the sum of $, and they have paid, or are entitled to be allowed thereout, the sum of $, leaving a balance due from them [*or* "to them," *as the case may be*,] of $ on that account.

[*If no personal estate, say:* No personal estate has come to the hands of the executors, nor are they chargeable with any.]

2. The creditor's claims sent in pursuant to my advertisement in that behalf (published in issues of the newspaper called), and which have been allowed, are set forth in the first Schedule hereto, and amount altogether to $

[*If no creditors, say:* No creditor has sent in a claim pursuant to my advertisement in that behalf, nor has any such claim been proved before me.]

3. The funeral expenses of the testator amounting to $ have been paid by the executors and are allowed to them in the amount of personal estate.

4. The legacies given by the testator are set forth in the second schedule hereto, and with the interest therein mentioned, remain due to the persons named [*or as the case may be*].

5. The personal estate of the said testator outstanding or undisposed of, is set forth in the third schedule hereto.

[*In this third schedule personal estate not specifically bequeathed should be set forth separately from the other personalty outstanding or undisposed of. If there is no specific bequest, it should be so stated in the body of the report.*]

6. The real estate which the said testator was seized of or entitled to, and the incumbrances (*if any*) affecting the same, are set forth in the fourth schedule hereto.

7. The rents and profits of the testator's real estate received by the said executors, or with which they are chargeable, amount to $, and they have paid, or are entitled to be allowed thereout, the sum of $, leaving a balance due from [*or* to] them of $ on that account.

[*If no rents, etc., received, say:* No rents and profits have come to the hands of the said executors, nor are they chargeable with any.]

8. I have allowed to the said executors the sum of $ as a compensation for their personal services in the management of the said estate.

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The first Schedule referred to in the foregoing Report.

No.	Names of Creditors.	Principal.	Interest allowed.		Costs (if any) subsequent to Judgment.	Costs of this suit.	Total.
			Rate per Cent.	Amount to date of Report.			
		$ c		$ c.	$ c.	$ c	$ c.
	[Distinguish any which are secured by mortgage, lien or otherwise entitled to any priority]						

[No general form can well be framed for the other Schedules, but in all cases brevity is to be studied. Where particulars are given they should shew merely the general character of the things described; as, for instance, the Schedule of outstanding personalty may say: A number of book debts outstanding amounting in the aggregate to $; a quantity of household furniture and effects valued at $; and the like short particulars should be given in other cases. Lands should be described without setting forth metes and bounds.

No. **43.**

Conditions of Sale referred to in Rule 96.

1. No person shall advance less than $10 at any bidding under $500, nor less than $20 at any bidding over $500, and no person shall retract his bidding.

2. The highest bidder shall be the purchaser; and if any dispute arise as to the last or highest bidder, the property shall be put up at a former bidding.

3. The parties to the action, with the exception of the vendor, (and, *naming any parties, trustees, agents, or others in a fiduciary situation,*) shall be at liberty to bid.

4. The purchaser shall, at the time of sale, pay down a deposit, in proportion of $10 for every $100 of the purchase money, to the vendor, or his solicitor; and shall pay the remainder of the purchase money, on the day of next; and upon such payment, the purchaser shall be entitled to the conveyance, and to be let into possession; the purchaser at the time of sale to sign an agreement for the completion of the purchase.

5. The purchaser shall have the conveyance prepared at his own expense, and tender the same for execution.

6. If the purchaser fails to comply with the conditions aforesaid, or any of them, the deposit and all other payments made thereon, shall be forfeited, and the premises may be resold; and the deficiency, if any, by such re-sale, together with all charges attending the same, or occasioned by the defaulter, are to be made good by the defaulter.

No. **44.**

Report on Sale referred to in Rule 104.

In the High Court of Justice.
——Division.

Between A. B., Plaintiff,

and

C. D., Defendant.

Pursuant to the judgment (*or* order) of this Honourable Court, bearing date the day of , and made in this cause, I have, under the Rules of the Supreme Court of Judicature, in the presence of (*or*, after notice to), all parties concerned, settled an advertisement and particulars and conditions of sale, for the sale of the lands mentioned or referred to in the said judgment (*or* order), and such advertisement having, according to my directions, been published in the (*naming the newspaper or newspapers*), once in each week for the weeks immediately preceding the said sale (*or as the case may be*), and bills of the said sale having been also, as directed by me published in different parts of the township (*town or city*) of and the adjacent country and villages (*or as the case may be*), the said lands were offered for sale by public auction, according to my appointment, on the day of , by me (*or* by Mr. of , appointed by me for that purpose, auctioneer), and such sale was conducted in a fair, open and proper manner, when , of , was declared the highest bidder for, and became the purchaser of the same, at the price or sum of $, payable as follows (*set out shortly the condition of sale as to payment of the purchase money*).

All which having been proved to my satisfaction by proper and sufficient evidence, I humbly certify to this Honourable Court.

Dated

[No general form can well be framed for the other Schedules, but in all cases brevity is to be studied. Where particulars are given they should shew merely the general character of the things described; as, for instance, the Schedule of outstanding personalty may say: A number of book debts outstanding amounting in the aggregate to $; a quantity of household furniture and effects valued at $; and the like short particulars should be given in other cases. Lands should be described without setting forth metes and bounds.

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PART V.

AFFIDAVITS.

No. 45.

Affidavit of Service of Summons.

In the High Court of Justice.
———Division.

Between A. B., Plaintiff,
and
C. D., Defendant.

I, of make oath and say as follows:—

(1) I did on the day of 18 , personally serve C. D., the above-named defendant in this action with a true copy of the writ of summons (*or* notice of the writ of summons) herein hereto annexed, by delivering the same to and leaving the same with the said defendant on the day last aforesaid at in the county of

(2) Upon the said copy so served as aforesaid was indorsed at the time of such service true copies of all the indorsements appearing upon the said original writ of summons (*or* notice) except the indorsement hereinafter mentioned.

(3) To effect such service I necessarily travelled miles.

(4) Subsequently, namely: upon the day of I did indorse upon the said original writ of summons (*or* notice) the day of the month and week of such service.

Sworn at this day of 18 .
Before me, etc.
This affidavit is filed on behalf of the

No. 46.

Form of Affidavit of Justification of Bail.

In the High Court of Justice.
———Division.

Between A. B., Plaintiff,
and
C. D., Defendant.

I, B. B., one of the bail for the above-named defendant, make oath and say, that I am a housekeeper, (*or* freeholder, *as the case may be*), residing at (*give particular description of the place of residence*), that I am worth

property to the amount of $ (*double the amount sworn to*) over and above what will pay all my just debts, (*if bail in any other action add*, and every other sum for which I am now bail,) that I am not bail for any defendant, except in this action, (*or if bail in any other action or actions add*, except for C. D., at the suit of E. F., in the (High Court of Justice Division) in the sum of $, for G. H., at the suit of J. K., in the in the sum of $, *specifying the several actions with the Courts in which they are brought, and the sums in which the deponent is bail*).

Sworn, etc., *as usual*. Rules T. T. 1856, 81.

No. **47.**

Affidavit by Landlord.

In the High Court of Justice.
——Division.

Between A. B., Plaintiff,
and
C. D., Defendant.

I, of make oath and say as follows:—

I am in possession of the land sought to be recovered in this action by myself (*or* by the said C. D., my tenant, (*as the case may be*).

Sworn at this day of

Before me, etc.

No. **48.**

Affidavit as to Documents.

In the High Court of Justice.
——Division.

Between A. B., Plaintiff,
and
C. D., Defendant.

I, the above-named defendant C. D., make oath and say as follows:

1. I have in my possession or power the documents relating to the matters in question in this action set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. That [*here state upon what grounds the objection is made, and verify the facts as far as may be*].

4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

5. The last mentioned documents were last in my possession or power on [*state when*].

6. That [*here state what has become of the last mentioned documents, and in whose possession they now are*].

7. According to the best of my knowledge, information and belief, I have not now, and never had in my possession, custody or power, or in the possession, custody, or power of my solicitors, or agents, solicitor or agent, or in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this action or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto, and the pleadings and other proceedings in the action.

No. 49.

Affidavit on production when made by an officer of a Corporation.

In the High Court of Justice.
——Division.

Between A. B., Plaintiff,
and
C. D., Defendant.

I, of , make oath and say as follows:—

1. I am the (*here state the name of the office held by the deponent in the service of the Company on whose behalf he makes the affidavit*), and as such, have knowledge of all documents which are, or have been, in the custody or possession of the said (Company), relating to the matters in question in this action.

2. I am cognizant of the matters in question in this action.

3. The said defendants have in their possession or power, the documents relating to the matters in question in this action, set forth in the first and second parts of the first schedule hereto.

4. The said defendants object to produce the said documents set forth in the second part of the said first schedule hereto.

5. That (*here state on what grounds the objection is made, and verify the facts as far as may* be).

6. The said defendants have had, but have not now, in their possession or power, the documents relating to the matters in question in this action, set forth in the second schedule hereto.

7. The last mentioned documents were last in the possession or power of the said defendants on (*state when*).

8. That (*here state what has become of the last mentioned documents, and in whose possession they now are*).

9. According to the best of my knowledge, information, and belief, the said defendants have not now, and never had, in their possession, custody, or power, or in the possession, custody, or power of myself, or of any of its solicitors or agents, or of any person or persons whomsoever, on its behalf any (*proceed as in last form*).

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No. 50.

Affidavit of Executor or Administrator as to claims, under Rule 981.

In the High Court of Justice.
——Division.

Between A. B., plaintiff,
and
C. D., defendant.

We, A. B., of, etc., the above named plaintiff [*or* defendant, *or as may be*], the executors [*or* administrators], of C. D., late of , in the County of , deceased, and E. F., of, etc., solicitor, severally make oath, and say as follows:—

I, the said E. F., [solicitor] for myself say as follows:—

1. I have, in the paper writing now produced and shewn to me, and marked A, set forth a list of all the claims the particulars of which have been sent in to me by persons claiming to be creditors of the said C. D., deceased, pursuant to the advertisement issued in that behalf, dated day of , 18 .

And I, the said A. B., for myself, say as follows:

2. I have examined the several claims mentioned in the paper writing now produced and shown to me, and marked A, and I have compared the same with the books, accounts, and documents of the said C. D., [*or as may be, and state any other inquiries or investigations made*], in order to ascertain, as far as I am able, to which of such claims the estate of the said C. D. is justly liable.

3. From such examination [*and state any other reasons*], I am of opinion, and verily believe, that the estate of the said C. D. is justly liable to the amounts set forth in the sixth column of the first part of the said paper writing marked A; and to the best of my knowledge and belief, such several amounts are justly due from the estate of the said C. D., and proper to be allowed to the respective claimants named in the said schedule.

I am of opinion that the estate of the said C. D. is not justly liable to the claims set forth in the second part of the said paper writing marked A, and the same ought not to be allowed without proof by the respective claimants, [*or*, I am not able to state whether the estate of the said C.D., is justly liable to the claims set forth in the second part of the said paper writing marked A, or whether such claims, or any part thereof, are proper to be allowed without further evidence],

Sworn, etc.

Exhibit referred to in the above Affidavit.

(*Short Title.*)

List of claims the particulars of which have been sent in to the said E. F., the solicitor of the plaintiff, [*or* defendant, *as may be*], by persons claiming to be creditors of C. D., deceased, pursuant to the advertisement issued in that behalf, dated the day of , 18 .

This paper writing, marked A, was produced and shewn to , and is the same as is referred to in his affidavit, sworn before me this day of , 18 .

W. B., etc.

First Part.– Claims proper to be allowed without further evidence.

Serial No.	Name of Claimants.	Addresses and Descriptions.	Nature of Claim.	Amount claimed.	Amount proper to be allowed.
					$ c.

Second Part.—Claims which ought to be proved by the Claimants.

Serial No.	Names of Claimants.	Addresses and Description.	Nature of Claim.	Amount claimed.
				$ c.

No. **51.**

Affidavit in support of Garnishee Order.

In the High Court of Justice.
———Division.

Between Judgment Creditor.

and

Judgment Debtor.

I, of the above-named judgment creditor [*or* solicitor for the above-named judgment creditor], make oath and say as follows:—

1. By a judgment of the Court given in this action, and dated the day of 18 , it was adjudged that I [*or* the above-named judgment creditor] should recover against the above-named judgment debtor the sum of $, and costs to be taxed, and the said costs were by a taxing officer's certificate dated the day of 18 , allowed at $

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2. The said still remains unsatisfied to the extent of and interest amounting to $

3. (*Name, address and description of garnishee*) is indebted to the judgment debtor in the sum of $ or thereabouts.

4. The said (*insert name of garnishee*) is within the jurisdiction of this Court.

Sworn at the day of 18 .
Before me

This affidavit is filed on behalf of the

No. 52.

Affidavit on Interpleader.

In the High Court of Justice.
——Division.

Between

Plaintiff,

and

Defendant.

I, of the defendant in the above action, make oath and say as follows:—

1. The writ of summons herein was issued on the day of 18 , and was served on me on the day of 18 . I have not yet delivered a statement of defence herein.

2. The action is brought to recover . The said (is *or* are) in my possession, but I claim no interest therein.

3. The right to the said subject-matter of this action has been and is claimed (*if claim in writing make the writing an exhibit*) by one who (*state expectation of suit or that he has already sued*).

4. I do not in any manner collude with the said or with the above-named plaintiff, but I am ready to bring into Court or to pay or dispose of the said in such manner as the Court may order or direct.

Sworn at the day of 18 .
Before me

This affidavit is filed on behalf of the

PART VI.

PLEADINGS.

No. **53.**

In the High Court of Justice.
———Division.

Writ issued 3rd September 18 .

Between A. B., Plaintiff,
and
E. F., Defendant.

Statement of Claim.

1. Between the 1st of January and the 28th of February, 1879, the plaintiff supplied to the defendant various articles of drapery; and payments on account were from time to time made by the defendant.

2. On the 28th of February, 1879, a balance remained due to the plaintiff of $325, and an account was on that day sent by the plaintiff to the defendant showing that balance.

3. On the 1st of March following, defendant paid the plaintiff by cheque $32 on account of the same. The residue of the said balance, amounting to $293, has never been paid.

The plaintiff claims $

The plaintiff proposes that this action should be tried at Whitby.

Delivered the day of 18 by X. Y., of Plaintiff's Solicitor.

No. **54.**

In the High Court of Justice.
———Division.

Writ issued 22nd December, 18 .

In the matter of the estate of A. B., deceased.

Between E. F., Plaintiff,
and
G. H., Defendant.

Statement of Claim.

Claim. 1. A. B., of K., in the County of L., died on the 1st July, 1880, intestate. The defendant, G. H., is the administrator of A. B.

2. A. B. died entitled to lands in the said county for an estate in fee simple, and also to some other real estate and to personal estate. The defendant has entered into possession of the real estate of A. B., and received the rents thereof.

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3. A. B. was never married; he had one brother only, who pre-deceased him without having been married, and two sisters only, both of whom also pre-deceased him, namely M. N. and P. Q. The plaintiff is the only child of M. N., and the defendant is the only child of P. Q.

The plaintiff claims—

1. To have the real and personal estate of A. B., administered in this Court, and for that purpose to have all proper directions given and accounts taken.

2. To have a receiver appointed of the rents of his real estate.

3. Such further or other relief as the nature of the case may require.

The plaintiff proposes that this action should be tried at London.

Delivered the day of 18 by X. Y. of Plaintiff's Solicitor.

No. **55.**

In the High Court of Justice.
——Division.

In the matter of the estate of A. B., deceased.

Between E. F., Plaintiff,
and
G. H., Defendant.

Statement of Defence.

1. The plaintiff is an illegitimate child of M. N. She was never married. The defendant admits the other allegations contained in the 1st and 3rd paragraphs of the plaintiff's statement of claim.

2. The intestate was not entitled to any real estate at his death.

3. The personal estate of A. B. was not sufficient for the payment of his debts, and has all been applied in payment of his funeral and testamentary expenses, and part of his debts.

Delivered the day of 18 by X. Y., of Defendant's Solicitor.

No. **56.**

In the High Court of Justice.
——Division.

Writ issued 22nd December, 18 .

In the matter of the estate of A. B., deceased.

Between E. F., Plaintiff,
and
G. H., Defendant.

Statement of Claim.

1. A. B., of K., in the county of L., duly made his last will, dated the 1st day of March, 1873, whereby he appointed the defendant and M. N.

(who died in the testator's lifetime), executors thereof, and devised and bequeathed his real and personal estate to and to the use of his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain 21, or a daughter who should attain that age, or marry, upon trust as to his real estate for the person who would be the testator's heir-at-law, and as to his personal estate for the person, who would be the testator's next of kin, if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The testator died on the 1st day of July, 1880, and his will was proved by the defendant on the 4th of October, 1880. The plaintiff has not been married.

3. The testator was at his death entitled to real and personal estate; the defendant entered into the receipt of the rents of the real estate and got in the personal estate; he has sold some part of the estate.

The plaintiff claims:—

1. To have the real and personal estate of A. B., administered in this Court, and for that purpose to have all proper directions given and accounts taken.

2. Such further or other relief as the nature of the case may require

The plaintiff proposes that this action should be tried at Napanee.

Delivered the day of 18 by
X. Y., of Plaintiff's Solicitor.

No. 57.

In the High Court of Justice.
——Division.

In the matter of the estate of A. B., deceased.

Between E. F., Plaintiff,
and
G. H., Defendant.

Statement of Defence.

1. A. B.'s will contained a charge of debts; he died insolvent; he was entitled at his death to some real estate which the defendant sold, and which produced the net sum of $22,500, and the testator had some personal estate which the defendant got in and which produced the net sum of $5,400.

2. The defendant applied the whole of the said sums and the sum of $84, which the defendant received from rents of the real estate, in the payment of the funeral and testamentary expenses and debts of the testator.

3. The defendant made up his accounts and sent a copy thereof to the plaintiff on the 10th of January, 1880, and offered the plaintiff free access to the vouchers, to verify such accounts, but he declined to avail himself of the defendant's offer.

4. The defendant admits the allegations in the 1st and 2nd paragraphs of the plaintiff's statement of claim.

5. The defendant submits that the plaintiff ought to pay the costs of this action.

Delivered the day of 18 by
X. Y., of Defendants' Solicitor.

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No. **58.**

Action against Del credere Agents.

In the High Court of Justice.
——— Division.

Writ issued 23rd August, 18 .

Between A. B. and Company, Plaintiffs,
and
E. F. and Company, Defendants.

Statement of Claim.

1. The plaintiffs are manufacturers of artificial manures, carrying on business at , in the county of

2. The defendants are commission agents, carrying on business in Toronto.

3. In the early part of the year , the plaintiffs commenced, and down to the 18 , continued to consign to the defendants, as their agents, large quantities of their manures for sale, and the defendants sold the same and received the price thereof and accounted to the plaintiffs therefor.

4. No express agreement has ever been entered into between the plaintiffs and the defendants with respect to the terms of the defendant's employment as agents. The defendants have always charged the plaintiffs a commission at per cent. on all sales effected by them, which is the rate of commission ordinarily charged by all del credere agents in the said trade. And the defendants, in fact, always accounted to the plaintiffs for the price, whether they received the same from the purchaser or not.

5. The plaintiffs contend that the defendants are liable to them as del credere agents, but if not so liable are, under the circumstances hereinafter mentioned, liable as ordinary agents.

6. On the , the plaintiffs consigned to the defendants for sale a large quantity of goods, including tons of

7. On or about the , the defendants sold tons of part of such goods to one G. H., for $, at three months' credit, and delivered the same to him.

8. G. H. was not, at that time, in good credit and was in insolvent circumstances, and the defendants might, by ordinary care and diligence, have ascertained the fact.

9. G. H. did not pay for the said goods, but before the expiration of the said three months for which credit had been given, the estate of the said G. H. was placed in liquidation under the Insolvency Acts then in force; and the plaintiffs have never received the said sum of $ or any part thereof.

The plaintiffs claim:

1. Damages to the amount of $

2. Such further or other relief as the nature of the case may require.

The plaintiffs propose that this action should be tried at Hamilton.

Delivered the day of 18 by X. Y., of Plaintiff's Solicitor.

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No. 59.

[Title as in claim, omitting date of issue of writ.]

Statement of Defence.

Defence.

1. The defendants deny that the said commission of per cent. mentioned in paragraph 4 of the claim is the rate of commission ordinarily charged by del credere agents in the said trade, and say that the same is the ordinary commission for agents other than del credere agents, and they deny that they ever accounted to the plaintiffs for the price of any goods, except after they had received the same from the purchasers.

2. The defendants deny that they were ever liable to the plaintiffs as del credere agents.

3. With respect to the 8th paragraph of the plaintiff's statement of claim, the defendants say that at the time of the said sale to the said G. H., the said G. H., was a person in good credit. If the truth is that the said G. H. was then in insolvent circumstances, the defendants did not suspect and had not reason to suspect the same, and could not by ordinary care or diligence have ascertained the fact.

4. The defendants admit the allegations contained in paragraph 1, 2, 3, 6, 7 and 9 of the plaintiff's statement of claim.

Delivered the day of 18 , by X. Y., of Defendants' Solicitor.

No. 60.

Bill of exchange.

In the High Court of Justice,
——Division.

Writ issued 23rd August, 18 .

Between A. B., and C. D., Plaintiffs,
and
E. F., and G. H., Defendants.

Statement of Claim.

Claim.

1. Messrs. M. N. & Co., on the day of drew a bill of exchange upon the defendants for $, payable to the order of the said Messrs. M. N. & Co., 3 months after date, and the defendants accepted the same.

2. Messrs. M. N. & Co. indorsed the bill to the plaintiffs.

[3. *(Introduced by amendment to meet the defence in the defendant's statement of defence infra).* The plaintiff gave value and consideration for the said bill in manner following, that is to say: on the day 18 , the said Messrs. M. N. & Co. were indebted to the plaintiff in about $ the balance of an account for goods sold from time to time by him to them. On that day they ordered of the plaintiff further goods to the value of about $ which last mentioned goods have since been delivered by him to them. And at the time of the order for such last mentioned goods it was agreed between Messrs. M. N. & Co. and the plaintiff, and the order was received upon the terms, that they

should indorse and hand over to him the bill of exchange sued upon, together with various other securities on account of the said previous balance, and the price of the goods so ordered on that day. The said securities, including the bill sued upon, were thereupon on the same day indorsed and handed over to the plaintiff.]

4. The bill became due on the , and the defendant has not paid it.

The plaintiffs claim:—(*state claim*)

The plaintiffs propose that this action should be tried at Kingston.

Delivered the day of 18 , by X. Y., of Plaintiffs' Solicitor.

[Title.]

No. 61.

Statement of Defence.

Defence.

1. The bill of exchange mentioned in the statement of claim was drawn and accepted under the circumstances hereinafter stated, and except as hereinafter mentioned there never was any consideration for the acceptance or payment thereof by the defendants.

3. Shortly before the acceptance of the said bill it was agreed between the said Messrs. M. N. & Co., the drawers thereof, and the defendants, that the said Messrs. M. N. & Co. should sell and deliver to the defendants free on board ship at the port of 1,200 tons of coal during the month of , and that the defendants should pay for the same by accepting the said Messrs. M. N. & Co.'s draft for $ at 6 months.

3. The said Messrs. M. N. & Co. accordingly drew upon the defendants, and the defendants accepted the bill of exchange now sued upon.

4. The defendants did all things which were necessary to entitle them to delivery by the said Messrs. M. N. & Co. of the said 1,200 tons of coals under their said contract, and the time for delivery has long since elapsed; but the said Messrs. M. N. & Co. never delivered the same, or any part thereof, but have always refused to do so, whereby the consideration for the defendants' acceptance has wholly failed.

5. The plaintiffs first received the said bill, and it was first indorsed to them after it was overdue.

6. The plaintiffs never gave any value or consideration for the said bill.

7. The plaintiffs took the said bill with notice of the facts stated in the 2nd, 3rd, and 4th paragraphs thereof.

Delivered the day of 18 by X. Y., of Defendants' Solicitor.

No. 62.

(Reply where plaintiff does not introduce into his statement of claim the allegations necessary by way of reply to the defence.)

[Title.]

Reply.

1. The plaintiff joins issue upon the defendant's statement of defence.

2. The plaintiff gave value and consideration for the said bill in manner following, that is to say, on the day of 18 , the

said Messrs. M. N. & Co. were indebted to the plaintiff in about $ the balance of an account for goods sold from time to time by him to them. On that day they ordered of the plaintiff further goods to the value of about $ which last mentioned goods have since been delivered by him to them. At the time of the order for such last mentioned goods it was agreed between Messrs. M. N. & Co. and the plaintiff, and the order was received upon the terms, that they should indorse and hand over to him the bill of exchange sued upon, together with various other securities on account of the said previous balance, and the price of the goods so ordered on that day. The said securities including the bill sued upon, were thereupon on the same day indorsed and handed over to the plaintiff.

Delivered the day of 18 by X. Y., of Plaintiff's Solicitor.

No. 63.

Promissory note.

In the High Court of Justice,
——— Division.

Writ issued 3rd November, 18

Between A. B., Plaintiff,
and
E. F., Defendant.

Statement of Claim.

Claim.

1. The defendant on the day of made a promissory note, whereby he promised to pay to the plaintiff or his order $ 3 months after date.

2. The note became due on the day of 18 , and the defendant has not paid it.

The plaintiff claims :—

The amount of the note and interest thereon to judgment.

The plaintiff proposes that this action should be tried at Peterborough.

Delivered the day of 18 , by X. Y., of Plaintiff's Solicitor.

[Title.]

No. 64.

Statement of Defence.

Defence.

1. The defendant made the note sued upon under the following circumstances :—The plaintiff and defendant had for some years been in partnership as coal merchants, and it had been agreed between them that they should dissolve partnership, that the plaintiff should retire from the business, that the defendant should take over the whole of the partnership assets and liabilities, and should pay the plaintiff the value of his share in the assets after deducting the liabilities.

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2. The plaintiff thereupon undertook to examine the partnership books, and inquire into the state of the partnership assets and liabilities; and he did accordingly examine the books, and make the said inquiries, and he thereupon represented to the defendant that the assets of the firm exceeded $10,000, and that the liabilities of the firm were under $3,000, whereas the fact was that the assets of the firm were less than $5,000, and the liabilities of the firm largely exceeded the assets.

The misrepresentations mentioned in the last paragraph induced the defendant to make the note now sued on, and there never was any other consideration for the making of the note.

Delivered the day of 18 , by
X. Y., of Defendant's Solicitor.

No. **65**.

Statement of Claim.

In the High Court of Justice,
——— Division.

Action on Bill of exchange.

Writ issued 1st February, 18 .

Between A. B., Plaintiff,
and
C. D., Defendant.

1. The plaintiff on the day of 18 , drew Claim.
a bill of exchange upon the defendant for $ payable 3 months after date, and the defendant accepted the same.

2. The bill became due on day of 18 , and the defendant has not paid it.

3. [*(Amendment to meet defence infra.)* The defendant ,who at the time of the acceptance of the said bill was an infant within the age of 21 years, ratified and confirmed the said acceptance after he attained full age and before action, by a writing made and signed by him.]

The plaintiff claims :—*(State claim.)*

The plaintiff proposes that this action should be tried at Picton.

Delivered the day of 18 , by
X. Y., of Plaintiff's Solicitor.

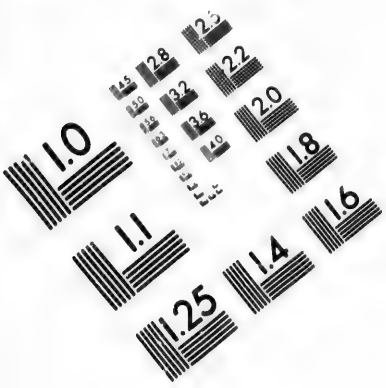
No. **66**.

Statement of Defence.

[Title.]

At the time of making the alleged acceptance of the said bill the defendant was an infant within the age of 21 years.

Delivered the day of 18 , by
X. Y., of Defendant's Solicitor.



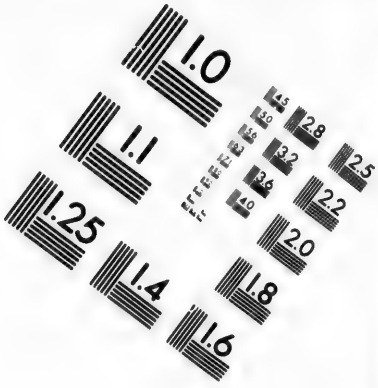
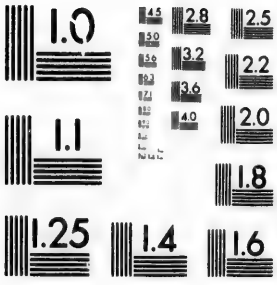
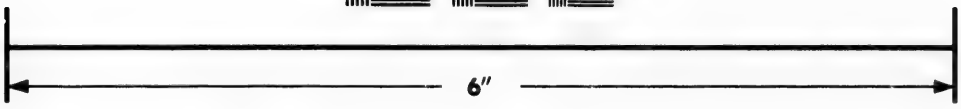
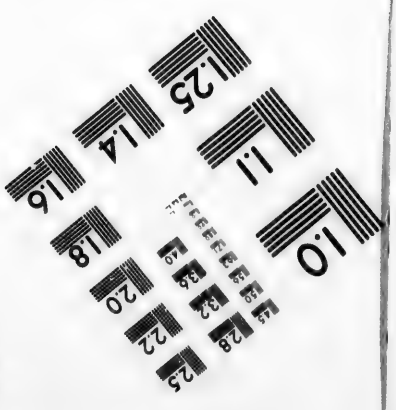


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No. 67.

(*Reply where plaintiff does not introduce into his statement of claim the allegations necessary by way of reply to the defence.*

[Title.]

Reply.

The defendant C. D., who at the time of the acceptance of the said bill was an infant within the age of 21 years, ratified and confirmed the said acceptance after he attained full age and before action, by a writing made and signed by him.

Delivered the day of 18 , by X. Y., of Plaintiff's Solicitor.

No. 68.

Claim. Bill of exchange and consideration.

In the High Court of Justice.
———Division.

Writ issued 3rd October, 18 .

Between A. B., and C. D., Plaintiffs,
and
E. F. and G. H., Defendants.

Statement of Claim.

Claim.

1. The plaintiffs are merchants, factors, and commission agents, carrying on business in Toronto.

2. The defendants are merchants and commission agents, carrying on business in Montreal.

3. For several years prior to the 18 , the plaintiffs had been in the habit of consigning goods to the defendants for sale, as their agents, and the defendants had been in the habit of consigning goods to the plaintiffs for sale, as their agents; and each party always received the price of the goods sold by him for the other; and a balance was from time to time struck between the parties, and paid.

On the of , the moneys so received by the defendants for the plaintiffs, and remaining in their names, largely exceeded the moneys received by the plaintiffs for the defendants, and a balance of $ was accordingly due to the plaintiffs from the defendants.

4. On or about the , 18 , the plaintiffs sent to the defendants a statement of the accounts between them, shewing the said sum as the balance due to the plaintiffs from the defendants; and the defendants agreed to the said statement of accounts as correct, and to the said sum of $ as the balance due by them to the plaintiffs, and agreed to pay interest on such balance if time were given to them.

5. The defendants requested the plaintiffs to give them three months' time for payment of the said sum of $, and the plaintiffs agreed to do so upon the defendants accepting the bills of exchange hereinafter mentioned.

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6. The plaintiffs thereupon on the drew two bills of exchange upon the defendants, one for $, and the other for $, both payable to the order of the plaintiffs three months after date, and the defendants accepted the bills.

The said bills became due on the 18 , and the defendants have not paid the bills, or either of them, nor the said sum of $.

The plaintiffs claim :—

$ and interest to the date of judgment.

The plaintiffs propose that this action should be tried at Toronto.

Delivered the day of 18 , by X. Y., of Plaintiffs' Solicitor.

No. **69.**

In the High Court of Justice,
—— —Division.

False imprisonment.

Writ issued 3rd September, 18 .

Between A. B., Plaintiff,
and
E. F., Defendant.

Statement of Claim.

Claim.

1. The plaintiff is a journeyman painter. The defendant is a builder having his building yard, and carrying on business at Ottawa, and for six months before and up to the 22nd August, 18 , the plaintiff was in the defendant's employment as a journeyman painter.

2. On the said 22nd August, 18 , the plaintiff came to work as usual in the defendant's yard, at about six o'clock in the morning.

3. A few minutes after the plaintiff had so come to work the defendant's foreman, X. Y., who was then in the yard, called the plaintiff to him, and accused the plaintiff of having on the previous day stolen a quantity of paint, the property of the defendant, from the yard. The plaintiff denied the charge, but X. Y. gave the plaintiff into the custody of a constable, whom he had previously sent for, upon a charge of stealing paint.

4. The defendant was present at the time when the plaintiff was given into custody, and authorized and assented to his being given into custody; and in any case X. Y., in giving him into custody, was acting within the scope and in the course of his employment as the defendant's foreman, and for the purposes of the defendant's business.

5. The plaintiff upon being given into custody, was taken by the said constable a considerable distance through various streets, on foot, to the police station and he was there detained in a cell till late in the same afternoon, when he was taken to the police court, and the charge against him was heard before the magistrate then sitting there, and was dismissed.

6. In consequence of being so given into custody, the plaintiff suffered annoyance and disgrace, and loss of time and wages, and loss of credit and reputation, and was thereby unable to obtain any employment or earn any wages for three months.

The plaintiff claims $ damages.

The plaintiff proposes that this action should be tried at Ottawa.

Delivered the day of 18 , by X. Y., of Plaintiff's Solicitor.

No. 70.

[Title.]

Statement of Defence.

Defence. 1. The defendant denies that he was present at the time when the plaintiff was given into custody, or that he in any way authorized or assented to his being given into custody. And the said X. Y., in giving the plaintiff into custody, did not act within the scope or in the course of his employment as the defendant's foreman, or for the purposes of the defendant's business.

2. At some time about five or six o'clock on the , being the evening before the plaintiff was given into custody, a large quantity of paint had been feloniously stolen by some person or persons from a shed upon the defendant's yard and premises.

3. At about 5.30 o'clock on the evening of the the plaintiff, who had left off work about half an hour previously, was seen coming out of the shed when no one else was in it, although his work lay in a distant part of the yard from, and he had no business in or near the shed. He was then seen to go to the back of a stack of timber in another part of the yard. Shortly afterwards the paint was found to have been stolen, and it was found concealed at the back of the stack of timber behind which the plaintiff had been seen to go.

4. On the following morning, before the plaintiff was given into custody, he was asked by X. Y. what he had been in the shed and behind the stack of timber for, and he denied having been in either place. X. Y. had reasonable and probable cause for suspecting, and did suspect that the plaintiff was the person who had stolen the paint, and thereupon gave him into custody.

Delivered the day of 18 , by X. Y., of Defendant's Solicitor.

No. 71.

Fraud. In the High Court of Justice.
——Division.

Writ issued 3rd September, 18 .

Between A. B., Plaintiff,
and
E. F., Defendant.

Statement of Claim.

Claim. 1. In or about March, 1880, the defendant caused to be inserted in the Newspaper an advertisement, in which he offered for sale the

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lease, fixtures, fittings, goodwill, and stock-in-trade of a baker's shop and business, and described the same as an increasing business, and doing twelve barrels a week. The advertisement directed application for particulars to be made to X. Y.

2. The plaintiff having seen the advertisement applied to X. Y., who placed him in communication with the defendant, and negotiations ensued between the plaintiff and the defendant for the sale to the plaintiff of the defendant's bakery at with the lease, fixtures, fittings, stock-in-trade, and good-will.

3. In the course of these negotiations the defendant repeatedly stated to the plaintiff that the business was a steadily increasing business, and that it was a business of more than twelve barrels a week.

4. On the 5th of April, 1880, the plaintiff, believing the said statement of the defendant to be true, agreed to purchase the said premises from the defendant, for $2,000, and paid to him a deposit of $300 in respect of the purchase.

5. On the 15th of April the purchase was completed, an assignment of the lease executed, and the balance of the purchase money paid. On the same day the plaintiff entered into possession.

6. The plaintiff soon afterwards discovered that at the time of the negotiations of the said purchase by him and of the said agreement, and of the completion thereof, the said business was and had long been a declining business; and at each of these times, and for a long time before, it had never been a business of more than four barrels a week. And the said premises were not of the value of $2,000, or any saleable value whatever.

7. The defendant made the false representations hereinbefore mentioned well knowing them to be false, and fraudulently, with the intention of inducing the plaintiff to make the said purchase on the faith of them.

The plaintiff claims $ damages.

The plaintiff proposes that this action should be tried at Brockville.

Delivered the day of 18 , by X. Y., of Plaintiff's Solicitor.

No. **72.**

[Title.]

Statement of Defence.

1. The defendant says that at the time when he made the representations mentioned in the 3rd paragraph of the statement of claim and throughout the whole of the transactions between the plaintiff and defendant, and down to the completion of the purchase and the relinquishment by the defendant of the said shop and business to the plaintiff, the said business was an increasing business, and was a business of over 12 barrels a week. And the defendant denies the allegations of the 6th paragraph of the statement of claim. Defence.

2. The defendant repeatedly during the negotiations told the plaintiff that he must not act upon any statement or representation of his, but must ascertain for himself the extent and value of the said business. And the defendant handed to the plaintiff for this purpose the whole of his books, shewing fully and truthfully all the details of the said busi-

ness, and from which the nature, extent, and value thereof could be fully seen, and those books were examined for that purpose by the plaintiff, and by an accountant on his behalf. And the plaintiff made the purchase in reliance upon his own judgment, and the result of his own inquiries and investigations, and not upon any statement or representation whatever of the defendant.

3. The defendant admits the allegations of paragraphs 1, 2, 3, and 4 of the statement of claim.

Delivered the day of 18 , by X. Y., of Defendant's Solicitor.

No. **73.**

Guarantee. In the High Court of Justice,
————Division.

Writ issued 3rd September, 18 .

Between A. B. and C. D., Plaintiffs,
and
E. F. and G. H., Defendants.

Statement of Claim.

Claim. 1. The plaintiffs are brewers, carrying on their business at Guelph, under the firm of X. Y. & Co.

2. In the month of March, 1879, M. N. was desirous of entering into the employment of the plaintiffs as a traveller and collector, and it was agreed between the plaintiffs and the defendants and M. N., that the plaintiffs should employ M. N. upon the defendants entering into the guarantee hereinafter mentioned.

3. An engagement in writing was accordingly made and entered into, on or about the 30th March, 1879, between the plaintiffs and the defendant, whereby, in consideration that the plaintiffs would employ M. N. as their collector, the defendants agreed that they would be answerable for the due accounting by M. N. to the plaintiffs for, and the due payment over by him to the plaintiffs of all moneys which he should receive on their behalf as their collector.

4. The plaintiffs employed M. N. as their collector accordingly, and he entered upon the duties of such employment, and continued therein down to the 31st September, 1880.

5. At various times between the 29th of September, and the 25th of December, 1880, M. N. received on behalf of the plaintiffs and as their collector, sums of money from debtors of the plaintiffs, amounting in the whole to the sum of $3,400; and of this amount M. N. neglected to account for or pay over to the plaintiffs sums amounting in the whole to $908, and appropriated the last-mentioned sums to his own use.

6. The defendants have not paid the last mentioned sums, or any part thereof, to the plaintiffs.

The plaintiffs claim:—*(State claim.)*

The plaintiffs propose that this action should be tried at Guelph.

Delivered the day of 18 , by X. Y., of Plaintiffs' Solicitor.

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No. 74.

In the High Court of Justice. Negligence.
——Division.

Writ issued 3rd September, 18 .

Between A. B., Plaintiff,
and
E. F., Defendant.

Statement of Claim.

1. The plaintiff is a shoemaker, carrying on business at Toronto. The defendant is a soap and candle manufacturer at the same place. Claim.

2. On the 23rd May, 1881, the plaintiff was walking eastward along the south side of King Street, in the city of Toronto, at about 3 o'clock in the afternoon. He was obliged to cross Yonge Street, which is a street running into King Street at right angles thereto. While he was crossing the street, and just before he could reach the foot pavement on the further side thereof, a two-horse van of the defendants under the charge and control of the defendant's servants, was negligently, suddenly, and without any warning, turned at a rapid and dangerous pace out of King Street into Yonge Street. The pole of the van struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken, and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for 4 months ill and suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

The plaintiff claims $ damages.

The plaintiff proposes that this action should be tried at Lindsay.

Delivered the day of 18 , by
X. Y., of Plaintiff's Solicitor.

No. 75.

[Title.]

Statement of Defence.

1. The defendant denies that the van was the defendant's van, or that it was under the charge or control of the defendant's servant. The van belonged to John Smith, of , a carman and contractor, employed by the defendant to carry and deliver goods for him; and the persons under whose charge and control the said van was were the servants of the said John Smith. Defence

2. The defendant denies that the van was turned out of King Street either negligently, suddenly, or without warning, or at a rapid or dangerous pace.

3. The defendants says that the plaintiff might and could by the exercise of reasonable care and diligence, have seen the van approaching him, and avoided any collision with it.

Delivered the day of 18 , by
X. Y., of Defendant's Solicitor.

No. 76.

Statement of Claim.

Action for assault.

In the High Court of Justice.
——Division.

Writ issued 15th March, 18 .

Between A. B., Plaintiff,
and
E. F., Defendant.

1. The plaintiff is a carrying on business at

2. On the day of the defendant assaulted the plaintiff and the plaintiff was seriously hurt and wounded, and was for a long time in consequence of his injuries, unable to transact his business, and incurred expense for nursing and medical attendance.

2. [*(Amendment to meet defence infra.)* The defendant pretends that he committed the assault complained of in his own defence; but the facts are that the defendant was trespassing on the plaintiff's land, and refused to leave though requested to do so, whereupon the plaintiff laid his hands on the defendant in order to remove him, using so much force and no more than was necessary for that purpose.]

The plaintiff claims $ damages.

The plaintiff proposes that this action should be tried at Cobourg.

Delivered the day of 18 , by
X. Y., of Plaintiff's Solicitor.

No. 77.

[Title.]

Statement of Defence.

The plaintiff first assaulted the defendant, who thereupon committed the alleged assault in his own defence.

Delivered the day of 18 , by
X. Y., of Defendant's Solicitor.

No. 78.

(Reply where plaintiff does not introduce into his statement of claim the allegations necessary by way of reply to the defence.)

[Title.]

Reply.

The defendant E. F., pretends that he committed the assault complained of in his own defence; but the facts are that the defendant was trespassing on the plaintiff's land and refused to leave though requested to do so, whereupon the plaintiff laid his hands on the defendant in order to remove him, using so much force and no more than was necessary for that purpose.

Delivered the day of 18 , by
X. Y., of Plaintiff's Solicitor.

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No. **79.**

Statement of Claim.

Action against Railway Company for injuries by collision caused through negligence.

In the High Court of Justice.
———Division.

Writ issued 18 .

Between A. B., Plaintiff,
and
———Defendants.

1. The defendants are carriers of passengers upon a railway from Toronto to

2. In January, 1881, the plaintiff took a ticket from Toronto to and was received by the defendants as a passenger to be by them safely carried in a train which started from Toronto for

3. Owing to the negligence of the defendants in the management of their railway, the train in which the plaintiff was travelling came into collision with an engine, at a short distance from Toronto.

4. The plaintiff was thrown from his seat by the said collision, and much injured about the head, and had his right arm broken.

5. [*The following paragraphs may be introduced by amendment to meet Defence infra.* The defendants allege that the plaintiff accepted the sum of $300 in full satisfaction of all cause of action which he might have on account of the said collision, but the facts are as follows:

6. A short time after the collision an officer of the defendants procured the plaintiff to accept the said accord and satisfaction by fraudulently representing that his injuries were of a temporary nature, and that if they should afterwards turn out to be more serious than he anticipated, he would still be able to obtain further compensation from the defendants.

7. The plaintiff, fully believing the said representations, and acting upon the faith thereof, was induced thereby to accept the said accord and satisfaction, and then accepted the same, subject to the express condition that he should not thereby exclude himself from further compensation from the defendants if his injuries should prove more serious than he then anticipated.

8. After the acceptance of the said accord and satisfaction, the injuries suffered by the plaintiff in the collision did turn out to be more serious than was anticipated at the time aforesaid, and thereupon the plaintiff commenced the present action.]

The plaintiff claims $ damages.

The plaintiff proposes that this action should be tried at Toronto.

Delivered the day of 18 , by X. Y., of Plaintiff's Solicitor.

No. **80.**

[Title.]

Statement of Defence.

1. Shortly after the collision referred to in the statement of claim, one of the officers of the defendants called upon the plaintiff for the purpose

of ascertaining from him whether he intended to make any claim against the defendants arising out of the said collision.

2. At such interview the plaintiff informed the said officer that he did intend to make a claim against the defendants arising out of the said collision; and it was there and then agreed between the plaintiff and the said officer acting on behalf and by the authority of the defendants, that in consideration that the defendants would pay to the plaintiff a sum of $300, he, the plaintiff, would accept such sum from the defendants in full satisfaction and discharge of all cause of action which he had or might have against the said defendants on account of the said collision.

3. Thereupon the said officer, acting on behalf of the defendants, paid to the plaintiff the sum of $300, and the plaintiff received the same in full discharge of the aforesaid cause of action.

Delivered the day of 18 , by X. Y., of Defendant's Solicitor.

No. **81.**

(Reply where Plaintiff does not introduce into his statement of claim the allegations necessary by way of reply to the Defence.)

[Title.]

Reply.

1. The defendants allege that the plaintiff accepted the sum of $300 in full satisfaction of all cause of action which he might have on account of the said collision, but the facts are as follows:

2. A short time after the collision an officer of the defendants procured the plaintiff to accept the said accord and satisfaction by fraudulently representing that his injuries were of a temporary nature, and that if they should afterwards turn out to be more serious than he anticipated, he would still be able to obtain further compensation from the defendants.

3. The plaintiff fully believing the said representations, and acting upon the faith thereof, was induced thereby to accept the said accord and satisfaction, and then accepted the same, subject to the express condition that he should not thereby exclude himself from further compensation from the defendants if his injuries should prove more serious than he then anticipated.

4. After the acceptance of the said accord and satisfaction, the injuries suffered by the plaintiff in the collision did turn out to be more serious than was anticipated at the time aforesaid, and thereupon the plaintiff commenced the present action.

Delivered the day of , 18 , by X. Y., of Plaintiff's Solicitor.

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No. **82.**

In the High Court of Justice. Landlord and tenant.
——— Division.

Writ issued 3rd September, 18 .

Between A. B., Plaintiff,
and
C. D., Defendant.

Statement of Claim.

1. On the day of the plaintiff, by deed, let to the defendant a house and premises, No. 52 Street, in the City of Belleville, for a term of 21 years from the day of , at the yearly rent of $400 payable quarterly. Claim.

2. By the said deed, the defendant covenanted to keep the said house and premises in good and tenantable repair.

3. The said deed also contained a clause of re-entry, entitling the plaintiff to re-enter upon the said house and premises, in case the rent thereby reserved, whether demanded or not, should be in arrear for twenty-one days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

4. On the , a quarter's rent became due; and on the , another quarter's rent became due. On the , both had been in arrear for twenty-one days, and both are still due.

5. On the same , the house and premises were not, and are not now, in good or tenantable repair, and it would require the expenditure of a large sum of money to reinstate the same in good and tenantable repair, and the plaintiff's reversion is much depreciated in value.

The plaintiff claims:—

1. Possession of the said house and premises.

2. $ for arrears of rent.

3. $ damages for the defendant's breach of his covenant to repair.

4. $ for occupation of the house and premises from the , to the day of recovering possession.

The plaintiff proposes that this action should be tried at Belleville.

Delivered the day of 18 , by X. Y., of Plaintiff's Solicitor.

No. **83.**

In the High Court of Justice, Recovery of land.
———Division.

Writ issued 4th January, 18 .

Between A. B., Plaintiff,
and
C. D., Defendant.

Statement of Claim.

1. On the day of the plaintiff let to the defendant a house, No. 62 Street, in the City of Ottawa, Landlord and tenant.

as tenant from year to year, at the yearly rent of $420, payable quarterly, the tenancy to commence on the day of

2. The defendant took possession of the house and continued tenant thereof until the day of last, when the tenancy determined by a notice duly given.

3. The defendant has disregarded the notice and still retains possession of the house.

4. [*Amendment to meet the counter-claim infra.*] (The defendant, C. D., sets up in his defence that the plaintiff agreed to give to the defendant a new lease, and the plaintiff, A. B., admits the agreement alleged in the statement of defence, but he refuses to grant to the defendant a lease, inasmuch as such agreement provided that the lease should contain a covenant by the defendant to keep the house in good repair and a power of re-entry by the plaintiff upon breach of such covenant and the plaintiff says that the defendant, since the agreement was made, has not kept the house in good repair, and the same is now in a dilapidated condition.)

The plaintiff claims:—

1. Possession of the house.

2. $ for mesne profits from the day of

The plaintiff proposes that this action should be tried at Ottawa.

Delivered the day of 18 , by X. Y., of Plaintiff's Solicitor.

No. 84.

Statement of Defence and Counter-claim.

In the High Court of Justice.
———Division.

Between A. B., Plaintiff,
and
C. D., Defendant.

(by original action,)

The defence and counter-claim of the above C. D.

Defence. 1. Before the determination of the tenancy mentioned in the statement of claim, the plaintiff A. B., by writing dated the day of , and signed by him, agreed to grant to the defendant C. D., a lease of the house mentioned in the statement of claim, at the yearly rent of $450, for the term of 21 years, commencing from the day of , when the defendant, C. D.'s tenancy from year to year determined, and the defendant has since that date been and still is in possession of the house under the said agreement.

Counter-claim. 2. By way of counter-claim the defendant claims to have the agreement specifically performed, and to have a lease granted to him accordingly.

Delivered the day of 18 , by X. Y., of Defendant's Solicitor.

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No. **85.**

Reply where plaintiff does not introduce into his statement of claim the allegations necessary by way of reply to the defence:

[Title.]

Reply.

Reply. The plaintiff, A. B., admits the agreement stated in the defendant, C. D.'s statement of defence, but he refuses to grant to the defendant a lease, because such agreement provided that the lease should contain a covenant by the defendant to keep the house in good repair, and a power of re-entry by the plaintiff upon breach of such covenant, and the plaintiff says that the defendant, since the making of the said agreement, has not kept the house in good repair, and the same is now in a dilapidated condition.

Delivered the day of 18 , by X. Y., of Plaintiff's Solicitor.

No. **86.**

In the High Court of Justice.
——Division.

Recovery of land.

Writ issued 18 .

Between A B., and C. D., Plaintiffs,
and
E. L., Defendant.

Statement of Claim.

Claim. 1. K. L., late of Barrie in the County of Simcoe duly executed his last will, dated the 4th day of April, 18 , and thereby devised his lands in the County of Simcoe unto and to the use of the plaintiffs and their heirs, upon the trusts therein mentioned for the benefit of his daughters Margaret and Martha, and appointed the plaintiffs executors thereof.

2. K. L. died on the 3rd day of January, 18 , and his said will was proved by the plaintiffs in the proper Surrogate Court on or about the 4th day of February, 18 .

3. K. L., was at the time of his death seised in fee of lot No. 1 in the 3rd concession of the township of , and lot No. 5 in the 4th concession of the township of , both in the County of Simcoe.

4. The defendant, soon after the death of K. L., entered into possession of the said lots, and has refused to give them up to the plaintiffs.

The plaintiffs claim:—

1. Possession of the said 2 lots.

2. $ for mesne profits of the premises from the death of K. L. till such possession shall be given.

The plaintiffs propose that this action should be tried at Barrie.

Delivered the day of 18 , by X. Y., of Plaintiffs' Solicitor.

No. 87.

Trespass to land.

In the High Court of Justice.
———Division.

Writ issued 3rd October, 18 .

Between A. B., Plaintiff,
and
E. F., Defendant.

Statement of Claim.

Claim.

1. The plaintiff was on the 5th March, 18 , and still is the owner and occupier of a farm in the Township of in the County of , being lot No. 4 in the 7th concession of the said Township.

2. A private road, known as Highfield Lane, runs through a portion of the plaintiff's farm. It is bounded upon both sides by fields of the plaintiff's and is separated therefrom by a fence and ditch.

3. For a long time prior to the 5th March, 18 , the defendant had wrongfully claimed to use the said road for his horses, carts and waggons on the alleged ground that the same was a public highway, and the plaintiff had frequently warned him that the same was not a public highway, but the plaintiff's private road, and that the defendant must not so use it.

4. On the 5th March, 18 , the defendant came with a cart and horse, and a large number of servants and workmen, and forcibly used the road, and broke down and removed a gate which the plaintiff had caused to be placed across the same.

5. The defendant and his servants and workmen on the same occasion pulled down and damaged the plaintiff's fence and ditch upon each side of the road, and went upon the plaintiff's field beyond the fence and ditch, and injured the crops there growing, and dug up and injured the soil of the road; and in any case the acts mentioned in this paragraph were wholly unnecessary for the assertion of the defendant's alleged right to use, or the user of the said road as a highway.

The plaintiff claims:—

1. Damages for the wrongs complained of.

2. An order restraining the defendant from any repetition of any of the acts complained of.

3. Such other relief as the nature of the case may require.

The plaintiff proposes that this action should be tried at Woodstock.

Delivered the day of 18 , by X. Y., of Plaintiff's Solicitor.

No. 88.

[Title.]

Statement of Defence.

1. The defendant says that the road was and is a public highway for horses and carriages; and a few days before the 5th of March, 18 , the plaintiff wrongfully erected the gate across the road for the purpose of

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obstructing and preventing, and it did obstruct and prevent the use of the road as a highway. And the defendant on the said 5th March, 18 , caused the said gate to be removed, in order to enable him lawfully to use the road by his horses, carts and waggons as a highway.

2. The defendant denies the allegations of the 5th paragraph of the statement of claim, and says that neither he nor any of his workmen or servants did any act, or used any violence, other than was necessary to enable the plaintiff lawfully to use the highway.

Delivered the day of 18 , by
X. Y., of Defendant's Solicitor.

No. **89.**

Form of Demurrer.

In the High Court of Justice,
———Division.

[Title.]

The defendant [plaintiff] demurs to the [plaintiff's statement of complaint *or* defendant's statement of defence, *or* of set-off, *or* of counterclaim] [*or* to so much of the plaintiff's statement of complaint as claims *or* as alleges as a breach of contract the matters mentioned in paragraph 7, *or as the case may be*], and says that the same is bad in law on the ground that [*here state a ground of demurrer*], and on other grounds sufficient in law to sustain this demurrer.

Delivered the day of 18 , by
X. Y., of Plaintiff's Solicitor.

No. **90.**

Special Case for the opinion of the Court.

The following case is stated for the opinion of the Court under an order of the Honorable Mr. Justice dated the day of 18 made pursuant to Rule 554 (*or as the case may be*), (*here state the material facts of the case bearing upon the question of law to be decided*).

The question (*or* questions) for the opinion of the Court is (*or* are)

First—Whether, etc.

Second—Whether, etc.

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PART VII.

PRÆCIPES.

No. **91.**

Amended Summons.

[Title, etc.]

Amend in pursuance of order [*or* fiat] dated the writ of summons in this action by (*set out amendments when required*).

Dated the day of 18 .

(Signed)

(Address)

Solicitor for the

No. **92.**

Renewed Summons.

[Title, etc.]

Required in pursuance of order dated , a renewed writ of summons in this action,

Dated the day of 18 .

(Signed)

(Address)

Solicitor for the

No. **93.**

Entry of Appearance.

[Title, etc.]

Enter an appearance for in this action .

Dated the day of 18 .

(Signed)

(Address)

The said defendant require (*or* do not require, *as the case may be*) a statement of claim to be delivered.

(*In case the defendant wishes to dispute the amount claimed, and to make no other defence, the following may be added*). The defendant disputes the amount claimed by the plaintiff, (*or* the defendant insists that the amount due to the plaintiff is $ only, *or* the defendant insists that the amount due to the plaintiff is, $ for principal and $ for interest, since the day of etc., and no more,) *as the case may be.*

No. **94.**

Entry of Appearance in action for land limiting Defence.

[Title, etc.]

Enter an appearance for the defendant in this action. The said defendant limits his defence to part only of the property mentioned in the writ of summons, namely, to

Dated the day of 18 .

(Signed)

(Address)

The said defendant require a statement of claim to be delivered.

No. **95.**

Entry of Appearance, by new defendant.

[Title, etc.]

Enter an appearance for who has been served with an order dated the day of to carry on and prosecute the proceedings in this action.

Dated the day of 18 .

(Signed)

(Address)

No. **96.**

Entry of Appearance, by party served with notice, under Rule 329.

[Title, etc.]

Enter an appearance for to the notice issued in this action on the day of 18 , by the defendant under the Rules of the Supreme Court, Rule 329.

Dated the day of 18 .

(Signed)

(Address)

The said defendant require a statement of claim to be delivered.

No. **97.**

Entry of Appearance to Counter-claim.

[Title, etc.]

Enter an appearance for to the counter-claim of the above-named defendant in this action.

Dated the day of 18 .

(Signed)

(Address)

No. **98.**

Entry for Argument Generally.

[Title, etc.]

Set down for argument the

Dated the day of 18 .

(Signed)

(Address)

No. **99.**

Entry of Demurrer for Argument.

[Title, etc.]

Enter for argument the demurrer of to the in this action.

Dated the day of 18 .

(Signed)

(Address)

No. **100.**

Entry of Special Case.

[Title, etc.]

Set down for argument the special case filed in this action on the day of , 18 ; (*or* set down the dated the day of 18 ; of Mr. the referee in this for hearing as a special case).

Dated the day of 18 .

(Signed)

(Address)

No. **101.**

Search.

[Title, etc.]

Search for

Dated the day of 18 .

(Signed)

(Address)

Agent for

Solicitor

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No. **102.**

Entry of Action for Trial.

[Title, etc.]

Enter this action for trial.

Dated the day of 18 .

(Signed)

(Address)

No. **103.**

Commission to Examine Witnesses.

[Title, etc.]

Required in pursuance of order dated a commission to examine witnesses directed to

Dated the day of 18 .

(Signed)

(Address)

Solicitor for the

No. **104.**

Habeas Corpus ad Testificandum.

[Title, etc.]

Required in pursuance of order dated a writ of habeas corpus ad testificandum directed to the to bring before

Dated the day of 18 .

(Signed)

(Address)

Solicitor for the

No. **105.**

Entry of Appeal.

[Title, etc.]

Enter this appeal from the order [*or* judgment] of in this action dated the day of 18 .

(Signed)

(Address)

No. **106.**

Fieri Facias.

[Title, etc.]

Required a writ of fieri facias directed to the sheriff of to levy against C. D. the sum of $ and interest thereon at the rate of $ per centum per annum from the day of [and $ costs] to

Judgment [*or* order] dated day of

Taxing master's certificate, dated day of

Dated the day of

(Signed)
(Address)
Solicitor for the [*party on whose behalf writ is to issue.*]

No. **107.**

Venditioni Exponas.

[Title, etc.]

Required a writ of venditioni exponas directed to the sheriff of to sell the goods and of C. D., taken under a writ of fieri facias in this action tested day of

Dated the day of 18

(Signed)
(Address)
Solicitor for the

No. **108.**

Writ of Sequestration.

[Title, etc.]

Required a writ of sequestration against C. D. for not at the suit of A. B directed to the sheriff of

Order dated day of

Dated the day of 18 .

(Signed)
(Address)
(Solicitor for the

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No. **109.**

Writ of Possession. (*Lands.*)

[Title, etc.]

Required a writ of possession directed to the sheriff of to deliver possession to A. B. of .

Judgment dated day of .

Dated the day of 18 .

(Signed)
(Address)
Solicitor for the

No. **110.**

Writ of Delivery. (*Chattels.*)

[Title, etc.]

Required a writ of delivery directed to the sheriff of to make delivery to A. B. of .

Dated the day of 18 .

(Signed)
(Address)
Solicitor for the

No. **111.**

Writ of Attachment.

[Title, etc.]

Required in pursuance of order dated day of an attachment directed to the sheriff of against C. D. for not delivering to A. B.

Dated the day of 18 .

(Signed)
(Address)
Solicitor for the

No. 112.

Præcipe for Direction to the Bank referred to in Rule 167.

In the Court of Appeal,
or
In the High Court of Justice,
Division

(*Short style of cause.*)

Required a direction for the Bank to receive from
$ payable into Court to the credit of this cause
under dated (*or as the case may be.*)

Date

A. B.,
Defendant's Solicitor.
(*or as the case may be.*)

General order (Chy.) Sch. O.

No. 113.

Præcipe for Cheque referred to in Rule 176.

In the Court of Appeal,
or
In the High Court of Justice,
Division.

(*Short style of cause.*)

Required a cheque for $ with $ interest thereon from
to (*being a period, if any, for which interest is payable under the order or judgment, but which has not already been taken into account and computed*), payable to ; and the following papers are produced herewith, (*naming the Judgments, orders, reports, etc., showing the party's right to the cheque*), *thus :*

Judgment, dated .
Order, dated .
Report, dated ., etc.

Date

A. B.,
Plaintiff's Solicitor.
(*or as the case may be.*)

General order (Chy.) 356, Sch.

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PART VIII.

SUBPŒNAS, ETC., FOR EXAMINATION OF WITNESSES.

No. 114.

Subpœna ad Testificandum (General Form.)

In the High Court of Justice,
——Division.

Between

Plaintiff,

and

Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to greeting: We command you to attend before at on day the day of 18 , at the hour of in the noon, and so from day to day, until the above cause is tried, to give evidence on behalf of the (plaintiff *or* defendant.)

Witness, the Honourable President, etc., the day of 18 .

No. 115.

Subpœna Duces Tecum (General Form).

[Title, etc.]

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to greeting: We command you to attend before at on day the day of 18 , at the hour of in the noon, and so from day to day, until the above cause is tried, to give evidence on behalf of the and also to bring with you and produce at the time and place aforesaid (*specify documents to be produced*).

Witness, the Honourable President, etc., the day of 188 .

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No. 116.

Subpœna ad Testificandum at Assizes.

[Title, etc.]

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to greeting: We command you to attend before our Justices assigned to take the assizes in and for the county of to be holden at on day the day of 18 , at the hour of in the noon, and so from day to day during the said assizes until the above cause is tried, to give evidence on behalf of the

Witness, the Honourable President, etc., the day of 188 .

No. 117.

Subpœna Duces Tecum at Assizes.

[Title, etc.]

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to greeting: We command you to attend before our Justices assigned to take the assizes in and for the county of to be holden at on day the day of 18 , at the hour of in the noon, and so from day to day during the said assizes, until the above cause is tried, to give evidence on behalf of the , and also to bring with you and produce at the time and place aforesaid (*specify documents to be produced*).

Witness, the Honourable President, etc., the day of

No. 118.

Commission to Examine Witnesses.

[Title, etc.]

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the faith, to of commissioner named by and on behalf of the and to of a commissioner named by and on behalf of the greeting: Know ye that we in confidence of your prudence and fidelity have appointed you and by these presents give you power and authority to examine on interrogatories and *viva voce* as hereinafter mentioned witnesses on behalf of the said and respectively at before you or either of you.—And we command you as follows:

1. Both the said and the said shall be at liberty to examine on interrogatories, and *viva voce* on the subject matter thereof or arising out of the answers thereto, such witnesses as shall be produced on their behalf with liberty to the other party to cross-examine the said witnesses on cross interrogatories and *viva voce* on the subject matter thereof or

arising out of the answers thereto, the party producing any witness for examination being at liberty to re-examine him *viva voce;* and all such additional *viva voce* questions whether on examination, cross-examination, or re-examination, shall be reduced into writing, and with the answers thereto shall be returned with the said commission.

2. Not less than forty-eight hours before the examination of any witness on behalf of either of the said parties, notice in writing, signed by one of you, the commissioner of the party on whose behalf the witness is to be examined, and stating the time and place of the intended examination and the names of the witnesses to be examined, shall be given to the other party by delivering the notice to [*name and address of the person named in the order for this purpose*] (or to a grown up person there) and shall be given also to the commissioner of the other party at the address aforesaid of such commissioner or to a grown up person for him at the said last mentioned address, and if the commissioner of that party neglect to attend pursuant to the notice, then you, the commissioner of the party on whose behalf the notice is given, shall be at liberty to proceed with and take the examination of the witness or witnesses *ex parte*, and adjourn any meeting or meetings, or continue the same from day to day until all the witnesses intended to be examined by virtue of the notice have been examined, without giving any further or other notice of the subsequent meeting or meetings.

3. In the event of any witness on his examination, cross-examination or re-examination producing any book, document, letter, paper, or writing, and refusing for good cause to be stated in his deposition to part with the original thereof, then a copy thereof, or extracts therefrom, certified by the commissioners or commissioner present and acting to be a true and correct copy or extract shall be annexed to the witnesses' deposition.

4. Each witness to be examined under this commission shall be examined on oath, affirmation, or otherwise in accordance with his religion by or before the commissioners or commissioner present at the examination.

5. If any one or more of the witnesses do not understand the English language (the interrogatories, or cross-interrogatories, and *viva voce* questions, if any, being previously translated into the language with which he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters to be nominated by the commissioners or commissioner present at the examination, and to be previously sworn according to his or their several religions, by or before the said commissioners or commissioner truly to interpret the questions to be put to the witness and his answers thereto.

6. The depositions to be taken under this commission shall be subscribed by the witness or witnesses, and by the commissioners or commissioner who shall have taken the depositions.

7. The interrogatories, cross-interrogatories, and depositions, together with any documents referred to therein, or certified copies thereof or extracts therefrom, shall be sent to the of the Supreme Court of Judicature on or before the day of inclosed in a cover under the seals or seal of the commissioners or commissioner.

8. Before you or any of you, in any manner act in the execution hereof you shall severally take the oath hereon indorsed on the Holy Evangelists or otherwise in such other manner as is sanctioned by the form of your several religions and is considered by you respectively to be binding on your respective consciences.

And we give you or any one of you authority to administer such oath to the other or others of you.

Witness, the Honourable President, etc., the day of in the year of our Lord one thousand eight hundred and

This writ was issued by
of
agent for
of
solicitor for the
who reside at

Commissioners' Oath.

You shall, according to the best of your skill and knowledge, truly and faithfully, and without partiality to any or either of the parties in this cause take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission within written. So help you God.

Clerk's Oath.

You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, write down, transcribe, and engross all and every the questions which shall be exhibited or put to all and every witness and witnesses, and also the depositions of all and every such witness and witnesses produced before and examined by the said commissioners named in the commission within written, as far forth as you are directed and employed by the commission to take, write down, transcribe or engross the said questions and depositions.

So help you God.

Witnesses' Oath.

You are true answers to make to all such questions as shall be asked you, without favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth. So help you God.

Interpreter's Oath.

You shall truly and faithfully, and without partiality to any or either of the parties in this cause, and to the best of your ability, interpret and translate the oath or oaths, affirmation or affirmations which shall be administered to, and all and every the questions which shall be exhibited or put to all and every witness and witnesses produced before and examined by the commissioners named in the commission within written, as far forth as you are directed and employed by the said commissioners, to interpret and translate the same out of the English into the language of such witness or witnesses, and also in like manner to interpret and translate the respective depositions taken and made to such questions out of the language of such witness or witnesses into the English language. So help you God.

Direction of interrogatories, etc., when returned by the commissioners.

The of the Supreme Court of Judicature,
Osgoode Hall,
Toronto.

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No. **119.**

Habeas Corpus ad Testificandum.

[Title, etc.]

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the [keeper of our prison at]

We command you that you bring , who it is said is detained in our prison under your custody , before at on day the day of at the hour of in the noon, and so from day to day until the above action is tried, to give evidence on behalf of the . And that immediately after the said shall have so given his evidence you safely conduct him to the prison from which he shall have been brought.

Witness, the Honourable President, etc., the day of

This writ was issued by solicitor for the who reside at

PART IX.

ORDERS.

No. **120.**

Order (*General Form.*)

In the High Court of Justice,
——Division.
[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of fi'ed the day of 18 , and

It is ordered and that the costs of this application be

Dated the day of 18 .

No. **121**

Order for Service out of Jurisdiction.

In the High Court of Justice,
——Division.
[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of . 18 , and

It is ordered that the plaintiff be at liberty to issue a writ for service out of the jurisdiction against

And it is further ordered that the time for appearance to the said writ be within days after the service thereof, and that the costs of this application be

Dated the day of 18 .

No. **122.**

Order for Substituted Service.

In the High Court of Justice,
——Division.

[*Name of the Judge or Master*] in Chambers.

Between Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that service of a copy of this order, and of a copy of the writ of summons in this action, by sending the same by a prepaid and registered post letter, addressed to the defendant at , shall be good and sufficient service of the writ.

Dated the day of 18 .

No. **123.**

Order allowing Service made out of the Jurisdiction.

In the High Court of Justice,
——Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that the service of the writ (*or* notice of the writ) made upon the defendant as shown by the said affidavit, be allowed as good and sufficient service.

Dated the day of 18 .

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No. **124.**

Order for Renewal of Writ of Summons.

In the High Court of Justice,
——Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that the writ in this action be renewed for twelve months from the date of its renewal, pursuant to the Rules of the Supreme Court.

Dated the day of 18 .

No. **125.**

Order for Time.

In the High Court of Justice,
——Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that the shall have time for, etc., and that the costs of this application be

Dated the day of 18 .

No. **126.**

Order under Rule 739, etc., (final judgment).

In the High Court of Justice,
——Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that the plaintiff may sign final judgment in this action for the amount indorsed on the writ, with interest, if any, and costs to be taxed, and that the costs of this application be

Dated the day of 18 .

No. 127.

Order under Rule 739, etc., (leave to defend unconditionally).

In the High Court of Justice,
——Division
[*Name of the Judge or Master*] in Chambers.
Between
Plaintiff,
and
Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that the defendant be at liberty to defend this action by delivering a statement of defence within days after delivery of the plaintiff's statement of claim, and that the costs of this application be

Dated the day of 18 .

No. 128.

Order under Rule 739, etc., (leave to defend on payment into Court).

In the High Court of Justice,
—— Division.
[*Name of the Judge or Master*] in Chambers.
Between
Plaintiff,
and
Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that if the defendant pay into Court within a week from the date of this order the sum of $, he be at liberty to defend this action by delivering a statement of defence within days after delivery of the plaintiff's statement of claim, but that if that sum be not so paid the plaintiff be at liberty to sign final judgment for the amount indorsed on the writ of summons, with interest, if any, and costs, and that in either event the costs of the application be

Dated the day of 18 .

No. 129.

Order under Rule 739, etc., (leave to defend as to part on payment into Court, and as to residue unconditionally).

In the High Court of Justice,
——Division.
[*Name of the Judge or Master*] in Chambers.
Between
Plaintiff,
and
Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

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It is ordered that if the defendant pay into Court within a week from the date of this order the sum of $, he be at liberty to defend this action as to the whole of the plaintiff's claim.

And it is ordered that if that sum be not so paid the plaintiff be at liberty to sign judgment for that sum and the defendant be at liberty to defend this action as to the residue of the plaintiff's claim.

And it is ordered that in either event the statement of defence be delivered within days after delivery of the plaintiff's statement of claim, and that the costs of this application be

Dated the day of 18 .

No. **130.**

Order to Amend.

In the High Court of Justice,
——Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that the plaintiff be at liberty to amend the writ of summons in this action by , and that the costs of this application be

Dated the day of 18 .

No. **131.**

Order for names of Partners.

In the High Court of Justice,
——Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that the furnish the with a statement in writing, verified by affidavit, setting forth the names of the persons constituting the members or co-partners of their firm, pursuant to Rule 317 of the Supreme Court, and that the costs of this application be

Dated the day of 18 .

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No. 132.

Order for Particulars (General).

In the High Court of Justice,
——Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that the plaintiff deliver to the defendant an account in writing of the particulars of the plaintiff's claim in this action, and that unless such particulars be delivered within days from the date of this order all further proceedings be stayed until the delivery thereof, and that the costs of this application be

Dated the day of 18 .

No. 133.

Order for Particulars (Accident Case).

In the High Court of Justice,
——Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 ,

It is ordered that the plaintiff deliver to the defendant an account in writing of the particulars of the injuries and expenses mentioned in the statement of claim, together with the time and place of the accident, and the particular acts of negligence complained of, and that unless such particulars be delivered within days from the date of this order all further proceedings in this action be stayed until the delivery thereof, and that the costs of this application be

Dated the day of 18 .

No. **134.**

Order to Discharge or Vary Order on Application by Third Party.

In the High Court of Justice,
———Division.
[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and .

It is ordered that the order of in this action dated the day of 18 be discharged [*or* varied by], and that the costs of this application be

Dated the day of 18 .

No. **135.**

Order to Dismiss for want of Prosecution.

In the High Court of Justice,
———Division.
[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and .

It is ordered that this action be, for want of prosecution, dismissed with costs, to be taxed and paid to the defendant by the plaintiff, and that the costs of this application be (*costs in the cause*)

Dated the day of 18 .

No. **136.**

Order for Production.

In the High Court of Justice,
———Division.
[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing

It is ordered that the do, within ten days after the service of this order, make discovery on oath of the documents which are or have been in possession or power relating to any matters in question in this action and that the costs of this application be

Dated the day of 18 .

No. **137.**

Order to Produce Documents for In pection.

In the High Court of Justice,
———Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that the do, at all seasonable times, on reasonable notice, produce at the office of solicitor, situate at the following documents, namely and that the be at liberty to inspect and peruse the documents so produced and to take copies and abstracts thereof and abstracts therefrom, at expense, and that in the meantime all further proceedings be stayed, and that the costs of this application be

Dated the day of 18 .

———

No. **138.**

Order for Commission to Examine Witnesses.

In the High Court of Justice,
———Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered as follows:

1. A commission may issue directed to of a commissioner named by and on behalf of the and to of a commissioner named by and on behalf of the for the examination upon interrogatories and *viva voce* of witnesses on behalf of the said and respectively at aforesaid before the said commissioners.

2. days previously to the sending out of the said commission, the solicitor of the said shall give to the solicitor of the said notice in writing of the mail or other conveyance by which the commission is to be sent out.

3. The costs of this order, and of the commission to be issued in pursuance hereof, and of the interrogatories, cross-interrogatories, and depositions to be taken thereunder, together with any document, copy, or extract and the official copies thereof, and all other costs incidental thereto, shall be

Dated the day of 18 .

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No. **139.**

Order of Reference under S. 101 of the Judicature Act.

In the High Court of Justice,
——Division.

[*Name of the Judge*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing . and upon reading the affidavit of filed the day of 18 , and

It is ordered that the following question arising in this action namely, be referred for inquiry and report to under section 101 of the Judicature Act, and that the costs of this application be

Dated the day of 18 .

No. **140.**

Order of Reference under S. 102 of the Judicature Act.

In the High Court of Justice,
——Division.

[*Name of the Judge*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that the [*state whether all or some and, if so, which of the questions are to be tried*] in this action be tried by

And it is ordered that the costs of this application be

Dated the day of 18 .

No. **141.**

Order for Examination of Witnesses before Trial.

In the High Court of Justice,
——Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that a witness on behalf of the be examined *viva voce* (on oath or affirmation) before [*or* before esquire, special examiner], the solicitor or agent giving to the solicitor or agent notice in writing of the time and place where the examination is to take place.

And it is further ordered that the examination so taken be filed in the office of , and that an office copy or copies thereof may be read and given in evidence on the trial of this cause, saving all just exceptions, without any further proof of the absence of the said witness than the affidavit of the solicitor or agent of the as to his belief, and that the costs of this application be

Dated the day of 18 .

No. **142.**

Garnishee Order (Attaching Debts).

In the High Court of Justice,
——Division.

[*Name of the Judge or Master*] in Chambers.

Between Judgment Creditor,
and
Judgment Debtor.
Garnishee.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor in the High Court of Justice on the day of 18 , for the sum of $, on which judgment the said sum of $, remains due and unpaid.

And it is further ordered that the said garnishee attend the in Chambers (*or as the case may be*) on day the day of 18 , at o'clock in the noon, on an application by the said judgment creditor, that the said garnishee pay the debt due from him to the said judgment debtor, or so much thereof as may be sufficient to satisfy the judgment.

And that the costs of this application be

Dated the day of 18 .

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No. **143.**

Garnishee Order (Absolute).

In the High Court of Justice,
———Division.

[*Name of the Judge or Master*] in Chambers.

Between Judgment Creditor,
and
Judgment Debtor,
Garnishee.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and whereby it was ordered that all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor should be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor in the High Court of Justice on the day of 18 , for the sum of $, on which judgment the said sum of $ remained due and unpaid.

It is ordered that the said garnishee do forthwith pay the said judgment creditor the debt due from him to the said judgment debtor (*or* so much thereof as may be sufficient to satisfy the judgment debt) and that in default thereof execution may issue for the same, and that the costs of this application be

Dated the day of 18 .

No. **144.**

Order on App'ication to tax Solicitor's Bill of Costs.

In the High Court of Justice,
———Division.

[*Name of the Judge or Master*] in Chambers.

In the matter of .

Gentleman,
One of the Solicitors of the Supreme Court.

Upon application of
It is ordered that the above-named solicitor do deliver to the applicant a bill of his fees, charges and disbursements and that the same when so delivered be [*or* the bill of fees, charges and disbursements delivered to the applicant by the above-named solicitor (*or* by the above solicitor to *as the case may be*) be] referred to the to be taxed.

And it is ordered that the costs of this application be

Dated the day of 18 .

No. **145.**

Order to try Action in County Court.

In the High Court of Justice.
——Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed this day of 18 , and .

It is ordered that this action be tried before the County Court of , and that the costs of this application be

Dated the day of 18 .

No. **146.**

Interpleader Order No. 1.

In the High Court of Justice.
——Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant,

and between

Claimant,

and

Respondent.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and .

It is ordered that the claimant be barred, that no action be brought against the above-named [sheriff] , and that the costs of this application be

Dated the day of 18 .

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No. **147.**

Interpleader Order No. 2.

In the High Court of Justice.
——Division.

[*Name of the Judge or Master,*] in Chambers.

Between

Plaintiff,

and

Defendant,

and

Claimant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that the above-named claimant be substituted as defendant in this action in lieu of the present defendant, and that the costs of this application be

Dated the day of 18 .

No. **148.**

Interpleader Order No. 3.

In the High Court of Justice.
——Division.

[*Name of the Judge or Master,*] in Chambers.

Between

Plaintiff,

and

Defendant,

and between

Claimant,

and the said execution creditor and the sheriff of

Respondents.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that the said sheriff proceed to sell the goods seized by him under the writ of fieri facias issued herein, and pay the net proceeds of the sale, after deducting the expenses thereof (*or as otherwise ordered*) into Court in this cause, to abide further order herein.

And it is further ordered that the parties proceed to the trial of an issue in the High Court of Justice, in which the said claimant (*or* execution debtor) shall be the plaintiff and the said execution creditor (*or* the claimant) shall be the defendant, and that the question to be tried shall be whether at the time [*insert here* delivery of the writ to the sheriff *or* seizure by the sheriff *or* sale by the sheriff *as the case may require*] the goods seized were the property of the claimant as against the execution creditor.

And it is further ordered that this issue be prepared and delivered by the plaintiff therein within from this date, and be returned by the defendant therein within days, and be tried at

And it is further ordered that the question of costs and all further questions be reserved until after the trial of the said issue, and that no action shall be brought against the said sheriff for the seizure of the said goods.

Dated the day of 18 .

No. **149.**

Interpleader Order No. 4.

In the High Court of Justice,
——Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant,

and between

Claimant,

and the said execution creditor and the sheriff of

Respondents.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that upon payment of the sum of $ into Court by the said claimant within from this date, or upon his giving within the same time security to the satisfaction of for the payment of the same amount by the said claimant according to the directions of any order to be made herein, and upon payment to the above-named sheriff of the possession money from this date, the said sheriff do withdraw from the possession of the goods seized by him under the writ of fieri facias herein.

And it is further ordered that unless such payment be made or security given within the time aforesaid the said sheriff proceed to sell the said goods, and pay the proceeds of the sale, after deducting the expenses thereof (*or as otherwise ordered*) and the possession money from this date, into Court in the cause, to abide further order herein.

And it is further ordered that the parties proceed to the trial of an issue in the High Court of Justice, in which the claimant (*or* execution creditor) shall be plaintiff and the execution creditor (*or* claimant) shall be defendant, and that the question to be tried shall be whether at the time of [*insert here* the delivery of the writ to the sheriff *or* the seizure by the sheriff *or* the sale by the sheriff *as the case may require*] the goods seized were the property of the claimant as against the execution creditor.

And it is further ordered that this issue be prepared and delivered by the plaintiff therein within from this date, and be returned by the defendant therein within days, and be tried at

And it is further ordered that the question of costs and all further questions be reserved until after the trial of the said issue, and that no action shall be brought against the sheriff for the seizure of the said goods.

Dated the day of 18 .

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No. **150.**

Interpleader Order No. 5.

In the High Court of Justice.
——Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant,

and between

Claimant,

and the said execution creditor, and the sheriff of

Respondents.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that upon payment of the sum of $ into Court by the said claimant, or upon his giving security to the satisfaction of for the payment of the same amount by the claimant according to the directions of any order to be made herein, the above-named sheriff withdraw from the possession of the goods seized by him under the writ of fieri facias issued herein.

And it is further ordered that in the meantime, and until such payment made or security given, the sheriff continue in the possession of the goods, and the claimant pay possession money for the time he so continues, unless the claimant desires the goods to be sold by the sheriff, in which case the sheriff is to sell them and pay the proceeds of the sale, after deducting the expenses thereof (*or as otherwise ordered*) and the possession money from this date, into Court in the cause, to abide further order herein.

And it is further ordered that the parties proceed to the trial of an issue in the High Court of Justice, in which the claimant (*or* execution creditor) shall be plaintiff and the execution creditor (*or* claimant) shall be defendant, and that the question to be tried shall be whether at the time of [*insert here* the delivery of the said writ to the sheriff *or* the seizure by the sheriff *or* the sale by the sheriff *as the case may require*] the goods seized were the property of the claimant as against the execution creditor.

And it is further ordered that this issue be prepared and delivered by the plaintiff therein within from this date, and be returned by the defendant therein within days, and be tried at .

And it is further ordered that the question of costs and all further questions be reserved until after the trial of the said issue, and that no action shall be brought against the sheriff for the seizure of the said goods.

Dated the day of 18 .

No. **151.**

Interpleader Order No. 6.

In the High Court of Justice.
———Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant,

and between

Claimant,

and the said execution creditor and the sheriff of

Respondents.

The claimant and the execution creditor having requested and consented that the merits of the claim made by the claimant be disposed of and determined in a summary manner, now upon hearing and upon reading the affidavit of filed the day of 18 , and

It is ordered that

And that the costs of this application be

Dated the day of 18 .

———

No. **152.**

Interpleader Order No. 7.

In the High Court of Justice.
———Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant,

and between

Claimant,

and the said execution creditor, and the sheriff of

Respondents.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that the above-named sheriff proceed to sell enough of the goods seized under the writ of fieri facias issued in this action to satisfy the expenses of the said sale, the rent (if any) due, the claim of the claimant, and this execution.

And it is further ordered that out of the proceeds of the said sale, (after deducting the expenses thereof, and rent, if any,) the said sheriff pay to the claimant the amount of his said claim, and to the execution creditor the amount of his execution, and the residue, if any, to the defendant.

And it is further ordered that no action be brought against the said sheriff, and that the costs of this application be

Dated the day of 18 .

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No. 153.

Order of Replevin.

In the High Court of Justice.
———Division.

[*Name of Judge or Master*] in Chambers.

Date

Between A. B., plaintiff,
and
C. D., defendant.

Upon the application of the above-named plaintiff, and upon reading the affidavit of filed, and upon hearing

It is ordered that the Sheriff of (*here insert the name of County, United Counties, District or City*), do without delay take the security required by law and cause to be replevied to the plaintiff, his goods, chattels and personal property following, that is to say: (*here set out description of property as in the affidavit filed*), which the said plaintiff alleges to be of the value of $, and to have been taken and unjustly detained (*or* unjustly detained, *as the case may be*) by the defendant, C. D., in order that the said plaintiff may have his remedy in that behalf.

And it is further ordered that the said Sheriff do forthwith, after the execution of this order, make return to (*insert here the officer in whose office the appearance in the action is to be entered*) what he shall have done in the premises, and do also return this order.

No. 154.

Order of Withernam.

In the High Court of Justice.
———Division.

Between A. B., plaintiff,
and
C. D., defendant.

Upon the application of the plaintiff, and it appearing by the return of the Sheriff of the of , to the order of replevin made herein on the day of , that the goods, chattels and personal property mentioned in the said order have been eloigned by the defendant, C. D., out of the bailiwick of the Sheriff of , to places to him unknown so that he could not replevy the same to the said plaintiff.

It is ordered that the said Sheriff do forthwith take in withernam the goods, chattels and personal property of the said defendant, C. D., in his bailiwick, to the value of the goods, chattels and personal property by the said defendant, C. D., before taken, and do forthwith deliver them to the said plaintiff to be kept by him until the said defendant, C. D., delivers the goods, chattels and personal property last aforesaid to the said plaintiff.

And it is further ordered that if the said plaintiff shall give security to the said Sheriff as provided by law for the prosecution of the plaintiff's claims and for the return of the goods, chattels and property so to be taken in withernam as aforesaid, if the return thereof shall be adjudged then the said Sheriff do take security with two sufficient sureties from the said defendant, C. D., to answer to the said plaintiff for the taking and unjustly detaining of his goods, chattels and personal property aforesaid.

And it is further ordered that the said Sheriff do forthwith make return to (*insert here the officer in whose office the appearance in the action is to be entered*), what he shall have done in the premises, and do also return this order.

Dated

No. **155.**

Order for Arrest.

In the High Court of Justice,
———Division.

(*Name of the Judge*) in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing and upon reading the affidavit of filed

It is ordered that the Sheriff of the County (*or* United Counties *or* City) of do forthwith arrest and take, or if already in custody, do detain C. D., the defendant, (*or* one of the defendants) if he shall be found in the said County (*or* United Counties) and him safely keep until he shall have given bail in this action to the amount of $ or shall by other lawful means be discharged from custody.

And it is further ordered that a copy of this order be served by the said Sheriff on the said C. D.

And it is further ordered that the said C. D. do within ten days after his arrest under this order, cause special bail to be put in for him in this Court and in this action, and the bail piece filed in the office of (*naming the office where appearance is required to be entered*) conditioned that if the defendant be condemned in this action at the suit of the plaintiff, he will satisfy the costs and condemnation money or in default for his surrender to the Sheriff of the County (*or* United Counties *or* City) of (*naming the County or United Counties or City having a Sheriff in which the office where the appearance is required to be entered, is situate*).

Dated

No. **156.**

Order of Certiorari to County Court.

In the High Court of Justice,
———Division.

(*Name of Judge*) in Chambers.

[Title, etc.]

Upon hearing , and upon reading the affidavit of .

It is ordered that the Judge of the County Court of the County of do forthwith send to the Registrar of the Division of the High Court of Justice at Toronto, the proceedings and papers in a certain action in the said County Court between plaintiff, and defendant, with all things touching the same, together with this order, that this Court may further cause to be done thereupon what it shall see fit to be done, and no further proceedings are to be taken in said County Court in said action until further order of this Court or a Judge.

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No. **157.**

Order of Certiorari (General).

In the High Court of Justice,
——Division.

(*Name of Judge*) in Chambers.

[Title, etc.]

Upon hearing , and upon reading the affidavit of .

It is ordered that . do send to the Registrar of the Division of the High Court of Justice at Toronto, forthwith (*or* on the day of) the , with all things touching the same, as fully and entirely as they remain in together with this order, that this Court may further cause to be done thereupon what it shall see fit to be done.

——

No. **158.**

Prohibition.

[Title, etc.]

It appearing that the said has [entered an action against] C. D. in the said Court, and that the said Court has no jurisdiction in the said [cause] or to hear and determine the said [action] by reason that [*state facts shewing want of jurisdiction*].

It is ordered that the said be and he is hereby prohibited from further proceeding in the said [action] in the said Court.

——

No. **159.**

Order dismissing Motion (Generally).

In the High Court of Justice,
——Division.

[*Name of the Judge or Master*] in Chambers.

Between

Plaintiff,

and

Defendant.

Upon hearing , and upon reading the affidavit of filed the day of 18 , and

It is ordered that the application of be dismissed, (*if the dismissal is with costs add*), with costs to be taxed and paid by the to the

Dated the day of 18 .

J. A.

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PART X.

FORMS OF JUDGMENTS.

No. 160.

Default of Appearance or Defence in case of Liquidated Demand.

In the High Court of Justice,
——Division.

Between A. B., Plaintiff,
and
C. D. and E. F., Defendants.

The day of 18 .

The defendants [*or* the defendant C. D.] not having appeared herein [*or* not having delivered any statement of defence], it is this day adjudged that the plaintiff recover against the said defendant $, and costs to be taxed.

No. 161.

Judgment in Default of Appearance or Defence where the Demand is Liquidated (Fixed Costs).

[Title, etc.]

The day of , 18 .

The defendant not having (appeared to the writ of summons *or* delivered any statement of defence or demurrer) it is this day adjudged that the plaintiff recover against the said defendant $ and $ costs.

No. 162.

Judgment in Default of Appearance in action for Recovery of Land.

[Title, etc.]

The day of , 18 .

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff recover possession of the land in the said writ mentioned.

No. **163.**

Judgment in Default of Defence in action for Recovery of Land.

[Title, etc.]

The day of , 18 .

No statement of defence having been delivered herein, it is this day adjudged that the plaintiff recover possession of the land in the statement herein mentioned and described as

---

No. **164.**

Judgment upon Confession by Defendant of action for recovery of Land.

[Title, etc.]

The day of 18 .

The defendant C. D. having confessed this action (*or* having confessed this action as to part of the said land, that is to say: *state the part*) it is this day adjudged that the said plaintiff do recover possession of the land in the writ (*or* statement of claim) mentioned (*or* of the said part of the said land) with the appurtenances and costs to be taxed.

No. **165.**

Judgment in Default of Defence in action for Recovery of Land with Damages.

[Title, etc.]

The day of 18 .

The defendant not having delivered any statement of defence, it is this day adjudged that the plaintiffs recover possession of the land in the statement of claim herein mentioned, and described as , in the County of , and costs to be taxed, and it is further adjudged that the plaintiffs recover against the defendant damages to be assessed.

Certificate for $, taxed costs, dated the day of , 18 .

No. **166.**

Interlocutory Judgment in Default of Appearance or Defence where Demand Unliquidated.

[Title, etc.]

The day of , 18 .

No appearance having been entered to the writ of summons (*or* no statement of defence or demurrer having been delivered by the defendant) herein:

It is this day adjudged that the plaintiff recover against the defendant the value of the goods *or* damages, *or both, as the case may be*, to be assessed.

No. 167.

Judgment after Appearance and Order under Rule 739.

[Title, etc.]

The day of , 18 .

The defendant having appeared to the writ of summons herein, and the plaintiff having by the order of , dated day of 18 , obtained leave to sign judgment under the Rule of the Supreme Court, No. 739, for (*recite order*), it is this day adjudged that the plaintiff recover against the defendant $ and costs to be taxed.

The above costs have been taxed and allowed at $, as appears by a Taxing Officer's Certificate dated the day of 18 .

No. 168.

Judgment in Default of Appearance or Defence, after Assessment of Damages.

[Title, etc.]

The day of , 18 .

No appearance having been entered to the writ of summons [*or* no statement of defence or demurrer having been delivered by the defendant] herein, and the damages which the plaintiff was entitled to recover having been assessed at $, as by dated the 18 , appears, it is adjudged that the plaintiff recover $ and costs to be taxed.

No. 169.

Judgment after Trial by Court without Jury.

(*No. 1.*)

[Title, etc.]

The day of 18 .

This action having on the day of 18 , been tried before and the said on the day of 18 , having ordered that judgment be entered for the for $

It is this day adjudged that the recover from the $ and costs to be taxed.

The above costs have been taxed and allowed at $, as appears by a Taxing Officer's Certificate dated the day of 18 .

No. 170.

Judgment at Trial by Judge without a Jury.

(*No. 2.*)

[Title, etc.]

The day of , 18 .

This action coming on for trial [the day of and] this day, before in the presence of counsel for the plaintiff and

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the defendants [*or, if some of the defendants do not appear,* for the plaintiff and the defendant C. D., no one appearing for the defendants E. F. and G. H., although they were duly served with notice of trial as by the affidavit of filed the day of appears,] upon hearing read the pleadings and what was alleged by counsel on both sides, this Court doth declare, etc.

And this Court doth order and adjudge, etc.

No. **171.**

Judgment after Trial by a Jury.

[Title, etc.]

The day of , 18 .

This action having on the 12th and 13th November, 18 , been tried before the Honourable Mr. Justice and a special jury of the County of , and the jury having found [*state findings as in Judge's or officer's certificate*], and the said Mr. Justice having ordered that judgment be entered for the plaintiff for $ and costs of suit [*or as the case may be*]: Therefore it is adjudged that the plaintiff recover against the defendant $ and $ for his costs of suit [*or,* that the plaintiff recover nothing against the defendant, and that the defendant recover against the plaintiff $ for his costs of defence, *or, as the case may be.*]

No. **172.**

Judgment after Trial before Referee.

[Title, etc.]

The day of , 18 .

The action having on the 27th November, 18 , been tried before X. Y., Esq., an official [*or* special] referee; and the said X. Y., having found [*state substance of referee's certificate*], it is this day adjudged that

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No. **173.**

Judgment after Trial of Questions of Account by Referee.

[Title, etc.]

The day of 18 .

The questions of account in this action having been referred to and he having found that there is due from the to the the sum of $ and directed that the do pay the costs of the reference.

It is this day adjudged that the recover against the said $ and costs to be taxed.

The above costs have been taxed and allowed at $, as appears by a taxing officer's Certificate dated the day of 18 .

No. 174.

Judgment on Motion Generally.

[Title, etc.]

The day of 18 . (*Date of order of Court.*)

This action having on the day of 18 come on before the Court on motion for judgment on behalf of the , and the Court after hearing counsel for the having ordered that (*as in order of Court.*)

It is this day adjudged that the recover against the the sum of $ and costs to be taxed.

The above costs have been taxed and allowed at $, as appears by a taxing officer's Certificate dated the day of 18 .

No. 175.

Judgment in pursuance of order. (For use where leave had been given to sign judgment unless some condition should be complied with.)

[Title, etc.]

The day of 18 .

Pursuant to the order of dated 18 whereby it was ordered and default having been made

It is this day adjudged that the plaintiff recover against the said defendant $ and costs to be taxed.

The above costs have been taxed and allowed at $, as appears by a taxing officer's Certificate dated the day of 18 .

No. 176.

Judgment in pursuance of order. (For use where leave has been given to sign judgment unless money should be paid into Court.)

[Title, etc.]

The day of 18 .

Pursuant to the order of dated the day of 18 , whereby it was ordered that unless $ be paid into Court by the defendant within a week, the plaintiff be at liberty to sign final judgment for the amount indorsed on the writ of summons with interest, if any, and costs; and the said defendant not having paid into Court the said amount of $, as conditioned by the said order, it is this day adjudged that the plaintiff recover against the defendant $ and $ for costs.

Certificate for costs dated the day of 18 .

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No. **177.**

Judgment on Certificate of Clerk of County Court.

[Title, etc.]

The day of 18 .

This action having been ordered to be tried in the County Court of and the Clerk of that Court having certified that the result was .

It is this day adjudged that recover against $ and costs to be taxed.

The above costs have been taxed and allowed at $, as appears by a taxing officer's Certificate dated the day of 18 .

No. **178.**

Judgment for Defendant's Costs on Discontinuance.

[Title, etc.]

The day of 18 .

The plaintiff having by a notice in writing dated the day of 18 , wholly discontinued this action, [*or* withdrawn his claim in this action for *or* withdrawn so much of his claim in this action as relates to—*or as the case may be*].

It is this day adjudged that the defendant recover against the plaintiff costs to be taxed.

The above costs have been taxed and allowed at $, as appears by a taxing officer's certificate dated the day of 18.

No. **179.**

Judgment for Plaintiff's Costs after Confession of Defence.

[Title, etc.]

The day of 18 .

The defendant in his statement of defence herein having alleged a ground of defence which arose after the commencement of this action, and the plaintiff having on the day of 18 delivered a confession of that defence.

It is this day adjudged that the plaintiff recover against the defendant costs to be taxed.

The above costs have been taxed and allowed at $, as appears by a taxing officer's certificate dated the day of 18 .

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No. 180.

Judgment for Costs after acceptance of Money paid into Court.

[Title, etc.]

The day of 18 .

The defendant having paid into Court in this action the sum of $ in satisfaction of the plaintiff's claim, and the plaintiff having by his notice dated the day of 18 , accepted that sum in satisfaction of his entire cause of action, and the plaintiff's costs herein having been taxed, and the defendant not having paid the same within 48 hours after the said taxation:

It is this day adjudged that the plaintiff recover against the defendant costs to be taxed.

The above costs have been taxed and allowed at $, as appears by a Taxing Officer's Certificate dated the day of 18 .

No. 181.

Judgment on Motion after Trial of Issue.

[Title, etc.]

The day of 18 . (*Date of order of Court.*)

The (Issues *or* Questions) of fact arising in this action by the order dated the day of ordered to be tried before having on the day of been tried before , and the having found . Now on motion before the Court for judgment on behalf of the , the Court having

It is this day adjudged that the recover against the the sum of $ and costs to be taxed.

The above costs have been taxed and allowed at $, as appears by a Taxing Officer's Certificate dated the day of 18 .

No. 182.

Form of Judgment on Præcipe for Sale or Foreclosure WITH REFERENCE AS TO INCUMBRANCES, *etc., and orders for Immediate Payment and delivery of Possession.*

[Title, etc.]

1. Upon the application of the Plaintiff under Rule No. 718, of the Rules of the Supreme Court, and upon reading the writ of summons issued in this action, and indorsed under Rule No. 248, [and the statement of claim (*if any*) and statement of defence *where the facts entitling the plaintiff to Judgment are admitted by the defence,*] and an affidavit, etc., filed, etc., [*where Judgment is obtained by default of appearance or defence add* and an affidavit, etc., filed, etc., of service of the said writ on the defendant, and no appearance having been entered in the said action, (*or* and the defendant having made default in delivering a defence or demurrer) as by the (books in the office of the at) appears;]

2. It is ordered that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had for redemption or sale (*or* redemption or foreclosure), and that for these purposes the cause be referred to the Master of this Court at

3. (*Where judgment is for immediate payment add*, It is further ordered that the defendant do forthwith after the making of the Master's report pay to the plaintiff what shall be found due to him for principal money, interest and costs at the date of the said report, and upon payment of the amount due to him (*where judgment is for sale add*), before the sale hereinbefore directed shall have taken place) that the plaintiff do assign and convey the said mortgaged premises, and deliver up all documents relating thereto.)

4. (*Where judgment is for immediate possession add*, It is further ordered that the defendant do forthwith deliver to the plaintiff, or to whom he may appoint, possession of the lands and premises in question, in this cause, or of such part thereof as may be in the possession of the said defendant.)

No. 183.

Form of Judgment for Foreclosure or Sale, ACCOUNT TAKEN BY REGISTRAR *and Orders for Immediate Payment and Delivery of Possession.*

[Title, etc.]

1. Upon the application of the plaintiff under Rule No. 718, of the Rules of the Supreme Court, and upon reading the writ of summons issued in this action, and indorsed under Rule No. 248 [and the statement of claim (*if any*) and statement of defence *where the facts entitling the plaintiff to Judgment are admitted by the defence*] and an affidavit of, etc., filed, etc., [*where Judgment is obtained by default of appearance or defence add* and an affidavit of, etc., filed, etc., of service of the said writ on the defendant, and no appearance having been entered in the said action, (*or* and the defendant having made default in delivering a defence or demurrer) as by the (books in the office of the at) appears;]

2. This Court finds that the subsequent interest at the rate of per centum per annum on the sum of principal money secured by the indenture of mortgage in the pleadings mentioned, up to the day of next, being the time appointed for payment as hereinafter mentioned, amounts to and that the costs of the plaintiff amount to which said subsequent interest and costs being added to the sum of claimed by the indorsement on the writ served on the defendant make together the sum of

3. And upon the said defendant paying the said sum of into the bank at the between the hours of ten o'clock in the forenoon and one o'clock in the afternoon of the day of next, to the joint credit of the plaintiff and the Registrar [*where order for payment granted insert*, or in case the plaintiff shall (*where judgment is for sale add*, before the sale hereinafter directed shall have taken place) recover the amount due to him under the order for payment hereinafter contained]; it is ordered that the said plaintiff do assign and convey the mortgaged premises, and deliver up all documents relating thereto;

4. But in default of the said defendant making such payment by the time aforesaid, it is ordered (*where judgment is for foreclosure, after*, "it is ordered," *say* "that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption in and to the said prem-

ises; " *where judgment is for sale, then after the words* " it is ordered," say "that the said premises be sold, with the approbation of the Master of this Court at).

5. (*If judgment is for foreclosure omit this section.*) And it is ordered that the purchasers do pay their purchase money into Court, to the credit of this cause, and that the same when so paid in be applied in payment of what has been found due to the said plaintiff together with subsequent interest and subsequent costs, to be computed and taxed by the said Master, and that the balance do abide the further order of the Court.

6. (*Where judgment is for immediate payment add :*) It is further ordered that the defendant do forthwith pay to the plaintiff the sum of being the amount due to the plaintiff at the date hereof for principal money, interest and costs.

7. (*Where judgment is for immediate possession add :*) And further ordered that the defendant do forthwith deliver to the plai , or to whom he may appoint, possession of the mortgaged premis such part thereof as may be in the possession of the said defendant .

No. 184.

Form of Judgment for Redemption, issued by a Local Master.

[Title, etc.]

1. Upon the application of the plaintiff, under Rule No. 718, of the Rules of the Supreme Court, and upon reading the writ of summons issued in this action, [and the statement claim (*if any*) and statement of defence *where the facts entitling the plaintiff to Judgment are admitted by the defence,*] and an affidavit of, etc., filed, etc,, [*where Judgment is obtained by default of appearance or defence add* and an affidavit of, etc., filed, etc., of service of the said writ on the defendant, and no appearance having been entered in the said action, (*or* and the defendant having made default in delivering a defence or demurrer) as by the (books in the office of the at) appears ;]

2. It is ordered that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had for the redemption of the premises in question, and that for this purpose the cause be referred to the Master at .

3. And it is ordered that upon the plaintiff paying to the defendant what shall be found due to him, or in case nothing shall be found due to the defendant then forthwith after the confirmation of the said Master's report, that the defendant do reconvey the said mortgaged premises, and deliver up all documents relating thereto.

4. It is further ordered that in case the plaintiff shall make default in payment as aforesaid of what may be found due to the defendant that the plaintiff's action do stand dismissed out of this Court, with costs to be paid by the plaintiff to the defendant forthwith after taxation thereof.

5. It is further ordered that in case nothing shall be found due from the plaintiff to the defendant that the defendant do pay the plaintiff his costs of this suit forthwith after taxation thereof, and in case any balance shall be found due from the defendant to the plaintiff that the defendant do pay such balance to the plaintiff forthwith after the confirmation of the Master's report.

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No. 185.

Form of Judgment for Administration by a Local Master.

1. Upon the application of the above-named plaintiff in the presence of the solicitor for the defendant [*or* no one appearing for the defendant although duly notified as by affidavit filed appears,] and upon hearing read the affidavits and papers filed, and what was alleged by the solicitor for the applicant *or* all parties].

2. It is ordered that all necessary inquiries be made, accounts taken, costs taxed and proceedings had for the administration and final winding up of the personal [and real] estate of and for the adjustment of the rights of all parties interested therein, by the Master of this Court at .

3. And it is ordered that all balances which may be found due from the plaintiff or defendant [or any or either of them] to the said estate be, forthwith after the same shall have been ascertained as aforesaid, paid into Court to the credit of this cause, subject to the further order of the Court.

4. And it is ordered that such personal [and real] estate, or such parts thereof as the said Master may hereafter direct, be sold, as the said Master may direct, and that the purchasers do pay their purchase money into Court to the credit of this cause, subject to the order of the Court.

5. It is further ordered that the Master do execute conveyances for any infant parties who by reason of their tender years are unable to execute the same.

No. 186.

Form of Judgment for Partition or Sale by Local Master.

1. Upon the application of the above-named plaintiff in the presence of the solicitor for the defendant [*or* no one appearing for the defendant although duly notified as by affidavit filed appears] and upon hearing read the affidavits and papers filed, and what was alleged by the solicitor for [the applicant *or* all parties].

2. It is ordered that all necessary inquiries be made, accounts taken, costs taxed and proceedings had for the partition or sale of the lands and premises in the said affidavits mentioned, and for the adjustment of the rights of all parties interested therein, or for a partition of part and sale of the remainder of the said lands as may be most for the interest of the parties entitled to share therein [*by the Master of this Court at* .

3. And it is further ordered that the said lands, or such part thereof as the said Master shall think fit, be sold, with the approbation of the said Master, freed from the claims of such of the incumbrancers thereon (if any) whose claims were created by parties entitled to the said lands before the death of the said testator [*or*, intestate], as shall have consented to such sale, and subject to the claims of such of them as shall not have consented [and freed also from the dower of *as the case may be*], and that the said Master do execute the conveyances on behalf of such of the infant parties as, by reason of their tender years, are unable to execute the same, and that the purchasers do pay their purchase money into Court to the credit of this cause, subject to the order of the Court.

4. And it is further ordered that, in the event of a partition of the whole of the said lands, or in the event of a partition of a part and the proceeds of the sale of the remainder being insufficient to pay the costs in full, the costs, or so much thereof as remains unpaid, be borne and paid by the said parties according to their shares and interests in the said lands [*if there be any infant parties interested in the estate add*] and that the proportion of the said costs payable by the infant parties respectively be, and the same is hereby declared to be, a lien on their respective shares, and that the plaintiff do pay the guardian of the infant defendants his costs of this suit and that the same be added to his own costs.

No. 187.

Form of Judgment or Order for Administration Accounts.

This Court doth order that the following accounts and inquiries be taken and made by the Master of the Supreme Court of Judicature at , that is to say:

1. An account of the personal estate of A. B., deceased, the testator in the pleadings mentioned, come to the hands of, etc.,

2. An account of the said testator's debts.

3. An account of the said testators's funeral expenses.

4. An account of the said testator's legacies.

5. An enquiry, what parts, if any, of the said testator's personal estate are outstanding or undisposed of.

(*If ordered*).

And it is ordered that the following further accounts and inquiries be taken and made, that is to say:

6. An inquiry what real estate the said testator was seised of, or entitled to, at the time of his death.

7. An inquiry what incumbrances affect the said testator's real estate.

8 An account of the rents and profits of the said testator's real estate received by, etc.

(*If Sale ordered*).

9. An account what is due to such of the incumbrancers as shall consent to the sale hereinafter directed in respect of their incumbrances.

10. An inquiry of what are the priorities of such last mentioned incumbrances.

And it is ordered that the testator's real estate be sold, with the approbation of———————.

And it is ordered that further directions and costs be reserved, until after the said Master shall have made his report.

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PART XI.

WRITS OF EXECUTION, ETC.

No. **188.**

Writ of Fieri Facias.

In the High Court of Justice.
——Division.

Between A. B., Plaintiff,
and
C. D. and others, Defendants.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To the sheriff of greeting.

We command you that of the goods and chattels (*or* lands and tenements) of C. D., in your bailiwick you cause to be made the sum of $ and also interest thereon from the day of [*Day of the judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be,*] which said sum of money and interest were lately before the Justices of our High Court of Justice in a certain action [or certain actions, *as the case may be*] wherein A. B. is plaintiff, and C. D. and others are defendants [*or* in a certain matter there depending intituled "In the matter of E. F.," *as the case may be*] by a judgment [*or* order *as the case may be*] of our said Court, bearing date the day of adjudged [*or* ordered, *as the case may be*] to be paid by the said C. D. to A. B., together with certain costs in the said judgment [*or* order *as the case may be*] mentioned, and which costs have been taxed and allowed (by one of the taxing masters of our said Court) at the sum of $ as appears by the certificate of the said taxing master, dated the day . And that of the goods and chattels (*or* lands or tenements) of the said C. D. in your bailiwick, you further cause to be made the said sum of $ [costs] together with interest thereon from the day of , (*the date of the certificate of taxation. The writ must be so moulded as to follow the substance of the judgment or order*) and that you have that money and interest before our Justices aforesaid at Toronto immediately after the execution hereof, (*or, in the case of lands and tenements,* immediately after the expiration of twelve months from the day of your receipt hereof) to be paid to the said A. B. in pursuance of the said judgment [*or* order *as the case may be*]. And in what manner you shall have executed this our writ make appear to our Justices aforesaid at Toronto immediately after the execution thereof. And have there then this writ.

Witness, the Honourable President, etc.
The day of 18

No. **189.**

Fieri Facias on Order for Costs.

[Title, etc.]

Victoria, etc.

To the sheriff of greeting.

We command you that of the goods and chattels of in your bailiwick you cause to be made the sum of for certain costs which by an order of our High Court of Justice dated the day of 18 , were ordered to be paid by the said to and which have been taxed and allowed at the said sum, and interest on the said sum at the rate of 6 per centum per annum from the day of 18 , and that you have the said sum and interest before the Justices of our High Court at Toronto, immediately after the execution hereof, to be rendered to the said . And in what manner you shall have executed this our writ make appear to us immediately after the execution hereof. And have there then this writ.

Witness, etc.,

The day of 18 .

Indorsements.

Levy $ and $ for costs of execution, etc., and also interest on $ at 6 per centum per annum from the day of 18 , until payment; besides sheriff's poundage, officer's fees, costs of levying, and all other legal incidental expenses.

This writ was issued by
of
agent for
of
solicitor for the

The is a and resides
at
in your bailiwick

No. **190.**

Writ of Venditioni Exponas.

[Title, etc.]

Victoria, etc.

To the sheriff of greeting.

Whereas by our writ we lately commanded you that of the goods and chattels (*making the necessary variations of this form throughout in the case of lands and tenements*) of C. D. [*here recite the fieri facias to the end*]. And on the day of you returned to our Justices in the Division of our High Court of Justice aforesaid, that by virtue of the said writ to you directed you had taken goods and chattels of the said C. D. to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers. Therefore, we being desirous that the said A. B. should be satisfied his money and interest aforesaid, command you that you expose to sale and sell, or

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cause to be sold, the goods and chattels of the said C. D., by you in form aforesaid taken, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before our Justices aforesaid, at immediately after the execution hereof, to be paid to the said A. B. And have there then this writ.

Witness, etc., , the day of 18 .

No. **191.**

Writ of Possession.

[Title, etc.]

Victoria, etc., to the sheriff of , greeting,

Whereas lately in our High Court of Justice, by a judgment of the Division of the same Court [A. B. recovered] *or* [E. F. was ordered to deliver to A. B.] possession of all that with the appurtenances in your bailiwick: Therefore, we command you that you enter the same, and without delay cause the said A. B. to have possession of the said land and premises with the appurtenances, and that you defend and keep him and his assigns in peaceable and quiet possession when and as often as any interruption may or shall, from time to time, be given or offered to them or any of them. Witness, etc.

No. **192.**

Writ of Delivery.

[Title, etc.]

Victoria, etc., to the sheriff of greeting.

We command you, that without delay you cause the following chattels, that is to say [*here enumerate the chattels recovered by the judgment for the return of which execution has been ordered to issue*], to be returned to A. B. which the said A. B. lately in our recovered against C. D. [*or* C. D. was ordered to deliver to the said A. B.] in an action in the Division of our said Court.* And we further command you, that if the said chattels cannot be found in your bailiwick, you distrain the said C. D. by all his lands and chattels in your bailiwick, so that neither the said C. D. nor any one for him do lay hands on the same until the said C. D. render the said A. B. the said chattels; and in what manner you shall have executed this our writ make appear to the Justices of the Division of our High Court of Justice at Toronto, immediately after the execution hereof, and have you there then this writ. Witness, etc.

No. **193.**

The Like, but instead of a Distress until the Chattel is returned, commanding the Sheriff to levy on the Defendant's goods the assessed Value of it.

[*Proceed as in the preceding form until the*, and then thus:*]

And we further command you that if the said chattels cannot be found in your bailiwick, of the goods and chattels of the said C. D. in your

bailiwick you cause to be made $ [*the assessed value of the chattels.*] and in what manner you shall have executed this our writ make appear to the Judges of the Division of our High Court of Justice at Toronto, immediately after the execution hereof, and have you there then this writ. Witness, etc.

No. **194.**

Writ of Attachment.

[Title, etc.]

Victoria, etc., to the sheriff of , greeting:

We command you to attach C. D. so as to have him before us in the Division of our High Court of Justice, there to answer to us, as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you. Witness, etc.

No. **195.**

Writ of Capias ad Satisfaciendum on a Judgment for Plaintiff.

To the sheriff of, etc.

We command you that you take C. D. if he shall be found in your bailiwick, and him safely keep so that you may have his body before our Justices of our High Court of Justice Division, at Toronto, immediately after the execution hereof, to satisfy ,* (*the amount of all moneys recovered by the judgment*) which the said A. B. lately in our High Court of Justice Division, recovered against the said C. D. for his damages (*or* debt and damages, *or otherwise according to the form of action*), whereof the said C. D. is convicted, and have you then there this writ. Witness, etc., (*as in usual form*).

No. **196.**

Writ of Capias ad Satisfaciendum on an order for Payment of Money.

Victoria, etc., (same as in form No. 195, to the*) which lately in our High Court of Justice (Division) by an order of our said Court (*or* by an order of the Honourable , (one of the Justices of our said High Court of Justice) dated the day of 18 , were ordered to be paid by the said C. D. to A. B., and have you then there this writ. Witness, etc.

No. **197.**

Writ of Capias ad Satisfaciendum on an order for Payment of Money and Costs.

Victoria, etc., (*same as in No. 195 down to the words* 'were ordered') were ordered to be paid by the said C. D. to the said A. B., together with certain costs in the said order mentioned, which said costs have been taxed and allowed by our said Court at $, (*the amount of the allocatur or allocaturs, if more than one*) and further to satisfy the said A. B. the said last mentioned sum, and have you then there this writ. Witness, etc.

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No. **198.**

Writ of Capias ad Satisfaciendum, on an order for the Payment of Costs only.

Victoria, etc., (*same as in No. 196 down to the word* "immediately,") immediately after the execution hereof, to satisfy A. B. for certain costs, which, by an order of our High Court of Justice (Division) *or* by an order of the Honourable one of the Justices of our High Court of Justice) dated the day of 18 , were ordered to be paid by the said C. D. to the said A. B., which said costs have been taxed and allowed by our said Court at the said sum and have you there then this writ. Witness, etc.

No. **199.**

Writ of Sequestration.

[Title, etc.]

Victoria, etc., to the sheriff of , greeting:

Whereas lately in the Division of our High Court of Justice in a certain action there depending, wherein A. B. is plaintiff and C. D. and others are defendants [*or*, in a certain matter there depending intituled "In the matter of E. F., *as the case may be*] by a judgment [*or* order, *as the case may be*] of our said Court made in the said action [*or* matter], and bearing date the day of 18 , it was ordered that the said C. D. should [pay into Court to the credit of the said action the sum of $; *or as the case may be*]. Know ye, therefore, that we have given, and by these presents do give to you full power and authority to enter upon all the lands, tenements and real estate whatsoever of the said C. D., and to collect, receive and sequester in your hands, not only all the rents and profits of his said lands, tenements and real estate, but also all his goods, chattels and personal estates whatsoever; and therefore we command you, that you do at certain proper and convenient days and hours, go to and enter upon all the lands, tenements and real estates of the said C. D., and that you collect, take and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands until the said C. D. shall [pay into Court, to the credit of the said action, the sum of $ *or, as the case may be,*] clear his contempt, and our said Court make other order to the contrary. Witness, etc.

No. **200.**

Delivery or Assessed Value of Chattels.

[Title, etc.]

Victoria, etc., to the sheriff of greeting:

We command you that without delay you cause to be returned to the following chattels, namely (*enumerate chattels recovered by judgment for the return of which execution has been ordered to issue,*) which the said lately (recovered against *or* was ordered to deliver to the said,) in an action of our High Court of Justice Division.

And we further command you that if the said chattels cannot be found in your bailiwick then of the said goods and chattels of the said in your bailiwick you cause to be made (*the assessed value of the chattels*). And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution hereof. And have there then this writ.

Witness, etc.

Indorsements.

If the chattels cannot be found in your bailiwick, levy $ the assessed value thereof, and interest thereon at 6 per centum per annum from the day of 18 , until payment, besides sheriff's poundage, officers' fees, costs of levying, and all other legal incidental expenses.

This writ was issued by
of
agent for
of
solicitor to the who resides at

The defendant is a
and resides at
in your bailiwick.

No. 201.

Writ of Assignment of Dower (under R. S. O. 1887, c. 56, s. 3, where the right of Dower is acquiesced in by the owner of the estate).

ONTARIO,

County of Victoria by the grace of God, etc.

To the Sheriff of the County of

Greeting:

Whereas, A. D., widow, who was the wife of C. D., deceased, demands against E. F. the third part of (here describe the Estate in which dower is claimed as in other writs of assignment of dower) as the dower of the said A. D. of the endowment of the said C. D., heretofore her husband. And whereas it has been made to appear to us in our High Court of Justice, Queen's Bench Division (or Common Pleas Division *or as the case may be*) in Ontario, that the said E. F. is the owner of the said real estate out of which said dower is claimed, and that he acquiesces in the said claim and is willing to assign to the said A. B. her proper dower, but that the said A. B. and E. F., are not agreed as to the admeasurement thereof. We therefore command you that, without delay, you do deliver the said A. B. seisin of her third part of the said with the appurtenances. To hold to her in severalty by metes and bounds; And that you do proceed in the execution of this our writ, according to the provisions of Chapter 56 of Revised Statutes of Ontario.

Witness, etc.

(*When the Plaintiff has married again, since the death of her late husband, under whom she claims dower, her name and description must be made such as to suit her circumstances.*)

Rules of 15th Feb., 1862.

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No. 202.

Warrant for arrest of a defaulting witness.

Province of Ontario,)
County of)

Between A. B., Plaintiff,
and
C. D., Defendant.

To E. F.

Whereas proof has been made before me that H. N. was duly subpœnaed to give evidence on behalf of the plaintiff (*or as the case may be*), in the cause at the sittings of the Court of Assize (*or as the case may be*) at Toronto (*or as the case may be*, which commenced on the day of 18); that the presence of the said H. N. is material to the ends of Justice; and that the said H. N. has failed to attend in accordance with the requirements of the subpœna.

These are therefore to command you to take the said H. N. and to bring and have him before me at the said sittings, or before such other Judge as may be presiding thereat, there to testify what he may know concerning the matters in question in the said cause, and that you detain him in your custody until he shall have given his evidence, or until the said sittings shall have ended, or until other order be made by the Court concerning him.

Given under my hand, the day of A.D. 18 , at

J. J. M.

PART XII.

PETITIONS OF RIGHT.

No. 203.

Petition.

In the High Court of Justice (Queen's Bench *or* Common Pleas *or* Chancery Division).

To the Queen's Most Excellent Majesty.

The humble petition of A. B. of , by his Solicitor E. F., of , sheweth that (*state the facts*).

Conclusion.

Your suppliant therefore humbly prays that, etc.

The suppliant proposes that the trial of this petition shall take place at the of

Dated the day of , A.D.

(Signed) A. B.
or C. D., Counsel for A. B.
or E. F., Solicitor for A. B.

R. S. O. 1877, c. 59, sched. Form 1.

No. **204.**

The suppliant prays for a plea or answer on behalf of Her Majesty within twenty-eight days after the date hereof, or otherwise, that the petition may be taken as confessed.

R. S. O. 1877, c. 59, sched. Form 2.

No. **205.**

Notice to Appear.

To A. B.

, You are hereby required to appear to the within petition in Her Majesty's High Court of Justice within eight days, and to plead or answer thereto within fourteen days after the date of service hereof.

Take notice that, if you fail to appear or plead or answer in due time, the said petition may, as against you, be ordered to be taken as confessed.

Dated, etc.

R. S. O. 1877, c. 59, sched. Form 3.

No. **206.**

Appearance.

In the High Court of Justice (Queen's Bench *or* Common Pleas *or* Chancery Division).

Petition of Right.

A. B., suppliant, *vs.* The Queen. } C. D. appears in person. *or* E. F., solicitor for C. D., appears for him.

(*If the appearance is in person, the address of the party appearing to be given*).

Entered the day of , 18 .

R. S. O. 1877, c. 59, sched. Form 4.

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No. **207.**

Certificate of Judgment for Petitioner.

To the Honourable the Treasurer of Ontario.

Petition of right of A. B., in Her Majesty's High Court of Justice at Toronto.

I hereby certify that on the day of , A.D. , it was by the said Court adjudged (*or* decreed *or* ordered) that the above-named suppliant was entitled to, etc.

Judge's signature.

R. S. O. 1877, c. 59, sched. Form 5.

PART XIII.

BONDS, ETC.

No. **208.**

Replevin Bond.

Know all men by these presents, that we, A. B., (*the plaintiff*) of W. G., of and J. S., of are jointly and severally held and firmly bound to W. P., Esquire, Sheriff of the County of , in the sum of of lawful money of Canada, to be paid to the said Sheriff, or his certain attorney, executors, administrators or assigns, for which payment to be well and truly made we bind ourselves, and each and every of us in the whole, our, and each and every of our heirs, executors and administrators, firmly by these presents, sealed with our seals.

Dated this day of , one thousand eight hundred and

The condition of this obligation is such, that if the above bounden A. B. do prosecute his suit with effect and without delay against C. D. for the taking and unjustly detaining (*or* unjustly detaining, *as the case may be*) of his cattle, goods and chattels, to wit: (*here set forth the property distrained, taken or detained*), and do make a return of the said property, if a return thereof shall be adjudged, and also do pay such damages as the defendant shall sustain by the issuing of the Writ of Replevin if the said A. B. fails to recover judgment in his said suit, and further do observe, keep and perform all rules and orders made by the Court in the said suit, then this obligation shall be void, or else remain in full force and virtue.

Sealed and delivered in the presence of }

Form of Assignment.

Know all men by these presents, that I, W. P., Esquire, Sheriff of the County of , have at the request of the within named C. D., the

avowant (*or person making cognizance*) in this cause, assigned over this Replevin Bond unto the said C. D., pursuant to the Statutes in such case made and provided.

In witness whereof, I have hereunto set my hand and seal of office this day of , one thousand eight hundred and

Sealed and delivered)
in the presence of)

R. S. O. 1877, c. 53, Form 2.

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for County Court Cases Re Co Act.

No. 209.

Appeal Bond (on Appeal to Court of Appeal).

Know all men by these presents that we (*naming all the obligors with their places of residence and additions*), are jointly and severally held and firmly bound unto (*naming the obligees with their places of residence and additions*), in the penal sum of dollars, for which payment, well and truly to be made, we bind ourselves, and each of us by himself, our, and each of our heirs, executors, and administrators, respectively, firmly by these presents.

Dated this day of

Whereas (*the appellant*) complains that, in the giving of a certain judgment in a certain suit in Her Majesty's High Court of Justice Queen's Bench (*or* Chancery *or* Common Pleas Division, *as the case may be*), in the Province of Ontario, between (*naming the parties to the cause*) manifest error hath intervened, wherefore (*the appellant*) desires to appeal from the said judgment to the Court of Appeal.

[*Where it is desired also to give the security required by law in order to stay execution insert*, And whereas the said (*appellant*) is desirous of having the execution of the said judgment stayed pending the appeal.]

Now the condition of this obligation is such, that if (*the appellant*) do and shall effectually prosecute such appeal, and pay such costs and damages as shall be awarded, in case the judgment aforesaid to be appealed from shall be affirmed or in part affirmed, [*In order to stay execution (See Rule 804) where the judgment directs sale or delivery of possession of property add*, and during the possession of the property in question in the said action (*or otherwise describing it*) by (*the appellant*) he shall not commit or suffer to be committed any waste on the property, and that if the judgment be affirmed, or in part affirmed, he shall pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof (add *in case the judgment is for the sale of the property and payment of any deficiency arising upon the sale*, and that in case of any deficiency arising upon a sale as directed by the said judgment he shall pay the amount of the deficiency) or the part thereof as to which the judgment may be affirmed if it be affirmed only as to part, *or where the judgment directs the payment of money add*, and shall pay the amount by said judgment directed to be paid, either as a debt or for damages or costs or the part hereof as to which the judgment may be affirmed, if it be affirmed only as to part, and all damages awarded against (*the appellant* on such appeal, *or where the judgment directs the delivery of documents or personal property add*, and shall obey the order to be made by the Court of Appeal] then this obligation shall be void, otherwise to remain in full force.

Signed, sealed and delivered, in the presence of

Affidavit of Justification to be annexed.

In the High Court of Justice. Division.

Between A. B., Plaintiff,
v.
C. D., Defendant.

I, E. F., of make oath and say, that I am a resident inhabitant of Ontario, and am a householder in (*or* a freeholder in ,) and that I am worth the sum of , (*the sum mentioned as the penalty, or such sum as the deponent is bound in*), over and above what will pay all my debts; and I, J. H., of make oath and say, that I am a resident inhabitant, and am a householder in (*or* a freeholder in ,) and that I am worth the sum (*as in the former case*) of over and above what will pay all my debts.

The above named deponents, E. F. & J. H., were sworn, etc., the day of 18 , before me.

Commissioner, etc.

No. **210.**

Appeal bond (on Appeal to the Privy Council).

Know all men by these presents, that we (*naming all the obligors, with their places of residence and additions*), are jointly and severally held and firmly bound unto (*naming the obligees, with their places of residence and additions*), in the penal sum of two thousand dollars, for which payment, well and truly to be made, we bind ourselves, and each of us by himself, our, and each of our heirs, executors, and administrators, respectively, firmly by these presents.

Dated this day of in the year of our Lord, 18 .

Whereas (*the appellant*) alleges, that in the giving of judgment in a certain action in Her Majesty's Court of Appeal for Ontario, between (*the respondent*) and (*the appellant*), manifest error hath intervened, wherefore (*the appellant*) desires to appeal from the said judgment to Her Majesty, in Her Majesty's Privy Council.

Now the condition of this obligation is such that if (*the appellant*) do and shall effectually prosecute such appeal, and pay such costs and damages as shall be awarded, in case the judgment aforesaid to be appealed from shall be affirmed, or in part affirmed, then this obligation shall be void, otherwise shall remain in full force.

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PART XIV.

MISCELLANEOUS.

No. **211.**

Certificate of Action being on Lower Scale.

(Title of cause or matter.)

I hereby certify that, to the best of my judgment and belief the Lower Scale tariff of fees is applicable to this case.

A. B., Solicitor for

Dated, etc.

No. **212.**

Certificate of Taxation.

[Title, etc.]

I certify that the costs of the have been taxed and allowed at $

Dated, etc.

No. **213.**

Form of Certificate of Officer after Trial.

[Title, etc.]

I certify that this action was tried before the Honourable Mr. Justice [and a special jury of the county of on the and days of (October,) 18 .]

[The jury found (*state findings*).]

(*If the Judge give instructions as to the judgment thereon, add*), And the said Judge directed, etc., [*as the case may be*].

Dated, etc.

No. 214.

Form of Satisfaction Piece.

In the on the day of A. D. 18 , to wit.
Satisfaction is acknowledged between plaintiff and defendant in an action for $ and costs. And do hereby expressly nominate and appoint solicitor to witness and attest. execution of this acknowledgment of satisfaction.

Judgment entered on the day of

Signed by the said in the presence of me of one of the solicitors of the Supreme Court of Judicature for Ontario. And I hereby declare myself to be solicitor for and on behalf of said expressly named by and attending at request to inform of the nature and effect of this acknowledgement of satisfaction (which I accordingly did before the same was signed by me). And I also declare that I subscribe my name hereto as such solicitor. Rules T. T. 1856, 64.

(*Signature*) the above-named plaintiff.

Date.

No. 215.

Form of return of Judgments.

List of Judgments entered in the office of the Deputy Clerk of the Crown (*or* Deputy Registrar *or* Local Registrar, *as the case may be*) of the County of during the three months ending the day of 18

(1) Plaintiff Defendant.
(2) Date of entry of judgment.
(3) The amount recovered, or other relief given, exclusive of costs.
(4) The amount of costs taxed. J. A. Rule 517.

No. 216.

Verification of Statement of Moneys in Court (Rule 161).

I hereby solemnly declare that the annexed statement is a full and true statement of the moneys paid into the High Court and the Court of Appeal during the year 18 , and that it correctly shows the state of the various accounts therein mentioned upon the 31st day of December last

(*Signature*) A. B.,
Accountant or Accountant's Clerk.

Subscribed and declared before me, at , this day of January, 18 .

C. D.
Commissioner for taking affidavits, or Justice of the Peace.

R. S. O. c. 50, s. 121, (4).

No. **217**.

Verification of Return of Moneys paid into C. C., or Surrogate Court.

I hereby solemnly declare that the annexed statement is a full and true statement of the moneys paid into the County (*or* Surrogate) Court of the County of , during the year 18 , and that it correctly shows the state of the various accounts therein mentioned upon the thirty-first day of December last.

(*Signature*) A. B.,
Clerk, or Registrar.

Subscribed and declared before me, at this day of January, 18 .

C. D.
Commissioner for taking affidavits, or Justice of the Peace.

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No. **218.**

FORM OF DEBT ATTACHMENT BOOK

Form of Debt Attachment Book under Rule 946.

Name of Plaintiff.	Name of Judgment Debtor.	Amount of Judgment.	Date of Judgment.	Name of Garnishee.	Date of Order for Attachment.	Amount ordered to be paid by Garnishee.	Date of such Order.	Date of order for Execution against Garnishee.	Date of order that Judgment Creditor may proceed against Garnishee.

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TARIFF A.

TABLE OF COSTS

—IN THE—

HIGH COURT OF JUSTICE AND COUNTY COURTS.

General allowance for Plaintiffs and Defendants, as well between Solicitor and Client as between Party and Party :—

Neither the Taxing Officer nor a single Judge has any discretion to exceed the amount specified by the tariff where no power to increase is thereby given : *Re Totten*, 8 P. R. 386.

Where an action is brought against a solicitor who defends it in person and obtains judgment, he is entitled upon taxation to the same costs as if he had employed a solicitor except in respect of items which the fact of his acting directly renders unnecessary : *London Scottish Benefit Society* v. *Chorley*, 12 Q. B. D. 452. Where he nominally appeared by a solicitor but did the work himself, the same costs were held to be taxable : *King* v. *Moyer*, 9 P. R. 514.

As to when defendants should appear by the same solicitor, or may appear by separate solicitors : see Morgan & Wurtzburg, on Costs, p. 124 ; *Barrett* v. *Campbell*, 7 P. R. 150 ; *Conolly* v. *Hill*, *Ib.*, 441 ; and notes to *Rule* 1202.

In *Re Lyall*, 29 Sol. Jour. 290, trustees, viz : the widow of the testator, who was also tenant for life, and three others, were allowed two sets of costs, they having severed on the ground that the *Rule* was that a trustee, also a tenant for life, might appear separately from his co-trustees.

Defendants joining in a statement of defence may sometimes properly separate at the trial, and be represented by different counsel, where their cases are distinct : see *Ager* v. *Blacklock*, 56 L. T. N. S. 890 ; see also *Petrie* v. *Guelph*, *etc.*, 10 P. R. 600. Where one of a body of mortgagees is a solicitor, he may have profit costs of enforcing the mortgage security, whether the mortgagees are trustees or not : *Re Donaldson*, 27 Ch. D. 544. A solicitor executor was held entitled to profit costs of an action in which his firm acted for himself and co-executors, but was not entitled to profit costs for business not done in the action : *Re Barber*, *Burgess* v. *Vinicome*, 35 W. R. 326 ; *Re Corsellis*, *Lawton* v. *Elwes*, 34 Ch. D. 675 ; see also *Re Roberts*, 43 Ch. D. 52, and a collection of cases and discussion, 20 C. L. J. 218.

Where an action is dismissed with costs it means the costs of all defendants, and in all capacities in which they are defendants : *Woolley* v. *Coleman*, W. N. 1886, 6, 36 ; 80 L. T. Jour. 320.

In an action on a covenant for indemnity against a mortgage, the plaintiff is not entitled to solicitor and client costs, but only to party and party costs of the action upon the covenant: *Hutton* v. *Wanzer*, 11 P. R. 302.

This tariff seems only to contemplate costs of the kind described as "between solicitor and client" and "between party and party." In *Cousineau* v. *City of London*, 12 P. R. 512, it was said that the costs in an action between solicitor and client include such costs as a solicitor can tax against a resisting client under a general retainer to prosecute or defend the action.

The existence of an intermediate class of costs "as between solicitor and client" was formerly recognized in the Chancery Taxing Office, and is referred to in *Rule* 1187; see also item 94, *infra*.

As to "moderation" of costs, see *Beatty* v. *Haldane*, 4 C. L. T. 541.

The tariff applies in solicitor and client taxations, and under *Rule* 1217 no other fees are are to be allowed in respect of the matters provided for by the tariff. See also *Re Harrison*, 80 L. T. Jour. 432.

	Higher Scale.	Lower Scale and County Courts.
	$ c.	$ c.
1. Instructions to sue in undefended cases	3 00	2 00
2. In defended cases	4 00	3 00
3. Instructions to defend	4 00	3 00
4. Instructions for petition where no writ of summons issued	2 00	1 00
Writs.		
5. All writs, except writs of execution, subpœnas, and concurrent, and renewed writs	2 00	1 00
6. Concurrent writ	1 50	0 75
7. Renewed writ (except writs of execution)	1 50	0 75
8. All writs if over four folios, for every folio	0 20	0 20
9. Subpœna *ad testificandum*	1 00	0 50
10. Subpœna *duces tecum*	1 25	0 75
11. All subpœnas if over four folios, additional per folio	0 15	0 15
12. Notice of writ for service in lieu of writ out of jurisdiction and copy	1 00	0 75
13. (Alias, and subsequent, writs, to be allowed as originals.)		
14. Special indorsement of writ of summons	1 00	0 75
15. Suing out any writ of execution	6 00	4 00

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	Higher Scale.	Lower Scale and County Courts.
TABLE OF COSTS—*Continued.*	$ c.	$ c.
Renewal of any writ of execution..... ..... (In both cases, including placing same in the Sheriff's hands, all attendances, indorsements and letters in connection therewith.)	4 00	2 50
COPY AND SERVICE OF WRITS OF SUMMONS, AND OTHER PROCESS.		
16. For copy, including copy of notices required to be indorsed, each	1 00	0 75
If over four folios, for every additional folio.....	0 10	0 10
The Taxing Officer has no discretion to reduce the charge of $1 where less than four folios: *Gage* v. *Canada Publishing Co.*, 19 C. L. J. 175; 3 C. L. T. 267.		
17. Service of each copy of writ, if not done by the Sheriff or an officer employed by him, when taxable to solicitor on Sheriff's default.....	1 00	0 50
It would seem that "writ" in this item includes a subpœna: *Corby* v. *London*, 13 P. R. 285; see also *Rule* 1212.		
18. If served at a distance of over two miles from the nearest place of business, or office of the solicitor serving same, for each mile beyond two miles.....	0 13	0 10
19. For service of writ out of jurisdiction	Such allowance as the Taxing Officer shall think fit.	Such allowance as the Taxing Officer or C. C. Judge shall think fit.
INSTRUCTIONS AFTER COMMENCEMENT OF ACTION.		
20. To counsel in special matters	1 00	0 50
21. To counsel in common matters.....	0 50	0 25
22. For special affidavits when allowed by the Taxing Officer (or County Court Clerk in C. C. cases)	1 00	0 50

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TABLE OF COSTS—*Continued.*	Higher Scale. $ c.	Lower Scale and County Courts. $ c.
23. For special affidavit on production when allowed by the Taxing Officer	2 00	1 00
24. For pleadings in action	1 50	1 00
This is allowed once only in the course of the action: *Torrance* v. *Torrance*, 9 P. R. 271; 2 C. L. T. 311.		
25. For counter-claim, when such claim could not prior to the Ont. Jud. Act, 1881, have formed the subject of a set-off	2 00	1 00
26. For reply to such counter-claims	2 00	1 00
27. To amend any pleading when the amendment is proper	2 00	1 00
28. For confession of defence under Rule 440	2 00	1 00
29. For special case in course of action	2 00	1 00
30. For special case when no writ issued, or pleadings had, and no instructions to sue allowed	3 00	2 00
31. To add parties by order of Court or Judge	2 00	1 00
32. For brief	2 00	0 50
33. For every suggestion	1 00	1 00
34. For adding parties in consequence of marriage, death, assignment, etc.	1 00	0 50
35. For issue of fact, by consent, or Judge's order	2 00	1 00
36. To defend added parties after suggestion of death of original party, or on revivor	2 00	1 00
37. For confession of action in ejectment as to the whole or in part	1 00	0 50
38. To strike or reduce special jury	2 00	1 00
39. For such other important step or proceeding in the suit as the Taxing Officer is satisfied warrants such a charge	2 00	1 00
Instructions for appeal $2.00 is proper: *Barber* v. *Morton*, 2 C. L. T. 340; also instructions to examine a plaintiff or a defendant, $2.00: *Alexander* v. *School Trustees*, 11 P. R. 157.		

	Higher Scale.	Lower Scale and County Courts.
TABLE OF COSTS—*Continued.*	$ c.	$ c.
DRAWING PLEADINGS, ETC.		
40. Statement of claim	2 00	1 00
41. If above ten folios, for every folio above ten, in addition	0 20	0 15
42. Statement of defence, if five folios or under	2 00	1 00
43. If above five folios, for every folio in addition	0 20	0 20
44. Statement of defence and counter-claim, up to fifteen folios	3 00	1 50
45. For every folio over fifteen	0 20	0 15
46. Reply and other pleadings for or on behalf of plaintiff or defendant	2 00	1 00
47. If above ten folios, for every folio in addition	0 20	0 15
48. Demurrer	2 00	1 00
49. Petition, per folio	0 20	0 15
50. Issue for trial of facts by agreement or order, for every folio	0 20	0 20
51. In special or contested actions or matters on the Higher Scale to be increased to such sum as the Taxing Officer in Toronto may think fit.		
52. Special case, per folio	0 20	0 20
53. Drawing interrogatories, or answers for any purposes required by law, per folio	0 20	0 20
54. Drawing reasons for or against appeal, per folio	0 20	0 20
55. (The above charges do not include engrossing, or copies to file or serve.)		
56. Taking cognovit and entering judgment thereon, when there has been no previous proceeding, and the true debt does not exceed $200	8 00	8 00
57. For same services when the true debt exceeds $200	12 00	10 00
58. Drawing and engrossing cognovit, and attending execution, when there have been previous proceedings	2 00	1 00

	Higher Scale.	Lower Scale and County Courts.
TABLE OF COSTS—*Continued.*	$ c.	$ c.
Copies.		
59. Of pleadings, brief and other documents, when no other provision is made, and copies properly allowable	0 10	0 10
60. Certified copy of pleadings, or issue, for use of Judge	1 50	0 75
61. For every folio above fifteen, per folio	0 10	0 10
62. Of special and common orders of Court or a Judge	0 75	0 50
63. Of special orders of Court above three folios, per folio	0 20	0 10
Notices, including One Copy.		
64. Of appearance, when duly entered and notice given on the day of appearance, but not otherwise	0 50	0 25
65. To Sheriff, to discharge prisoner out of custody	0 50	0 50
66. Notice, in action for recovery of land, to defend for part of premises; not to be allowed when defence limited by appearance	1 00	0 50
If above three folios, per folio in addition	0 20	0 15
67. Notice of claimant's or defendant's title in action for recovery of land, same fees.		
68. Notice of entry of appearance in action for recovery of land by a party not named in writ	0 50	0 25
69. Demand of particulars	0 50	0 50
70. Particulars of claim, demand, set-off, or counter-claim, five folios or under	2 00	0 75
If exceeding five folios, per folio in addition	0 20	0 15
71. Notice of admission of right and denial of ouster by a joint tenant	0 50	.....
If above three folios, for every folio additional	0 20	.....

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TABLE OF COSTS—*Continued.*	Higher Scale. $ c.	Lower Scale and County Courts. $ c.
72. Of discontinuance and one copy	0 50	0 40
For every additional copy, per folio	0 10	0 10
73. Of disputing amount of claim	0 50	0 25
74. Of confession of action in action for recovery of land as to whole or part	0 50	0 40
75. Notice in lieu of statement of claim, and one copy	0 50	0 25
For every additional copy, per folio	0 10	0 10
76. Of trial or assessment and one copy	0 50	0 25
For every additional copy, per folio	0 10	0 10
77. Demand of residence of plaintiff	0 50	0 25
78. Demand of names of partners	0 50	0 25
79. All common notices not above specified	0 50	0 25
80. Notice to admit, and produce, if not exceeding two folios, and one copy	0 50	0 25
For every additional copy, per folio	0 10	0 10
81. For each necessary folio above two	0 20	0 20
82. Notice of setting down on motion for judgment, or on further directions and one copy	0 50	0 25
For every additional copy, per folio	0 10	0 10
83. Notice of motion in Court, or Chambers, engrossing and copy to serve, per folio	0 30	0 15
For every additional copy, per folio	0 10	0 10
84. Notice of taxation, or appointment to tax, and one copy	0 50	0 25
For every additional copy, per folio	0 10	0 10
85. For preparing, and filling up for service, in any cause or matter, each notice to creditors to prove claims, and each notice that cheque may be received, specifying the amounts to be received for principal and interest, and costs, if any—including mailing	0 25	0 25

	Higher Scale.	Lower Scale and County Courts.
TABLE OF COSTS—*Continued.*	$ c.	$ c.
86. Notice of filing affidavits, when required, and one copy (only one notice to be allowed for a set of affidavits filed, or which ought to be filed together)	0 50	0 25
For every additional copy, per folio	0 10	0 10
87. Notice by Defendant to third party, under Rule 329	1 00	0 50
PERUSALS.		
88. Of each of the pleadings as defined by the Judicature Act	1 00	0 50
89. Of special case by the solicitor of any party, except the one by whom it is prepared, when the case is submitted in the course of the cause	2 00	1 00
90. And in special, or contested actions, or matters, or of interrogatories, and cross-interrogatories on commission	Such sum as the Taxing Officer in Toronto thinks fit.	0 50
91. Of affidavits and exhibits of a party adverse in interest, filed or produced on any application, where perusal is necessary if twenty folios or under	1 00	0 50
On the Higher Scale per folio over twenty folios (Not in any case to exceed the sum of $5.)	0 05	.....
ATTENDANCES.		
92. Necessary attendance consequent on the service of a notice to produce or admit, or an inspection of documents when produced under order including making admission, altogether	1 00	0 50

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	Higher Scale.	Lower Scale and County Courts.
TABLE OF COSTS—*Continued.*	$ c.	$ c.
To be increased by Taxing Officer (or County Court Clerk) in cases of special, difficult and important nature, to	2 00	1 00
93. Attending on return of motion, in Chambers...	1 00	0 50
To be increased in the discretion of the presiding officer, or in C. C. cases of the Judge, to	2 00	1 50
94. On consultation, or conference, with counsel, in special, difficult and important matters, in the discretion of the Taxing Officer in Toronto (or in C. C. cases of the County Court Clerk) to	2 00	1 00
To be increased in the discretion of the Taxing Officer as between solicitor and client, to such sum as he shall see fit, or in C. C. cases in the discretion of the C. C. Judge, to not exceeding.....	.....	3 00
No special attendance to be allowed to a solicitor on proceedings on which he also appears as counsel.		
See note to item 160.		
95. Solicitor attending Court on trial of cause, when not himself counsel, or partner of counsel.....	2 00	1 00
And in special, difficult and important cases, each hour necessarily present at trial.....	2 00	1 00
In no case to exceed, per day	10 00	5 00
(Provided the attendance of such solicitor, and the length of time of such attendance, be duly entered at the time in the book of the Registrar, Deputy-Registrar, Deputy-Clerk of the Crown, Clerk of Assize, C. C. Clerk, or other officer of the Court present at the time, or proved by affidavit.)		

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TABLE OF COSTS—*Continued.*	Higher Scale. $ c.	Lower Scale and County Courts. $ c.
96. To hear judgment when not given on close of argument This is properly taxable for attending to read a written judgment handed out by the Judge to the Registrar and not delivered in open Court: *Gage* v. *Canada Publishing Co.*, 19 C. L. J. 175; 3 C. L. T. 267.	2 00	1 00
97. To hear judgment when cause on list for judgment, but judgment not given	2 00	1 00
98. On taxation of costs	.....	1 00
99. On taxation of costs, per hour	1 00	.....
100. On revision, per hour, when attendance required by Taxing Officer, or revision had on order	1 00	0 50
101. On revision by County Court Judge on appeal	.....	0 50
102. To obtain or give undertaking to appear, when service accepted by a solicitor	1 00	0 50
103. Attendance to file, or serve	0 50	0 25
104. Attendance on warrant, or appointment, of Master, Registrar, Examiner, Referee, or County Court Clerk, per hour	1 00	0 50
To be increased in the discretion of the Taxing Officer in Toronto, or, in C. C. cases, the C. C. Judge, to not exceeding per hour...	2 00	1 00
105. Attendance on Master, or Registrar (or County Court Clerk), in special matters, per hour	1 00	0 50
106. Every other necessary attendance Only one attendance is taxable for a *præcipe* order: *Latour* v. *Smith*, 13 P. R. 214.	0 50	0 25
107. On important points and matters, requiring the attendance of counsel, the Master, or Examiner, or Referee, Judgment Clerk, or Inspector of Titles, may certify the amount of counsel fee proper to be allowed (to be noted at the time,) for the guidance of the Taxing Officer in Toronto (or the Judge in C. C. cases,) who may allow the same in lieu of fees for attendance.		
On the Lower Scale not to exceed $5 See note to item 160.		

	Higher Scale.	Lower Scale and County Courts.
TABLE OF COSTS—*Continued.*	$ c.	$ c.
108. Or on special and important points, and matters requiring the attendance of counsel, before Examiner, Referee, or County Court Clerk, the County Court Judge may, in County Court cases in lieu of the fees for attendance, allow a counsel fee when counsel attend the same, not to exceed $5.		
BRIEFS.		
109. For drawing briefs, five folios or under	2 00	1 00
Instructions for brief should be allowed where a brief itself is taxed: *McCallum* v. *McCallum*, 11 P. R. 179.		
110. For drawing briefs, for each folio above five...	0 10	0 10
111. For drawing brief, per folio, for original and necessary matter	0 20	0 20
112. Copy of documents, other than pleadings, per folio	0 10	0 10
113. Copy of brief for second counsel, when fee taxed to him, per folio.....	0 10	.....
Charges for obtaining copies of short-hand writer's notes of evidence for use of counsel at the argument of the case, where the argument is unavoidably postponed for a considerable time after the examination of the witnesses or the greater portion of the witnesses, are taxable: *Gage* v. *Canada Publishing Co.*, 19 C. L. J. 175; 3 C. L. T. 267.		
As to when the costs of plans and surveys are allowed: see *McGannon* v. *Clarke*, 9 P. R. 555; of depositions of witnesses examined *de bene esse*: *McMillan* v. *McMillan*, 8 C. L. J. 285, and of depositions of witnesses examined under a commission: see note to *Rule* 1214.		
COURT FEES.		
114. Fees after statement of claim, or, where statement dispensed with, after filing writ, on defence, joinder of issue, trial or argument before courts or any other step in the cause, and on judgments, other than præcipe judgments in mortgage cases. No two fees		

	Higher Scale.	Lower Scale and County Courts.
TABLE OF COSTS—*Continued.*	$ c.	$ c.
to be allowed to either party when such proceedings are taken, or had, between the first day of any sittings of the Courts, (fixed by Rule 216, or (R. S. O. 1887, c. 47, s. 12, as the case may be), and the first day of the following sittings so fixed.....	1 00	0 50
115. Fee on certified copy of pleadings for Judge...	1 00	0 50
116. Fee on every order, or judgment to the party obtaining the same.....	1 00	0 50
The item originally read as follows: "122. On every order of Court and Judge's order or order of Master in Chambers .....$1.00." Under the original item, and doubtless under the amended item, this fee was taxable on a *præcipe* order: *Gage* v. *Canada Publishing Co.*, 19 C. L. J. 175; 3 C. L. T. 267.		
117. Fee on præcipe judgment in mortgage cases...	4 00	2 00
AFFIDAVITS.		
118. Drawing affidavits, per folio	0 20	0 20
119. Engrossing same to have sworn, per folio	0 10	0 10
120. Copies of affidavits, per folio, when necessary...	0 10	0 10
121. Common affidavits of service, including service by post when necessary, or of payment of mileage and non-appearance, including copy, oath, and attendance to swear.....	1 00	0 75
122. The solicitor for preparing each exhibit in town or country	0 10	0 10
DEFENDANTS.		
123. Appearance, including attending to enter	1 00	0 50
For each additional defendant	0 20	0 10
124. For limiting defence in action for recovery of land in appearance, besides above allowance for appearance; not to be allowed when notice of limiting defence served.....	1 00	0 50

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	Higher Scale.	Lower Scale and County Courts.
TABLE OF COSTS—*Continued.*	$ c.	$ c.
JUDGMENT, RULES, OR ORDERS.		
125. Drawing (*a*) minutes of judgment, or order, per folio, when prepared by solicitor, under directions of Registrar, or Judgment Clerk, (or, in C. C. cases, of the C. C. Judge)...	0 20	0 20
Amended by J. A. Rule 544 (14) so as to read as above. The original item had at (*a*) the word "special."		
126. Judgment for non-appearance on specially indorsed writs, and in action for recovery of land	1 00	0 50
127. Attending for appointment to settle or pass judgment, or order of Court, copy and service	1 30	0 50
128. When served on more than one party, the extra copies and services are to be allowed.		
129. For every hour's attendance before proper officer on settling or passing minutes.....	1 00	0 50
To be increased in the discretion of the officer in special and difficult cases, when the solicitor attends personally, to a sum not exceeding altogether	5 00	2 50
LETTERS.		
130. Letter to each defendant before suit, only one letter to be allowed to any defendants who are in partnership, and when subject of suit relates to the transactions of their partnership.....	0 50	0 25
131. Common letters, including necessary agency letters	0 50	0 25
Necessary letters between a solicitor and his agent on the business of the cause are taxable as between party and party, whether the agent resides in the county town of the county in which the solicitor resides, or in another county, or in Toronto: *Agnew* v. *Plunkett*, 9 P. R. 456.		

TABLE OF COSTS—*Continued.*	Higher Scale. $ c.	Lower Scale. County Courts. $ c.
Necessary letters and attendance incurred in obtaining the decision of the Taxing Officer in Toronto relating to charges upon which a decision by him is required, in regard to increasing fees, etc., are taxable under item 161.		
132. With power to the taxing officer (or in C. C. cases the C. C. Clerk, as between solicitor and client, to increase the fee for special and important letters, to an amount not exceeding	2 00	1 00
133. Postages—the amount actually disbursed.		
134. For correspondence during the progress of an appeal to the Court of Appeal a reasonable sum in the discretion of the Taxing Officer may be allowed not exceeding	5 00	2 00
SALES BY MASTER, OR AUCTIONEER, OR REAL REPRESENTATIVE IN PARTITION SUITS.		
135. Drawing advertisements for the sale of real or personal estate under the direction of the Court, including all copies, except for printing	2 00	1 00
And for each folio over five, per folio	0 20	0 15
(To be increased in the discretion of the Master (or in C. C. cases the C. C. Judge) to a sum not exceeding ten dollars, when special information has been procured for the purpose of sale.)		
136. Copies for printing, per folio	0 10	0 10
137. Each necessary attendance on printer	0 50	0 25
138. Attending and making arrangements with auctioneer	1 00	0 50
139. Revising proof	1 00	0 50
140. Fee on conducting sale when held where solicitor resides	5 00	3 00

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	Higher Scale.	Lower Scale and County Courts.
TABLE OF COSTS—*Continued.*	$ c.	$ c.
141. If solicitor is engaged for more than three hours, for every hour beyond that time	1 00	0 75
142. Fee on conducting sale elsewhere, besides all necessary travelling and hotel expenses, when solicitor attends with the approval of the Master (or real representative) previously given	10 00	5 00
If the sale occupies more than one day, the Master may allow him, in addition to his travelling expenses, *per diem*, a sum not exceeding twenty dollars.		
The Master may also allow to one other party to the suit his fees and expenses for attending sales, if, in his opinion, it is necessary and proper that he should attend.		
MISCELLANEOUS.		
143. Statement of issues in Master's office, when required by the Master.....	2 00	1 00
In special matters to be increased in the discretion of the Taxing Officer in Toronto.		
See item 161.		
144. For each folio over 10.....	0 20	0 20
145. When it has been satisfactorily proved that proceedings have been taken by solicitors out of Court to expedite proceedings, save costs, or compromise actions, an allowance is to be made therefor in the discretion of the Taxing Officer in Toronto (or Judge of County Court in C. C. cases).		
Charges for proceedings taken to save expense are taxable whether taken between the solicitors for the parties or by one party: *Torrance* v. *Torrance*, 9 P. R. 271.		
See item 161.		

	Higher Scale.	Lower Scale and County Courts.
TABLE OF COSTS—*Continued.*	$ c.	$ c.
146. Drawing bill of costs as between party and party for taxation, (including engrossing and copy for Taxing Officer, or C. C. Clerk,) per folio	0 30	0 20
147. Copy, per folio, to serve	0 10	0 10
As to the allowance of costs of maps and plans, see *Rule* 1213.		
COUNSEL FEES.		
148. Fee on motion of course, or on motion in matters not special	2 00	1 00
A counsel fee of $5.00 should be taxed on each necessary and proper enlargement of a Court motion: *McCallum* v. *McCallum*, 11 P. R. 179.		
149. On special *ex parte* motion or application to the Court, (only one counsel fee to be taxed)	5 00	2 00
See also *Rule* 1216.		
To be increased in the discretion of the Taxing Officer in Toronto (or Judge of County Court in C. C. cases, who shall mark amount to be taxed on order of Court, if any, before taxation) to	10 00	5 00
See item 161.		
150. Fee on argument on supporting or opposing application to the Court, or argument of demurrer, special case, or appeal	10 00	5 00
On Higher Scale and Lower Scale to be increased in the discretion of the Taxing Officer in Toronto.		
In C. C. cases to be increased in the discretion of the Judge to	.....	10 00
See item 161.		
151. On consultations	5 00	2 00
See also *Rule* 1216.		
152. Fee, with brief, on assessment	10 00	6 00

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	Higher Scale.	Lower Scale and County Courts.
TABLE OF COSTS—*Continued.*	$ c.	$ c.
153. Fee, with brief, at trial	10 00	10 00
To be increased by taxing officer in his discretion to a sum not exceeding $40 to senior counsel, and $20 to junior counsel, in actions of a special and important nature, Provided that the Taxing Officer in Toronto shall have power to tax increased fees, but more than one counsel fee shall not be allowed in any case not of a special and important nature; not more than two in any case, Provided that if an application to increase fees be made in the first instance to the Local Taxing Officer, and a *fiat* granted, no application shall thereafter be made to the Taxing Officer at Toronto.		
To be increased by the Taxing Officer at Toronto or the Judge (as the case may require) in actions of a special or important nature and on appeals to the Court of Appeal, (on notice to the opposite party,) to a sum not exceeding	.....	25 00
See note to item 161.		
(In C. C. cases no charge to be made by either party in connection with such application.)		

This item is to be read as part of item 164: *McKeen* v. *South Gower*, 12 P. R. 553.

In arbitrations in England there is no general rule that only one counsel fee should be allowed: *Orient Steam Navigation Co.* v. *Ocean Marine Insurance Co.*, 35 W. R. 771.

See note to item 164.

Under an order made at the Assizes postponing the trial upon payment of the costs of the day, the phrase "costs of the day" includes only one counsel fee of $10.00: *Hogg* v. *Crabb*, 12 P. R. 14.

The midday adjournment of the Court was held not to be included in computing the time occupied by a case: *Collins* v. *Worley*, 60 L. T. N. S. 748.

Except in a strong case a Judge on appeal will not interfere with the discretion exercised by the Taxing Officer: *Fox* v. *Toronto & Nipissing Ry.*, 7 P. R. 157. See notes to *Rule* 851.

A counsel fee paid to plaintiff's solicitor in an alimony suit is a disbursement: *Bucke* v. *Bucke*, 21 Gr. 77.

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	Higher Scale.	Lower Scale and County Courts.
TABLE OF COSTS—*Continued.*	$ c.	$ c.
Where by the resignation of a Judge a second argument was rendered necessary, the Court allowed the successful party the costs of both arguments: *Platt* v. *Attrill*, 19 C. L. J. 348; 3 C. L. T. 543.		
154. On argument or examination in Chambers in cases proper for the attendance of counsel and where counsel attends.....	2 00	1 00
To be increased in the discretion of the Master in Chambers, or the Master in Ordinary in High Court cases.		
To be increased in the discretion of the Judge in C. C. cases to a sum not exceeding	.....	5 00
This item would appear to apply in taxations between solicitor and client as well as between party and party: See *Re Chapman*, 9 Q. B. D. 254; 10 Q. B. D. 54.		
155. On argument of Appeal in the Court of Appeal, in the discretion of the Taxing Officer at Toronto, not exceeding $80 to the senior counsel, and $50 to the junior counsel (in ordinary cases larger fees than $40 to the senior counsel and $20 to the junior counsel not to be allowed) in High Court cases and in County Court appeals not exceeding $25.		
(Two counsel fees not to be allowed except in difficult and important cases.)		
156. To attend reference to Master, C. C. Clerk or Referee, when counsel necessary	5 00	3 00
To be increased in special and important matters requiring the attendance of counsel, in the discretion of the Taxing Officer in Toronto, (or County Court Clerk in C. C. cases,) not exceeding	.....	6 00
See item 161. See also *Rule* 1210.		
157. Fee on drawing, and settling, allegations in præcipe for revivor, in special cases, proper for opinion of counsel.....	2 00	1 00

TABLE OF COSTS—*Continued.*	Higher Scale. $ c.	Lower Scale and County Courts. $ c.
To be increased in the discretion of Taxing Officer, (or C. C. Clerk in C. C. cases,) to an amount not exceeding	5 00	2 00
158. On settling pleadings, interrogatories, special cases or petitions, and advising on evidence in contested cases, in the discretion of the Taxing Officer, (or C. C. Clerk in C. C. cases,) not exceeding.....	5 00	3 00
See item 161. One fee for advising on evidence would seem under this item all that can be taxed in an action. In England a second fee may be allowed where, after the pleadings are closed, and advice on the evidence obtained, the opposite party has by motion obtained a change of pleadings: *Wicksteed* v. *Biggs*, 52 L. T. N. S. 428. A fee revising a special reply to a counter-claim is proper: *Alexander* v. *School Trustees*, 11 P. R. 157.		
159. On settling the appeal case and reasons for or against appeal.....	5 00	2 00
To be increased in the discretion of the Taxing Officer at Toronto in special and important matters to a sum not exceeding.....	20 00	5 00
160. When any fee is subject to be increased, in the discretion of the Taxing Officer in Toronto, either party to the taxation may, during its progress, require that such item shall be referred by the Local Taxing Officer to the Taxing Officer in Toronto, whose decision shall be final as to that item, but this shall not prevent an appeal from such taxation. See item 161.		
161. The necessary letters and attendances incurred in obtaining the decision of the Taxing Officer in Toronto in any matters which are in his discretion shall be allowed as part of the costs of the cause.		

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	Higher Scale.	Lower Scale and County Courts.
TABLE OF COSTS—*Continued.*	$ c.	$ c.

162. The Taxing Officer in Toronto may apply to a Judge, or the Courts, on the taxation of any item which is in his discretion, or is referred to him.

163. No application shall be allowed by either solicitor, or counsel, to a Judge, or the Court, in reference to any item which is in the discretion of the Taxing Officers in Toronto, but this is not to prevent an appeal from a Taxing Officer.

See item 153.

164. On arbitrations, counsel fees may be allowed and taxed on the same scale and conditions, so far as possible, as those hereinbefore prescribed for counsel fees at trials.

Item 153 is to be read as part of this item, and the Taxing Officers at Toronto have authority to consider the question of increased counsel fees in the case of an arbitration where there is no cause in Court, and a reference to a local officer to tax costs has been made under R. S. O. 1887, c. 53, s. 24: *Re McKeen & South Gower*, 12 P. R. 553.

As to the discretion of the Taxing Officer in regard to fees and expenses of arbitrators, and in regard to the fees of counsel on arbitrations; see *Re Hillyard & Royal Ins. Co.*, 12 P. R. 255.

As to whether more than one counsel fee can be taxed under this item and item 154 *Quære*; R. S. O. 1887, c. 53, s. 25, provided that no more than one counsel fee should be taxed to either party for any meeting of arbitrators. Possibly that section is now superseded by the provisions of item 153. In arbitrations in England there is no general rule that only one counsel fee should be charged: *Orient Steam Nav. Co.* v. *Ocean Marine Ins. Co.*, 35 W. R. 771.

In taxing the costs of an arbitration upon the County Court scale, no larger fee for attendance of counsel before the arbitrators than $25 can be allowed, even though the attendance is for several days: see item 153.

NOTE 1.—In taxing costs between solicitor and client, the Taxing Officer or County Court Clerk, in County Court cases, may allow for services rendered not provided for by

TABLE OF COSTS—*Continued.*	Higher Scale. $ c.	Lower Scale and County Courts. $ c.
this tariff, a reasonable compensation as far as practicable analogous to its provisions.		
NOTE. 2.—On appeals to the Court of Appeal where the fees are not above provided for the same fees and allowances shall be taxed as are allowed for similar services in the High Court or County Court, as the case may be. App. O. 28-51.		

Though a Taxing Officer has a discretion in the taxation of costs as between party and party and the same discretion as between solicitor and client, still it by no means follows that what is reasonable in the former case is also reasonable in the latter: *Re Blyth & Fanshawe*, 52 L. J. Chy. 186.

A fee of $20 a day was allowed to a solicitor attending upon the execution of a commission: *Greey* v. *Smith*, 7 C. L. T. 168.

Before incurring any unusual expense, the solicitor should inform his client that it was unusual, and obtain his sanction, letting him know that the expense may not be allowed between party and party: *Re Broad* v. *Broad*, 15 Q. B. D. 252, 420. See also *Rule* 1215. A trustee was allowed costs out of the estate of a petition to correct slips in a former petition: *In re Hopper's Trusts*, 34 W. R. 392. A solicitor was disallowed between solicitor and client costs occasioned by an inaccurate statement in particulars of sale, by reason of which the Court of Appeal held a purchaser not bound to complete his purchase: *Re X.*, 81 L. T. Jour. 6. The costs of journeys to London by a country solicitor were, under special circumstances, allowed: *In re Storer*, 32 W. R. 767.

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TARIFF B.

TARIFF OF DISBURSEMENTS.

(Referred to in Rule 1218.)

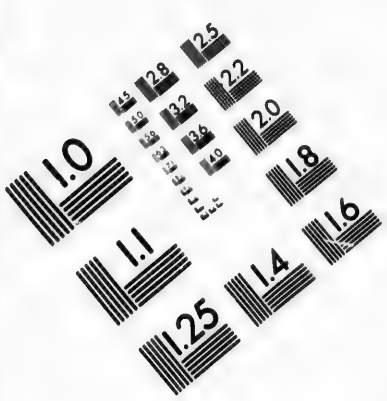
The following fees and allowances shall be taken and received by the officers and persons herein mentioned in Civil Actions in the High Court and Court of Appeal and in the County Courts in lieu of all fees payable to those officers and persons under the tariffs heretofore in force in the said Courts :—

See also secs. 155, 157, 162, of the Act.

	Higher Scale.	Lower Scale and County Courts.
FEES TO BE PAYABLE IN STAMPS OR OTHERWISE TO OFFICERS OF THE COURT. *(Inclusive of all Fees expressly imposed by Statute.)*		
Registrar of Court of Appeal.	$ c.	$ c.
Setting down for argument (*a*)	4 00	0 50
On every judgment or order of the Court passed and entered (*a*)	2 00	.....
Certificate on discharging appeal	0 90	0 90
On every order in Chambers	0 50	0 50
For other services the like charges as are to be taken by the Registrars of the High Court for similar services.		

(*a*) Imposed by R. S. O. 1887, c. 44, s. 156.

	Higher Scale.	Lower Scale and County Courts.
FEES TO BE PAYABLE IN STAMPS—*Con.*	$ c.	$ c.
MASTER IN ORDINARY, LOCAL MASTERS, AND OFFICIAL AND SPECIAL REFEREES.		
Filing and entering judgment or order in Master's book	0 20	0 10
Every warrant or appointment	0 50	0 10
Administering oath or taking affirmation	0 20	0 20
Marking every exhibit	0 20	0 10
Drawing depositions (in infancy matters only) reports or orders, per folio, to include time occupied	0 20	0 20
Fair copy, per folio (when necessary)	0 10	0 10
Copy of papers given out when required, per folio	0 10	0 10
Every attendance upon any proceeding or enlargement thereof or selling property	1 50	0 50
For each additional hour	1 50	0 50
Fee on report signed (only one to be allowed in each action or matter, on first report	2 00	*Nil.*
Every certificate, if not longer than two folios	0 50	0 20
For each folio over two	0 20	*Nil.*
Filing each paper, or subsequent order	0 10	0 10
Taxing costs, per hour	1 00	.....
Taxing costs including attendance	.....	0 80
Making up and forwarding depositions, bills of costs and proceedings in Master's office	0 50	0 10
Every special attendance out of office within two miles, per hour occupied by reference or sale	2 00	0 50
Ever additional mile above two for travelling expenses	0 20	0 10
Every attendance on application to a Master in Chambers	1 00	0 50
Every order in Chambers	0 50	0 20
Searching files in office	.....	0 10
Do. on Higher Scale same allowance as to Deputy Registrar.		



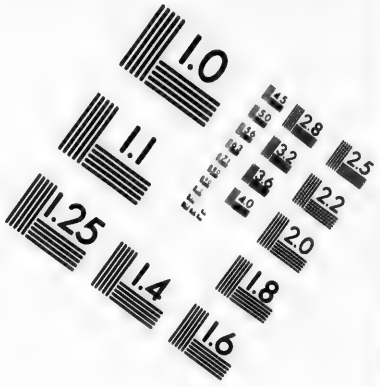
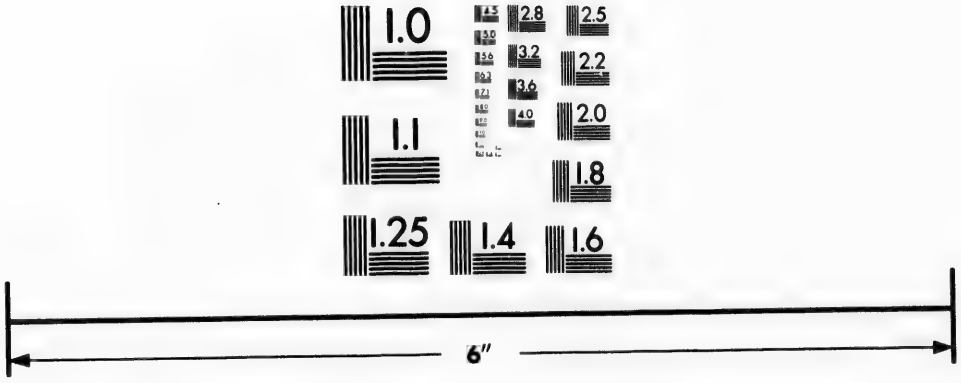
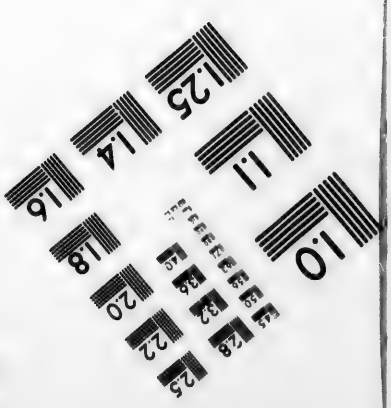


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	Higher Scale.	Lower Scale and County Courts.
FEES TO BE PAYABLE IN STAMPS—*Con.*	$ c.	$ c.
CLERK OF THE PROCESS, CLERK OF RECORDS AND WRITS, REGISTRARS, LOCAL REGISTRARS, DEPUTY REGISTRARS, DEPUTY CLERKS OF THE CROWN, CLERK IN CHAMBERS, ACCOUNTANT AND TAXING OFFICERS IN THE HIGH COURT, AND THE CLERKS OF THE COUNTY COURTS.		
Every Writ	0 50	0 50
Every Concurrent, Alias, Pluries or Renewed Writ	0 50	0 40
Additional on every Writ by Statute (*b*)	0 50	.....
Every appearance entered, and filing memorandum thereof	0 20	0 15
Every appearance, each Defendant after the first	0 10	0 10
Filing every Affidavit, Writ, or other proceeding	0 10	0 10
Amending every Writ or other proceeding	0 30	0 25
Upon payment of money into Court	0 30	0 30
Upon payment of money out of Court	0 30	0 30
Passing and certifying Record (payable in cash to Deputy Clerks of the Crown, Local Registrars and Deputy Registrars not paid by salary)	1 00	0 50
Entering action for trial or assessment (including H. C. cases entered for trial at C. C.) payable in actions in the Chancery Division to the present Deputy Registrars so long as they retain office and are not paid by salary; in other cases payable to the Deputy Clerk, Local Registrar or Clerk of Assize	2 00	0 50
(The fee of $2 payable by Statute to be payable in cash to Deputy Clerks of the Crown, Local Registrars and Deputy Registrars not paid by salary. An additional fee of $5 cash to be also paid to the present Deputy Registrars so long as they retain office and are not paid by salary.)		

(*b*) Imposed by R. S. O. 1887, c. 44, s. 155, and payable in stamps.

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	Higher Scale.	Lower Scale and County Courts.
FEES TO BE PAYABLE IN STAMPS—*Con.*	$ c.	$ c.
On setting down on the paper for argument every demurrer or special case	0 20	0 20
Additional fee payable by Statute (*b*)	0 30	.....
Setting down a cause for any other purpose	0 50	0 20
Subpœna, including filing Præcipe	0 50	0 20
Additional fee by Statute (*b*)	0 50	.....
Every Reference, Inquiry, Examination, or other special matter for every meeting not exceeding one hour	1 00	0 75
Every Reference, Inquiry, Examination, or other special matter for every additional hour or less	1 00	0 50
These items do not include attendances on settling Minutes of Judgment: Boyd, C., 29th September, 1888.		
Fee on report made on such reference, etc.	1 00	1 00
Attending on opening Commission	1 00	0 50
Every Certificate made evidence by law, or required by the practice, including any necessary search	0 50	0 50
Additional fee where Seal is required (*b*)	0 50	.....
Every Certificate for Registration	0 50	0 20
Additional fee for seal of Court or office (*b*)	0 50	.....
Entering Certificate of Title or Conveyance, per folio	0 10	0 10
Every ordinary Rule or Order	0 30	0 30
Additional fee by Statute (*b*)	0 20	.....
Every Special Rule or Order, not exceeding six folios, per folio	0 20	0 20
Additional fee by Statute (*b*)	0 20	.....
Every Chamber Order	0 50	0 50
Every Interlocutory Judgment or Judgment by Default	0 50	0 30
Additional fee by Statute (*b*)	0 60	.....
Every Final Judgment otherwise than Judgment by Default	0 50	0 50
Additional fee by Statute (*b*)	0 60	.....

(*b*) Imposed by R. S. O. 1887, c. 44, s. 155, and payable in stamps.

	Higher Scale.	Lower Scale and County Courts.
FEES TO BE PAYABLE IN STAMPS—*Con.*	$ c.	$ c.
Taxing Bill of Costs, and giving allocatur or certificate	0 70	0 80
Additional fee by Statute (*b*)	0 20	.....
Entering Order when necessary, per folio	0 10	0 10
Taking account on Præcipe Judgment	1 00	0 50
Exemplification, or office or other copy of papers or proceedings required to be given out, per folio, besides certificate and seal when required	0 10	0 10
Additional fee by Statute for Seal of Court (*b*)	0 50	.....
Examining and authenticating papers when copies prepared by Solicitor—every three folios	0 05	0 05
Every search, if within one year	0 10	0 10
Every search, if over one year and within two years	0 20	0 10
Every search, if over two years, or a general search	0 50	0 20
Every Affidavit, Affirmation, etc., taken before them	0 20	0 20
Every Allowance and Justification of Bail	0 30	.....
Taking Recognizance of Bail	0 20	.....
Entering Satisfaction on Record, and filing Satisfaction piece, including any necessary search	0 50	0 30
Every Commission for the Examination of Witnesses	1 00	0 50
Making up and forwarding papers, including bills of costs	0 50	0 10
Every Commission for taking Bail and Affidavit (to be on parchment)	2 00	.....
Entering Exoneretur in Bail piece	0 30	0 20
Making up Records of Conviction, or of Acquittal, per folio	0 10	.....
Entering and Docketing Judgment	0 50	.....
For making the Entry required in the Debt Attachment Book and in Cognovit Book	0 50	0 50
CLERKS OF THE COUNTY COURTS (*Additional*).		
Every Verdict taken, non-suit, Jury discharged, Record withdrawn, or rule or order of reference at the trial	.....	0 50

(*b*) Imposed by R. S. O. 1887, c. 44, s. 155, and payable in stamps.

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	Higher Scale.	Lower Scale and County Courts.
FEES TO BE PAYABLE IN STAMPS—*Con.*	$ c.	$ c.
Drawing Appointments made by the Judge	.....	0 25
Attending at every special hearing before the Judge under R. S. O. 1887, c. 53, s. 1, and at taking Examinations and Evidence and at Sittings in reference to C. C. Judge from the H. C. not exceeding one hour	.....	0 50
Every additional hour or less	.....	0 50
Every appointment for taxation of costs or otherwise, made by C. C. Clerk	.....	0 10
Every meeting under R. S. O. 1887, c. 53, s. 9, not exceeding two hours	.....	2 00
For each additional hour or less (to be taxed by the C. C. Judge)	.....	1 00
For every Jury sworn	.....	1 00
Every enlargement on application to the Judge in Chambers, including search, if marked by the Clerk	.....	0 15
DEPUTY REGISTRARS NOT PAID BY SALARY.		
(Additional, only so long as the present officers retain office and are not paid by salary.		
Marking every exhibit produced on the examination of witnesses	0 20	.....
Swearing each witness	0 20	.....
Attending on inspection of documents, produced with affidavits on production, per hour	1 00	.....
SPECIAL EXAMINER.		
Every appointment	0 50	0 10
Administering oath or taking affirmation	0 20	0 20
Marking every exhibit	0 20	0 20
Taking depositions per hour	1 50	0 75
Fair copy for Solicitor, per folio (when required)	0 10	0 10

	Higher Scale.	Lower Scale and County Courts.
FEES TO BE PAYABLE IN STAMPS—*Con.*	$ c.	$ c.
Every attendance out of office when within two miles	2 00	0 50
Every attendance over two miles out of office—extra per mile	0 20	0 10
Every certificate	0 50	0 25
Making up and for arding answers, depositions, etc., including filing Præcipe	0 50	0 25
For every attendance upon an appointment, when solicitor or witnesses do not attend and examiner not previously notified	1 00	0 50
REFEREE OF TITLES.		
Every Warrant or Appointment	0 30	.....
Administering Oath or taking Affirmation	0 20	.....
Marking every exhibit	0 20	.....
Drawing depositions, reports or orders, per folio	0 20	.....
One fair copy when necessary, per folio	0 10	.....
Copy of papers given out when required, per folio	0 10	.....
Every attendance upon a reference	1 00	.....
For each additional hour	1 00	.....
Every certificate	0 50	.....
Filing each paper	0 10	.....
Taxing costs, including attendance	1 00	.....
Making up and forwarding answers and depositions	0 30	.....
Every special attendance out of office within two miles	1 00	.....
Every additional mile above two	0 20	.....
Reading affidavit, per folio	0 02	.....
Matter added, per folio	0 20	.....
Searching files in office	0 20	.....
Every deed in the chain of title other than satisfied mortgages	0 50	.....
Drawing and engrossing certificate of title or conveyance in duplicate	4 00	.....

For other fees chargeable see *Rules* 1033, 1036.

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	Higher Scale.	Lower Scale and County Courts.
FEES TO BE PAYABLE IN STAMPS—*Con.*	$ c.	$ c.
Real Representative.		
The Real Representative acting under the Act respecting the partition and sale of Real Estate (R. S. O. 1887, c. 104), shall, in the case of proceedings being instituted in the High Court or a County Court, be entitled to demand and receive for all services performed by him under the said Act, the same fees as nearly as may be as are allowed to Local Masters or Special Examiners for similar services. Rule of Q. B. and C. P., 6th June, 1878.	2 00	0 50
Crier.		
Calling every case, with or without jury	0 60	0 50
Swearing each witness, or constable	0 15	0 15
Commissioners.		
For taking every affidavit	0 20	0 20
For taking every recognizance of bail	0 50	0 50
For marking every exhibit	0 10	0 10

Allowance to Witnesses.

A plaintiff is not bound to rely on the admissions of the defendants in the examination for discovery and the costs of witnesses called to prove facts thus admitted are taxable: *Alexander* v. *School Trustees*, 11 P. R. 157. The costs of witnesses called to prove irrelevant matters should not be allowed: *Christopher* v. *Noxon*, 10 P. R. 149. When the witness is subpœnaed and not called the Taxing officer may inquire into the practicability and necessity of subpœnaing them: *McLean* v. *Evans*, 3 P. R. 154; and see *Re Prescott Election*, 32 U. C. Q. B. 303. The extra costs of witnesses occasioned by trying the action out of the county where the witnesses reside may be disallowed by a Judge to a successful party: see *Ledyard* v. *McLean*, 18 Gr. 139, where such costs were disallowed to a successful defendant.

Higher Scale.	Lower Scale and County Courts.
$ c.	$ c.
0 30	.....
0 20	.....
0 20	.....
0 20	.....
0 10	.....
0 10	.....
1 00	.....
1 00	.....
0 50	.....
0 10	.....
1 00	.....
0 30	.....
1 00	.....
0 20	.....
0 02	.....
0 20	.....
0 20	.....
0 50	.....
4 00	.....

	Higher Scale.	Lower Scale and County Courts.
FEES TO BE PAYABLE IN STAMPS—*Con.*	$ c.	$ c.
The Master may examine into the truth of an affidavit of disbursements for witness fees, or counsel's receipt for fees: *Doe dem. Boulton* v. *Switzer*, 1 C. L. Ch. 83; *Horn* v. *Lasher*, 24 U. C. Q. B. 359.		
To witnesses residing within three miles of the court house, per diem	1 00	1 00
To witnesses residing over three miles from the court house..	1 25	1 25
Barristers and solicitors, physicians and surgeons, other than parties to the cause, when called upon to give evidence, in consequence of any professional service rendered by them, or to give professional opinions, per diem	4 00	4 00
Engineers, surveyors and architects, other than parties to the cause, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per diem	4 00	4 00
An auctioneer was held entitled to fees as a professional witness in *Re Workingmen's Mutual Soc.*, 31 Ch. D. 831, and it was there held also that the witness though sworn might refuse to answer until paid the fee to which he was entitled. An officer of the Court subpœnaed to produce public documents in his custody was held to be entitled to professional witness fees of $4 a day: *Re Nelson*, 2 Chy. Ch. 252; but this would not seem to be proper under the present tariff.		
If witnesses attend in one case only, they will be entitled to the full allowance. If they attend in more than one case, they will be entitled to a proportionate part in each cause only.		
The travelling expenses of witnesses, over three miles, shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed twenty cents per mile, one way.		
See *Picasso* v. *Trustees of Maryport Harbour*, W. N. 1884, 85; 28 Sol. Jour. 391, where costs of keeping a witness until the trial were allowed under special circumstances. The Ontario Rules and Tariff do expressly authorize such an allowance. See also *The City of Lucknow*, 51 L. T. N. S. 907.		

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	Higher Scale.	Lower Scale and County Courts.
FEES TO BE PAYABLE IN STAMPS—*Con.*	$ c.	$ c.
The expense of witnesses subpœnaed but not called may be allowed in the discretion of the Taxing Officer, but were disallowed where the evidence expected from the witnesses was apparently of no value, and they were subpœnaed from abundance of caution: *Beddington* v. *Deichmann*, 80 L. T. Jour. 226.		
Amongst the costs of the day given to a defendant on an adjournment of the trial, his expenses were allowed where his counsel certified that he could not have proceeded without him; and it was held that it was premature to say at that stage of the cause that no material evidence could be given by defendant: *Goodfellow* v. *Shuttleworth*, 3 C. L. T. 105.		
The travelling expenses of a plaintiff who was a necessary and material witness in his own behalf, and came from England to give evidence at the trial, were allowed: *Fox* v. *Toronto & Nipissing Ry. Co.*, 7 P. R. 157.		
The costs of executing a commission are entirely in the discretion of the Taxing Officer: *Ib.* See also *Colborne* v. *Thomas*,, 4 Gr. 169.		
The amount to be allowed for procuring the attendance of witnesses who live out of the jurisdiction is in the discretion of the Taxing Officer, and is not limited to the amount here specified: *Ball* v. *Crompton Corset Co.*, 11 P. R. 256; see also note to *Rule* 1220.		
N.B.—In all applications and proceedings before the County Court Judges not relating to suits instituted in any Court of Civil Jurisdiction there shall be payable to the Clerks of the County Courts the same fees as in this Table as far as the same are applicable.	1 00	1 00
	1 25	1 25
	4 00	4 00
	4 00	4 00

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TARIFF C.

FEES OF SHERIFFS AND CORONERS IN CIVIL MATTERS.

(*Referred to in* Rule *1232.*)

	Higher Scale	Lower Scale and County Courts.
FEES PAYABLE TO SHERIFFS AND CORONERS.	$ c.	$ c.
General Matters.		
Receiving, filing, entering and indorsing all Writs, Pleadings, Rules, Notices or other papers, each	0 25	0 10
Return of all Process and Writs, except Subpœnas....	0 50	0 25
Return of Pleadings, Rules, Notices or other papers	0 25	0 15
Every search, not being by a party to a cause or his Solicitor	0 30	0 30
Certificate of result of such search, when required (a search for a Writ against lands of a party shall include sales under Writ against same party, and for the then last six months).....	0 75	0 75
Where a certificate respecting executions against lands is required, the Sheriff, if so requested, is to include in one certificate any number of names in respect of which the certificate may be required in the same matter or investigation, but shall be entitled to the same fees as if one		

	Higher Scale.	Lower Scale and County Courts.
FEES OF SHERIFFS AND CORONERS—*Con.*	$ c.	$ c.
certificate were given for each name, provided that no greater sum than $4 shall be charged or collected in respect of such certificate. (50 V. c. 7, s. 5.)		
Every Warrant to execute any Process *mesne* or final, directed to the Sheriff, when given to a Bailiff...	0 75	0 50
Every Jury sworn, or cause tried before a Judge.....	1 00	0 80
Every Letter written (including copy) required by party or his Solicitor respecting Writs or Process, when postage prepaid.....	0 50	0 30
Drawing every affidavit when necessary and prepared by Sheriff.....	0 25	0 25
SERVICE OF PROCESS AND PAPERS.		
Service of non-bailable Process, each defendant (no fee for Affidavit of Service in such cases to be allowed, unless service made or recognized, by Sheriff; on Lower and County Court scales, including affidavit of service).....	1 50	1 00
Serving Subpœnas, Rules, Notices, or other papers (besides mileage).....	0 75	0 50
For each *additional* party served	0 50	0 25
Actual and necessary mileage from the Court House to the place where service of any Process, paper or proceeding is made, per mile	0 13	0 13
ARREST AND ATTACHMENT.		
Arrest when amount does not exceed $200.....	2 00	2 00
" " " $400....	4 00	4 00
" " over..... $400.....	6 00	.....
Bail Bond or Bond to the limits.....	2 00	1 00
Assignment of the same.....	1 00	0 25
Mileage going to arrest when made, per mile	0 13	0 13
" conveying party arrested from place of arrest to the gaol, per mile.....	0 13	0 13

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	Higher Scale.	Lower Scale and County Courts.
FEES OF SHERIFFS AND CORONERS—*Con.*	$ c.	$ c.
Bringing up Prisoner on attachment or *Habeas Corpus*, besides travel at 20c. per mile.....	1 50	1 00
Certificate of Surrender of Principal by bail.....$1 00. See *Rule* 1064.		
Absconding Debtors.		
Seizing estate and effects on attachment against an absconding debtor	3 00	1 50
Valuators, each	1 00	1 00
Removing or retaining property, reasonable and necessary disbursements and allowances to be made by the Taxing Officer, or in the C. C. by order of the Court or a Judge.		
Drawing Bond to secure goods taken under an attachment against an absconding debtor; if prepared by Sheriff	1 50	1 50
Replevin.		
Precept or Warrant to Bailiff in Replevin	0 75	0 40
Drawing Notice for Service on Defendant in Replevin	0 75	0 40
Delivering Goods to the party obtaining the Order of Replevin	3 00	1 50
For Writ *De Retorno Habendo*	1 00	0 50
Drawing Replevin Bond	2 00	1 00
Assignment	1 00	0 25
All necessary disbursements for the possession, care and removal of property taken in Replevin.		
Juries.		
Notice of Appointment for ballot of Jury.....	0 50	0 25
Notice to Clerk of Peace of such appointment.....	0 50	0 25
Fee on balloting Special Jury.....	5 00	2 50
Fee on striking.....	2 50	1 25

	Higher Scale.	Lower Scale and County Courts.
FEES OF SHERIFFS AND CORONERS—*Con.*	$ c.	$ c.
Serving each Special Juror (besides mileage at 13c. per mile)	0 50	0 25
Returning Panel of Special Jurors	1 00	0 50
Keeping and checking pay list of Special Jurors' attendance, in each case	1 00	1 00
SALES, POUNDAGE, ETC.		
Poundage on Executions, and on attachments in the nature of Executions, where the sum made shall not exceed $1,000 (in the C. C. on the sum made	6 per ct.	5 per ct.
Where the sum is over $1,000 and under $4,000, upon the excess over $1,000 (in addition to the poundage allowed up to $1,000)	3 per ct	
Where the sum is $4,000 and over, upon the excess over $4,000 (in addition to the poundage allowed up to $4,000)	1½ per ct.	
(Exclusive of mileage, for going to seize and sell, and of all disbursements necessarily incurred in the care and removal of property.)		
Schedule taken on Execution, attachment or other process, including copy to Defendant, not exceeding 5 folios	1 00	0 50
Each folio above 5	0 10	0 10
Drawing advertisements when required by law to be published in the official *Gazette* or other newspaper, or to be posted up in a Court House or other place, and transmitting same, in each suit	1 50	0 75
Every necessary notice of Sale of Goods (not more than 3), in each suit	0 75	0 40
Every notice of Postponement of Sale, in each suit	0 25	0 20
The sum actually disbursed for Advertisements required by law to be inserted in the official *Gazette* or other newspaper.		

	Higher Scale.	Lower Scale and County Courts.
FEES OF SHERIFFS AND CORONERS—*Con.*	$ c.	$ c.
SEQUESTRATION.		
Upon seizure of estate and effects under writ of sequestration	4 00	1 00
Schedule of goods taken in execution (including copy for defendant) if not exceeding five folios	1 00	0 50
Each folio above five	0 10	0 10
Removing or retaining property, reasonable and necessary disbursements and allowances to be made by the Taxing Officer, or by the order of the Court or Judge.		
(Poundage upon sequestration followed by sale and collection—as on other executions.)		
WRIT OF POSSESSION.		
Executing Writ of Possession and serving and executing Writ of Restitution, besides mileage	6 00	2 00
HAB. FAC. SEISIN.		
Viewing Lands, and instructing Surveyors under Hab. Fac. Seisin, exclusive of mileage, per day	5 00	.....
Giving Possession, exclusive of mileage and assistance	5 00	.....
All necessary disbursements to surveyors and others for surveying the lands and giving possession, to be allowed to the Sheriff.		
ON A VIEW BY A JURY.		
For travelling expenses to the Sheriff, Shewers, and Jurymen—Expenses actually paid, if reasonable.		
Fee to the sheriff, when the distance does not exceed five miles from his office	2 00	.....
Where such distance exceeds five miles	3 00	.....
In case he shall be necessarily absent more than one day—then for each day after the first, a further fee of	3 00	.....

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	Higher Scale.	Lower Scale and County Courts.
FEES OF SHERIFFS AND CORONERS—*Con.*	$ c.	$ c.
Fee to each of Shewers—the same as to the Sheriff, calculating, etc.		
Fee to each common juryman, per diem	1 00	.....
Fee to each special juryman, per diem.....	2 00	.....
Allowance for refreshment to the Sheriff, shewers and jurymen, common or special, each. per diem	1 00	.....
To the Sheriff for summoning each juryman, whose residence is not more than five miles distant from the Sheriff's office	0 40	.....
And for each whose residence exceeds five miles from Sheriff's office	0 60	.....
Rules T. T. 1856, 39.		
WRIT OF INQUIRY, ESCHEAT, ETC.		
Presiding or attendance on execution of Writ or Enquiry, or under any Writ of Escheat, or other Writ of a like nature	5 00	4 00
Summoning each Juror in such case.....	0 50	0 50
Bailiff's Fee summoning Jury, mileage per mile.....	0 13	0 13
Hire of Room, if actually paid, not to exceed $2 per day.....		
Mileage from the Court House to the place where Writ executed, per mile	0 13	0 13
CORONERS.		
The same fees shall be taxed and allowed to Coroners for services rendered by them in the service, execution and return of process, as allowed to Sheriff's for the same services as above specified.		

(Signed) JOHN H. HAGARTY, C.J.O. (Signed) W. PROUDFOOT, J.
" GEO. W. BURTON, J.A " THOMAS FERGUSON, J.
" C. S. PATTERSON, J.A. " JOHN E. ROSE, J.
" F. OSLER, J.A. " THOMAS ROBERTSON, J.
" J. A. BOYD, C. " W. G. FALCONBRIDGE, J.
" THOMAS GALT, C. J., C.P.D. " W. P. R. STREET, J.
" J. D. ARMOUR, C.J., Q.B.D. " HUGH MacMAHON, J.
J.A.

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TABLE

OF

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No. of Rule.	Con. Rule.	Remarks.
		These Rules are effete.

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1	.....	Rescinded by Rules of 17th Nov. 1875, 17.

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RULES OF 22ND DECEMBER, 1874.

1 2	.....	Effete.

RULES OF 17TH NOVEMBER, 1875.

1 2 3 4 5 6 7 8	.....	Effete.
9 10	220	
11	221	
12	222	
13	223	

RULES OF 17TH NOVEMBER, 1875.

No. of Rule.	Con. Rule.	Remarks.
14 15 16 17	.....	Effete.

RULES OF 1ST DECEMBER, 1875.

1 2	.....	Effete.

RULES OF 4TH DECEMBER, 1875.

1	.....	Unnecessary.
2 3	671	
4 5 6	.....	Sup. *See* C. R. 654, etc.

RULES OF 7TH FEBRUARY, 1876.

1 2 3 4	.....	Effete.

RULES OF 7TH FEBRUARY, 1876.

1-7	.....	Crown cases reserved.

RULES OF 10TH MARCH, 1876.

1	802	

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RULES OF 10TH MARCH, 1876.

No. of Rule.	Con. Rule.	Remarks.
2	.....	Effete.
3	1183	
4	.....	Effete.
5	205	
6	206	
7	1184	

RULES OF 15TH MAY, 1876.

1-5	.....	Sup. *See* C. R. 210.
6	.....	" 211.
7	.....	Sup. Rules H. C. J. 7.
8	.....	Sup. *See* C. R. 540.
9	.....	" 537.
10	212	
11	.....	Effete.
12-21	.....	Part sup. J. A. Act, s. 28, and part effete.
22	.....	Unnecessary
23, 24	.....	Effete.

RULE OF 16TH MAY, 1876.

1	28 (*d*)	

RULE OF Q. B., 3RD JUNE, 1876.

1	.....	Effete

RULE OF 21st MAY, 1877.

1	389	

RULE OF Q. B. JUNE, 1877.

No. of Rule.	Con. Rule.	Remarks.
1	.....	Effete.

RULE OF C. P. 9TH JUNE, 1877.

1	.....	Effete.

RULE OF 6TH JUNE, 1878.

1	.....	Tariff B.

RULE OF 6TH MARCH, 1880.

1	.....	Sup. Tariff, 1881.

RULE OF Q. B. 5TH JUNE, 1880.

1	.....	Effete.

RULE OF C. P. 5TH JUNE, 1880.

1	.....	Effete.

RULE OF 27TH NOVEMBER, 1880.

1	220, 223	

RULE OF Q. B. MICH. T. 1880.		
No. of Rule.	Con. Rule.	Remarks.
1	.....	Effete.

RULE OF C. P. MICH. T., 1880.		
1	.....	Effete.

MUN. ELECTION RULES.		
No. of Rule.	Con. Rule.	Remarks.
	.....	Sup. C. R. 1036, &c.

CHANCERY ORDERS.

CHANCERY ORDERS.		
No. of Order.	Con. Rule.	Remarks.
1-7	.....	Effete.
8	.....	Sup. Chy. O. 648.
9		
10	.....	Effete.
11		
12	762	
13	763	
14		
22	.....	Abrogated by Chy. O. 559.
23	23 (14)	
24	202	
	203	
25	25	
26	*See* 24	
27		
28	.....	Rep. 41 V. c. 8, s. 5.

CHANCERY ORDERS.		
No of Order.	Con. Rule.	Remarks.
29	.....	Unnecessary.
30	*See* 615	
31	.....	Rescinded by Ch. O. 558.
32	775	
33	204	
34	18	
35	20	
36	.....	Sup. 48 Vict. c. 13, s. 21. *See* C. R. 41, 138.
37	25	
38	.....	Sup. *See* C. R. 718, 726, 765(*a*), 766, 768.
39	.....	Effete.
40	242	
41	*See* 242	
42	461	

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CHANCERY ORDERS.

No. of Order.	Con. Rule.	Remarks.
43	461	
44	.....	Sup. C. R. 242.
45	462	
46	.....	Sup. *See* C. R. 461.
47	252	
48	460	
49	463	
50	.....	Sup. *See* C. R. 198.
51		
52	201	
53	.....	Sup. *See* C. R. 324.
54	.....	*See* C. R. 300, 445.
55	.....	" 324, 444.
56	.....	Sup. *See* C. R. 310.
57	319	
58	320	
59	321	
60	322	
61	.....	Sup. *See* C. R. 309.
62	.....	" 302, 303.
63	307	
64	487	
65	323	
66	.....	*See* C. R. 395, 448, 605.
67	.....	" "
68	.....	Sup. *See* C. R. 399, 449, 605.
69	421	
70	422	
71	*See* 1195	
72	.....	Sup. *See* C. R. 279.
73	.....	Effete.
87		
88	.....	Rescinded by Chy. O. 623.
89	.....	Effete.
90	.....	Rescinded by Chy. O. 623.
91	*See* 267	Effete.
92		
93	.....	Effete.
94		
95	.....	Rescinded by Chy. O. 625.
96–104	.....	Effete.
105	.....	*See* C. R. 393.

CHANCERY ORDERS.

No. of Order.	Con. Rule.	Remarks.
106	.....	Effete.
133		
134	.....	Sup. *See* C. R. 503.
136		
137	.....	*See* C. R. 513.
138	*See* 487	
139	.....	Sup. *See* C. R. 488, 510.
140	*See* 489	
141	494	
142		
143	.....	*See* C. R. 495.
144	499	
	520	
145	648	
146	.....	Sup. *See* C. R. 506.
147	497	
148	498	
149–155	.....	Sup. *See* C. R. 368, *et seq.*
156	.....	Sup. *See* C. R. 617-619.
157		
158	.....	" 653.
159	.....	Effete.
160		
161	.....	*See* C. R. 654, 663.
162	.....	Effete.
163	.....	Sup. *See* C. R. 663, 664, 665.
164	.....	*See* C. R. 23 (16).
165	.....	Sup. *See* C. R. 664.
166	.....	Effete.
167	....	Unnecessary.
168	.....	Effete. *See* C. R. 564, 676, 681.
169	.....	Effete.
170–171	.....	Effete. *See* R. S. O. 1877, c. 62, s. 4.
172–173	.....	Effete. *See* R. S. O. 1877, c. 62, ss. 18-20.
174	.....	Effete.
175	.....	Abrogated.
176	567	
177	683	
178	684	

CHANCERY ORDERS.

No. of Order.	Con. Rule.	Remarks.
179	*See* 685	
180	.....	Sup. *See* C. R. 1189.
181	.....	Unnecessary.
182	686	
183	.....	Sup. *See* C. R. 672.
184	.....	Sup. *See* C. R. 673, 797.
185	.....	Effete.
186	771	
187	777	
188	778	
189	)	
190	.....	Effete.
191	)	
192	)	
193	.....	Effete. *See* 44 V. c. 5, s. 85.
194	.....	Effete.
195	773	
196	770	
197	542	
198	.....	Sup. *See* C. R. 479, 525-527.
199	467	
200	*See* 547	
201	) 547	
207	)	
208	548	
209	.....	Effete.
210	549	
211	45	
212	50	
213	) 52	
214	)	
215	53	
216	54	
217	55	
218	) 49	
	) 1188	
219	56	
220	57	
221	) 58	
	) 590	
222	59	
223	60	
224	61	
225	*See* 1178	

CHANCERY ORDERS.

No. of Order.	Con. Rule.	Remarks.
226	62	
227	63	
228	64	
229	65	
230	66	
231	67	
232	68	
233	69	
234	*See* 1189	
235	.....	Unnecessary.
236	.....	Sup. *See* C. R. 1204.
237	70	
238	71	
239	72	
240	73	
241	74	
242	75	
243	76	
244	46	
245	47	
246	48	
247	77	
248	78	
249	79	
250	80	
251	81	
252	*See* 848	Altered.
253	" 82	
254	83	
255	85	
256	86	
257	584	
258	) 605	
	) 607	
259	609	
260	614	
261	616	
262	.....	Sup. *See* C. R. 532, 533.
263	479	
264	479	
265	964	
266	)	
267	)	Sup. *See* C. R. 578.
268	)	
269	)	

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CHANCERY ORDERS.

No. of Order.	Con. Rule.	Remarks.
270	.....	Sup. *See* C. R. 727.
271	.....	" 744.
272	.....	" 579.
273	.....	" 646, 647, 648.
274	.....	Sup. *See* C. R. 646, 647, 648.
275	*See* 1170(*a*)	Sup. *See* C. R. 646, 647, 648.
276	.....	Sup. *See* C. R. 646, 647, 648.
277	534	
278	*See* 116	
279	" 117	
280	" 118	
281	" 119	
282	" 120	
283	" 121	
284	.....	Effete. *See* J. A. s. 16 (6).
285	.....	Effete.
286	192	
287	193	
288	880	
289	881	
290	*See* 882	Altered.
291	883	
292	884	
293	.....	Sup. *See* C. R. 879.
294	.....	" 861, 868.
295	.....	Effete. *See* C. R. 526, 527
296	521	
297	.....	Sup. *See* C. R 887.
298	.....	Rescinded by Chy. O. 616.
303	.....	
304	1178	
305		
306	1215	
307	1216	
308	.....	Sup. *See* C. R. 1214.
309	1218	
310	1198	
311	1208	
312	1209	
313	1210	
314	.....	Effete.

CHANCERY ORDERS.

No. of Order.	Con. Rule.	Remarks.
315	1202	
316	1197	
317	.....	Effete.
318		
319	1181	
320	.....	Sup. *See* C. R. 1170.
321	.....	" 1242, 1247.
322	.....	Sup. *See* C. R. 798, 800.
328		
329	.....	Abrogated by Chy. O. 559.
330	782	
331	783	
332	784	
333	785	
334	786	
335	.....	Sup. *See* C. R. 780.
336	781	
337	.....	Sup. *See* C. R. 620 *et seq.*
343		
344	.....	Sup. *See* C. R. 444 *et seq.*
351		
352	166	Altered.
353	167	Altered.
354	170	
355	.....	Abrogated by Chy. O. 559.
356	176	
357	.....	Effete. *See* C. R. 172, 175.
358	178	
359	.....	Sup. *See* C. R 141.
360	.....	" 142.
361	.....	" 143.
362	.....	" 144.
363	.....	" 145, 146.
364	.....	" 149.
365	.....	" 150.
366	.....	" 151.
367	162	
368	.....	Sup. *See* C. R. 155.
369	.....	" 185.
370	.....	" 186.
371	.....	" 187.
372	.....	" 188.
373	.....	" 156.
374	91	

CHANCERY ORDERS.

No. of Order.	Con. Rule.	Remarks.
375	92	
376	93	
377	94	
378	95	
379	96	
380	97	
381	98	
382	99	
383	100	
384	101	
385	*See* 102, 1178	
386	*See* 103, 1178	
387	104	
388	105	
389	106	
390	108	
391	109	
392	110	
393	111	
394	112	
395	113	
396	114	
397	115	
398		
399		
400	.....	Sup. *See* C. R. 1141, etc.
401		
402	453	
403	.....	Sup. *See* C. R. 395.
404	.....	" 396.
405	.....	Effete.
406	.....	Sup. *See* C. R. 473, 474, 476.
407	.....	
408	484	
409	477	
410		
411	.....	Sup. *See* C. R. 480.
412	.....	" 485.
413	.....	Effete.
414	.....	Sup. *See* Jud. Act s. 89.
415	.....	*See* C. R. 210.
416	.....	Abrogated by Chy. O. 559. *See* C. R. 211.

CHANCERY ORDERS.

No. of Order.	Con. Rule.	Remarks.
417	.....	Effete.
418	.....	Sup. *See* C. R 537.
419	758	
420	.....	Abrogated.
421		
422	.....	Sup. *See* C. R. 486.
423		
424	.....	" 7.
425	.....	" 8.
426	347	
427	304	
428	348	
429	*See* 349	
430	351	
431	352	
432		
433	.....	Sup. *See* C. R. 718.
434	717	
435	718	
436		
437	.....	Effete
438	306	
439	.....	Unnecessary.
440	305	
441	776	
442	124	
443	125	
444	126	
445	127	
446	128	
447	129	
448	130	
449	131	
450	.....	Sup. *See* C. R. 137.
451	353	
452	132	
453	133	
454	134	
455	354	
456	350	
457	355	
458	356	
459	357	
460	358	
461	359	

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CHANCERY ORDERS.			CHANCERY ORDERS.		
No. of Order.	Con. Rule.	Remarks.	No. of Order.	Con. Rule.	Remarks.
462	360		506	1028	
463	361		507	1029	
464	*See* 341		508	1030	
465	.....	Effete.	509	1031	
466	.....	Sup. *See* C. R. 362, 363.	510	1032	
467	965		511	1037	
468	966		512	.....	Tariff.
469	967		513		
470	968		514	1036	
471	969		515	1033	
472	970		516	1034	
473	971		517	.....	Sup. Chy. O. 610. *See* C. R. 258, *et seq.*
474	975		518	.....	Effete.
475	976		519	.....	Sup. Chy. O. 610. *See* C. R. 252, 262.
476	977		520		
477	978		521		
478	979		522	337	
479	980		523	338	
480	981		524	.....	Unnecessary.
481	982		525	537	
482	983		526	339	
483	984		527	994	
484	985		528	995	
485	986		529	996	
486	987		530	997	
487	988		531	998	
488	.....	Sup. *See* C. R. 224.	532	999	
489	530		533	1001	
	1185		534	1002	
490	738		535	1003	
491	.....	Effete.	536	.....	Abrogated.
492	1013		537	122	
493	1014		538	.....	Sup. 48 V., c. 13, s. 5.
494	1015		539	.....	Effete.
495	1017		540	44	
496	1018		541	207	
497	1019		542	*See* 469	
498	1020		543	" 470	
499	1021		544	469	
500	1022			*See* 470	
501	1023		545	471	
502	1024		546	.....	Effete.
503	1025		547	454	
504	1026		548	455	
505	1027				

CHANCERY ORDERS.		
No. of Order.	Con. Rule.	Remarks.
549	456	
550	.....	Effete.
551	.....	Sup. *See* Tariff B.
552	966	
553	*See* 1219	
554	1221	
555	1222	
556	1223	
557	1224	
558	.....	Sup. Chy. O. 633.
559	.....	Effete.
560	30	
561	996	
562	.....	Sup. *See* C. R. 42.
563	.....	Effete.
564	1178	
565	*See* 33	
566	.....	Sup. *See* C. R. 846.
567	.....	Effete.
568	.....	Sup. *See* C. R. 139, 141.
569	.....	Effete.
570		
571	.....	Sup. *See* C. R. 172, 175.
572	.....	Tariff.
573	.....	Sup. *See* C. R. 179.
574		
575		
576	.....	" 180.
577		
578	.....	" 181.
579	.....	" 180, 181.
580	.....	" 182.
581	.....	" 183.
582	.....	" 184.
583	.....	" 189.
584	51	
585	*See* 1170(*a*)	
586	*See* 1170(*a*)	
587	322	
588	123	
589	87	
590	.....	Sup. *See* C. R. 210, 211.
591	1035	
592	.....	Sup. *See* C. R. 210, 211.
593		

CHANCERY ORDERS.		
No. of Order.	Con. Rule.	Remarks.
594	774	
595	25	
596	762	
597	451	
598	.....	Effete.
602		
603	.....	Sup. *See* C. R. 544.
604	.....	Effete.
607		
608	.....	Sup. Tariff 1884.
609	.....	Effete.
610	.....	Effete.
611		
612		
613		
614	.....	Sup. *See* C. R. 757.
615	.....	Tariff B.
616	.....	Effete.
617		
618	.....	Not consolidated.
619	.....	Effete.
620	.....	Effete.
621		
622		
623		
628		
629	.....	Sup. O. in C., 30th June, 1881.
630	.....	Effete.
631	.....	Sup. *See* C. R. 156.
632	.....	*See* C. R. 23 (1).
633	1016	
634	.....	Effete.
637		
638	972	
639	973	
	974	
640	989	
641	990	
642	*See* 849	
643	1187	
644	1188	
645	717	
646	717	
	718	

CHANCERY ORDERS.			CHANCERY ORDERS.		
No. of Order.	Con. Rule.	Remarks.	No. of Order.	Con. Rule.	Remarks.
647	.....	Effete.	650	991	
648	718		651	.....	Effete.
649	.....	Effete.			

RULES UNDER THE JUDICATURE ACT.

RULES UNDER ONTARIO JUDICATURE ACT.			RULES UNDER ONTARIO JUDICATURE ACT.		
No. of Rule.	Con. Rule.	Remarks.	No. of Rule.	Con. Rule.	Remarks.
1	224		20	*See* 230	
2	.....	Sup. *See* C. R. 1141, etc.	21	.....	Sup. J. A. Rule 547.
3	.....	Unnecessary.	22	224	
4	.....	Effete.	23	224	
5	224		24	229	
6	*See* 1195		25	.....	Sup. J. A. Rule 547.
7	231		26	235	
8	232		27	236	
9	233, 1047		28	237	
10	444		29	250	
11	243		30	251	
12	244		31	238	
13	224		32	239	
14	.....	*See* C. R. 245.	33	252	
15	246		34	253	
16	247		35	257	
17	248		36	258, 262	
18	240		37	259	
19	241		38	265	

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RULES UNDER ONTARIO JUDICATURE ACT.			RULES UNDER ONTARIO JUDICATURE ACT.		
No. of Rule.	Con. Rule.	Remarks.	No. of Rule.	Con. Rule.	Remarks.
39	264		82	740	
40	265		83	741	
41	266		84	742	
42	269		85	743	
43	.....	Abrogated.	86	745	
44	256		87	746	
45	.....	C. R. 271 substituted.	88	747	
46	276		89	300, 1171	
47	.....	Effete.	90	445	
48	274		91	301	
49	272		92	302	
50	.....	Sup. J. A. Rule 547.	93	303	
51	*See* 277		94	308	
52	282		95	309	
53	284		96	313	
54	285		97	314	Altered.
55	286		98	315	
56	287		99	316	
57	288		100	317	Altered.
58	289		101	318	
59	278		102	320	
60	283		103	324	
61	281		104	325	
62	293		105	326	
63	294		106	327	
64	295		107	328	
65	296		108	329	
66	297		109	330	
67	298		110	331	
68	299		111	332	
69	336 (*a*)		112	333	
70	.....	Sup. C. R. 261.	113	.....	Sup. C. R. 338.
71	704		114	334	
72	705		115	340, 346	
73	706		116	341	
74	707, 1175		117	342	
75	708		118	343	
76	714		119	344	
77	715		120	345	
78, 79	718		121	346	Unnecessary.
80	739		122, 123	346	
81	.....	Unnecessary.			

RULES UNDER ONTARIO JUDICATURE ACT.			RULES UNDER ONTARIO JUDICATURE ACT.		
No. of Rule.	Con. Rule.	Remarks.	No. of Rule.	Con. Rule.	Remarks
124	335		166	378	
125	394		167	379	
126	*See* 369 " 371		168	374	
			169	375	
127	373		170	641 642	
128	339 *See* 449		171	670	
129	395		172	641	
130	396		173	381	
131	.....	Sup. C. R. 461.	174	382	
132	397		175	383	
133	404		176	392	
134	405		177	420	
135	406		178	423	
136	407		179	424	
137	408		180	425	
138	409		181	426	
139	410		182	427	
140	411		183	428	
141	413		184	429	
142	414		185	430	
143	415		186	431	
144	416		187	432	
145	417		188	433	
146	401		189	384	
147	402		190	385	
148	403		191	386	
149	419		192	387	
150	398		193	388	
151	434		194	389	
152	435		195	539	
153	436		196	.....	Sup. C. R. 390.
154	437		197	*See* 1170	
155	438		198		
156	439		199	.....	Effete.
157	440		200	*See* 1170	
158	369		201	391	
159	370		202	538	
160	371		203	646	
161	372		204	719	
162	.....	Abrogated.	205	720	
163	1189		206	721	
164	376		207	722	
165	377		208	723	

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RULES UNDER ONTARIO JUDICATURE ACT.			RULES UNDER ONTARIO JUDICATURE ACT.		
No. of Rule.	Con. Rule.	Remarks.	No. of Rule.	Con. Rule.	Remarks.
209	724		249	555	
210	725		250	556	
211	727		251	557	
212	728		252	538	
213	729		253	558	
214	796		254	653	
215			255	647	
216				654	
217	.....	Sup. *See* C. R. 632-640.	256	655	
218			257	656	
219	502		258	660	
220	1177		259	661	
221	507		260	660	
222	508		261	663	
223	509		262	664	
224	488		263	.....	Effete.
	510		264	665	
225	511		265	.....	*See* C. R. 668, 668.
226			266		
227	487		267	669	
228	513		268	672	
229	514		269	673	
230	1196		270	795	
231	515		271	676	
232	516		272	681	
233	517		273	682	
234	518		274	687	
235	519		275	688	
236	499		276	34	
	520		277	*See* 36	
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243	619		285	566	
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297	602	
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299	.....	Abrogated.
300	604	
301	568	
302	569	
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304	571	
305	572	
306	751	
307	789	
308	.....	Abrogated.
309 } 310 }	.....	Sup. J. A. Rule 526.
311	791	
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313	.....	Abrogated.
314	793	
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316 } 317 }	.....	Sup. J. A. Rule 510.
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321	755	
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324	744	
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326	764 *See* 765	
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339	862	
340	867	
341	868	
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343	874	
344	858	
345	875	
346	876	
347	888	
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349	893	
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351	891	
352	863	
353	894	
354	895	
355	885	
356	886	
357	866	
358	887	
359	*See* 782	
360 } 361 }	.....	Unnecessary.
362	859	
363	860	
364	878	
365	879	
366	926	
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382	.....	*See* C. R. 873.
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391	628	
392	649	
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394	651	
395	652	
396	1131	
397	1133	
398	1135	
399	1134	
400	1132	
401	1130	
402	1136	
403	90	
404	525	
405	526	Altered.
406	528	
407	479	
408	529	
409	531	
410	532	
411	533	
412	526	Altered.
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422	*See* 41 *See* 138	
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425	.....	Abrogated.
426	*See* 32, 42	
427	846	
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431	1242	
432	.....	Tariff B.
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434	1193	
435	1195	
436	1204	
437	1194	
438	*See* 194 *See* 197	
439	*See* 196 1207	
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440	1201	
441	1203	
442	1214	
443	*See* 1226	
444	1228	
445	1220	
446	.....	Unnecessary.
447	1230	
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451	447	
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453	.....	Unnecessary.
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457	476		499	863	
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460	483		502	718	
461	484		503	1225	
462	485		504	177	
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468	611		510	*See* 798	
469	612		511	1174	
470	*See* 614		512	1172	
471	219		513	508	
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487	.....	" "	527	.....	Sup. C. R. 767, 798.
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490	1257		530	.....	"
491	2		531	.....	"
492	.....	Unnecessary.	532	486	
493	.....	Not consolidated.	533	.....	Omitted. Never confirmed by Order in Council.
494	.....	"			
495	.....	Unnecessary.			
496	.....	Sup. C. R. 271 substituted.	534	1261	
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543	.....	Sup. J. A. Rule 549.
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585	992	
586	993	
587	999 1000	
588	336	
589	877	
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591	667	Altered.
592	668	
593	1207	
594	892	
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596	393	
597	.....	Sup. C. R. 490.
598	*See* 490 " 451 " 578	
599	" 84	
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2	.....	Sup. C. R. 211.
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10	.....	"

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9	814	
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13	818	
14	819	
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16	821	
17	822	
18	.....	Sup. App. O. 67, 68.
19	824	
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28	.....	Tariff A.
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35	.....	Insolvency matters.
36		Effete.
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45	841	
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50	844	
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52	845	
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55	.....	Vacations. Sup. *See* C. R. 486.
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58	.....	Sup. *See* C. R. 485.
59	.....	" 474.
60	475	
61	.....	Unnecessary.
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64	.....	Sup. 48 V. c. 13, s. 20.
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	28	805			15	27 (*a*)	
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RULES OF COURT AFFECTING THE COMING INTO FORCE OF THE CONSOLIDATED RULES.

Whereas the Acts or parts of Acts mentioned in Schedule A of the Revised Statutes of 1887, stand repealed from and after the coming into force of the said Revised Statutes, 1887, and whereas a consolidation of all the statutory provisions and other Rules affecting practice and procedure is in preparation, but will not be ready for adoption until the first day of February next.

It is hereby ordered that all matters of practice and procedure affected by the said Acts shall meanwhile be deemed in force as if the same were in substance repeated in this Rule.

31st December, 1887.

(Signed) J. H. HAGARTY, C.J.O.
" C. S. PATTERSON, J.A.
" F. OSLER, J. A.
" J. A. BOYD, C.
(Signed) THOS. FERGUSON, J.
" JOHN E. ROSE, J.
" THOMAS ROBERTSON, J.
" W. G. FALCONBRIDGE, J.

Whereas the new Consolidated Rules are not to go into force until the first day of March, next.

It is hereby ordered that all matters of practice and procedure affected by the Acts referred to in the Rule of 31st December, 1887, shall be deemed to be in force until the first day of March aforesaid, as if the same were in substance repeated in this Rule.

30th January, 1888.

(Signed) JOHN HAGARTY, C.J.O.
" GEO. W. BURTON, J.A.
" C. S. PATTERSON, J.A.
" F. OSLER, J.A.
" J. A. BOYD, C.
" THOMAS GALT, C.J., C.P.D.
" J. D. ARMOUR, C.J., Q.B.D.
(Signed) W. PROUDFOOT, J.
" THOMAS FERGUSON, J.
" JOHN E. ROSE, J.
" THOMAS ROBERTSON, J.
" W. G. FALCONBRIDGE, J.
" W. P. R. STREET, J.
" HUGH MacMAHON, J.

It is hereby ordered that the new Consolidated Rules shall not go into force until the first day of April, next; and it is further ordered that all matters of practice and procedure affected by the Acts referred to in the Rule of 31st December, 1887, shall be deemed to be in force until the first day of April aforesaid, as if the same were in substance repeated in this Rule.

Dated at Osgoode Hall, 29th February, 1888.

(Signed) JOHN H. HAGARTY, C.J.O.
" GEO. W. BURTON, J.A.
" C. S. PATTERSON, J.A.
" F. OSLER, J.A.
" J. A. BOYD, C.
" THOMAS GALT, C.J., C.P.D.
" J. D. ARMOUR, C.J., Q.B.D.
(Signed) W. PROUDFOOT, J.
" THOMAS FERGUSON, J.
" JOHN E. ROSE, J.
" THOMAS ROBERTSON, J.
" W. G. FALCONBRIDGE, J.
" W. P. R. STREET, J.
" HUGH MacMAHON, J.

It is hereby ordered that the new Consolidated Rules shall not go into force until the first day of September, next; and it is further ordered that all matters of practice and procedure affected by the Acts referred to in the Rule of 31st December, 1887, shall be deemed to be in force until the first day of September aforesaid, as if the same were in substance repeated in this Rule.

Dated at Osgoode Hall, 29th March, 1888.

(Signed)	JOHN H. HAGARTY, C.J.O.	(Signed)	W. PROUDFOOT, J.
"	GEO. W. BURTON, J.A.	"	THOMAS FERGUSON, J.
"	C. S. PATTERSON, J.A.	"	JOHN E. ROSE, J.
"	F. OSLER, J.A.	"	THOMAS ROBERTSON, J.
"	J. A. BOYD, C.	"	W. G. FALCONBRIDGE, J.
"	THOMAS GALT, C.J., C.P.D.	"	W. P. R. STREET, J.
"	J. D. ARMOUR, C.J., Q.B.D.	"	HUGH MacMAHON, J.

The following Rule was subsequently passed on 9th June, 1888:

It is hereby ordered that the Consolidated Rules 210, 211 and 212 shall not come into force on the first day of September next nor until the further order of this Court be passed fixing a day for the same to come into force.

And it is further ordered that until such Rules do come into force all matters of practice and procedure affected thereby shall be deemed to be in force as if the same were in substance repeated in this Rule.

9th June, 1888.

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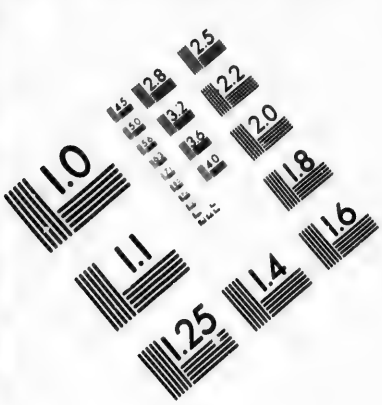
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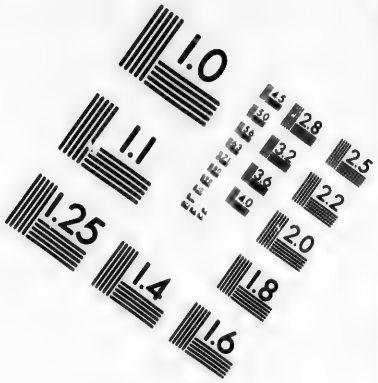
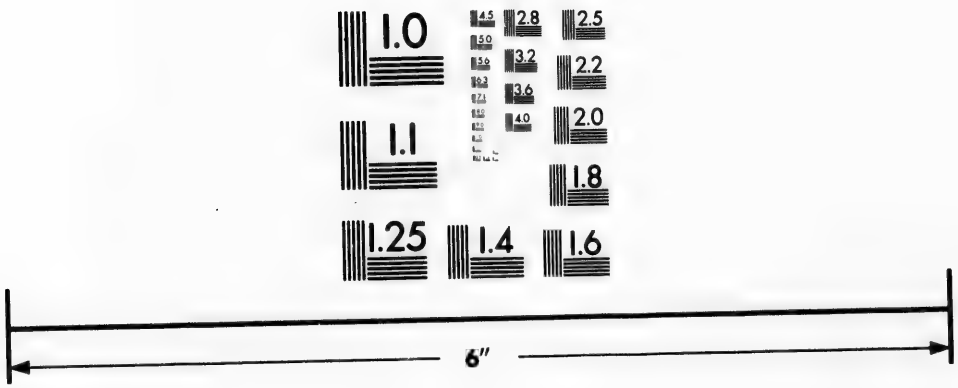
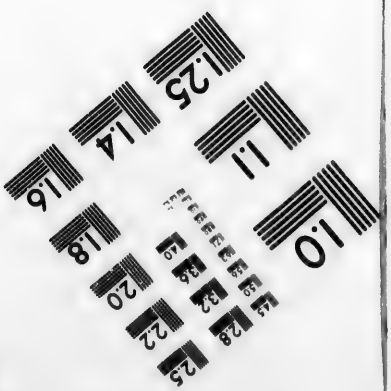


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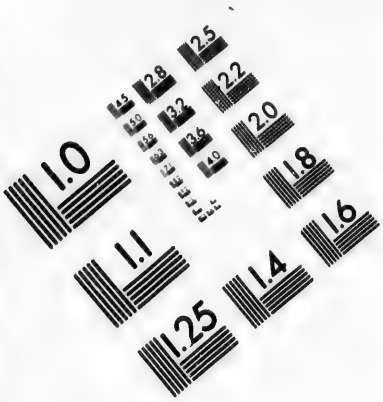
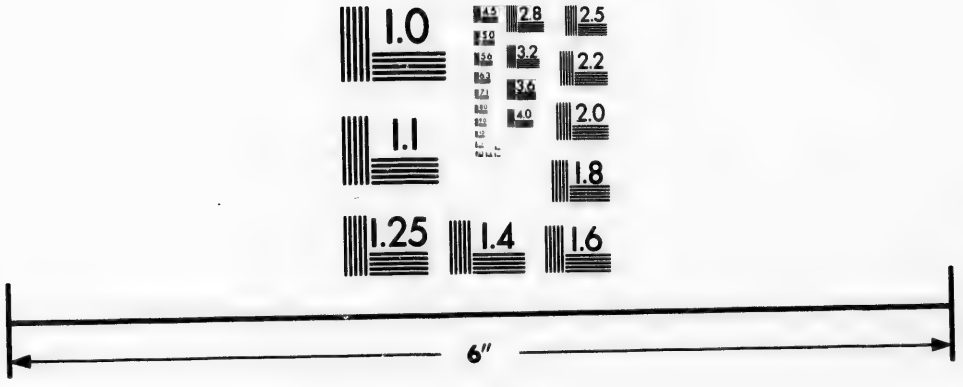
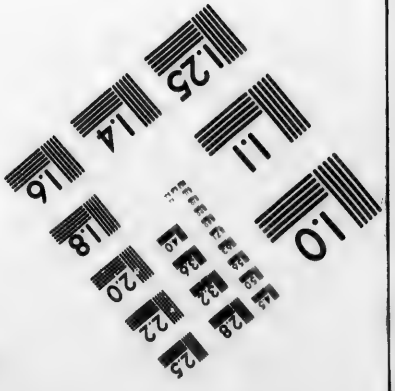




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